December 9, 2015

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Office of Air, Waste and Toxics (AWT– 150)
EPA Region 10
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Re: Docket ID No. **EPA–R08–OAR–2015–0342** – Proposal to reclassify to Serious the Salt Lake City, Provo and Logan portion of the Logan, UT/ID nonattainment areas in Utah for the 2006 24-hour fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) and Docket ID. No. **EPA–R10–OAR–2015–0681** – Proposal to reclassify to Serious the Franklin County, Idaho portion of the multi-state Logan, Utah/ Franklin county, Idaho nonattainment area (Logan UT/ID area) for the 2006 24-hour $PM_{2.5}$ NAAQS.

Dear Region 8 Air Program and
Region 10 Office of Air, Waste and Toxics,

Thank you for the opportunity to comment on your proposal to reclassify to "Serious Areas" the Salt Lake City, Provo and Logan Utah/Idaho nonattainment areas in Utah and Idaho for the 2006 24-hour $PM_{2.5}$ NAAQS (collectively the "Three NAAs"). I submit these comments on behalf of Utah Physicians for a Healthy Environment, Utah Chapter of the Sierra Club, WildEarth Guardians and Western Resource Advocates (collectively "Utah Physicians").

As we explain in more detail below, we support EPA's recognition of the serious condition of Utah's air quality. We also support, as in keeping with the Clean Air Act and legally mandated, EPA's proposal to require Utah to submit the updated emission inventory, the optional precursor insignificance demonstration and the provisions to assure the requisite implementation of best available control measures by June 2017. *See*. 80 Fed. Reg. 69173, 69178 (Nov. 9, 2015); 80 Fed. Reg. 69172, 69172-3 (Nov. 9, 2015).[1] Finally, we support the

[1] As the Region 10 proposal relies heavily on the Region 8 proposal, we cite the Region 8 proposal. However, our comments apply equally to both proposals.

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proposal to require Utah to finalize and submit the Nonattainment New Source Review SIP revisions by 18 months following reclassification. *Id.*

What concerns us, and what we deem as contrary to the Clean Air Act, is that at the same the agency acknowledges the seriousness of air quality in Utah, EPA is proposing a path that would delay the deadline by which Utah must finalize and submit critical portions of the very state implementation plans (SIPs) that would require steady progress toward attainment and that would guarantee attainment of the NAAQS as expeditiously as practicable. Because EPA has tied this unreasonable postponement of planning to its reclassification proposal, we oppose the rule.

What makes EPA's plan more inappropriate is that were the agency to wait a few days or weeks to acknowledge Utah's nonattainment areas have not attainment the 2006 24-hour $PM_{2.5}$ NAAQS by the Moderate attainment deadline of December 31, 2015, EPA would **not** be acting to delay the due date for the SIPs and instead would require submission of all elements of the plans simultaneously in June 2017, or shortly thereafter. EPA has characterized this prompt and simultaneous submission of all SIP components as the most efficient and effective way to achieve the Clean Air Act goals and to promote meaningful EPA and public review of the SIPs.

Thus, were EPA to couple its reclassification of Utah's nonattainment areas to a determination that the language and goals of the Clean Air Act would best be served by a due date for a complete Serious SIP in June 2017 or shortly thereafter, we would support the agency's proposal. As it stands now, however, the plan is not reasonable, as the delay in critical SIP elements frustrates the goal of prompt planning and expeditious attainment.

I. Commenting Organizations

Members of **Utah Physicians for a Healthy Environment**, the largest community service organization of its kind in Utah, include health professionals, toxicologists, biologists, chemists and engineers. The organization is dedicated to protecting the health and well-being of the citizens of Utah by promoting science-based health education and interventions that result in progressive, measurable improvements to air quality and the environment.

Utah Chapter of the Sierra Club has been working to protect Utah's spectacular parks, public lands and other places that Utah's rich animal and plant life calls home since its foundation in 1959. The organization also led the fight for clean air and water, and protecting Utah's high quality of life. The Sierra Club is a grassroots organization. As such most of the Sierra Club's work is done by volunteers, supported by a small number of paid staff. In Utah, volunteers help with phone banks, letter-writing, events and outings. In addition, a small core group of issue activists review environmental documents, represent us at public meetings and hearings, and research and write on specific public lands and environmental health issues.

Western Resource Advocates is a regional non-profit conservation organization with programs and staff spanning the intermountain west, including Utah. Our mission is to protect the land, air and water of our region, using law, science, economics, advocacy, education, and action. To this end, we work to improve air quality, curb climate change and achieve environmentally sustainable management of energy, land, and water resources. WRA represented intervenor Utah Physicians for a Healthy Environment before the D.C. Circuit Court of Appeals, successfully defending an EPA decision to include the most populous portions of Tooele and Box Elder County in the Salt Lake City Nonattainment Area. *ATK Launch Systems v. EPA*, 669 F.3d 330 (D.C. Cir. 2012).

WildEarth Guardians is an environmental non-profit working to protect and restore the wildlife, wild places, wild rivers, and the health of the American West. WildEarth Guardians defends wildness, empowers life, strives to end injustice, and stands for healthy, sustainable ecosystems and human communities. For the past decade the organization has worked to improve air quality in Utah.

In carrying out their missions, these organizations have met with former Governor John Huntsman Jr., Governor Gary Herbert, members of the Utah Public Service Commission, staff of the Utah Division of Air Quality and the Environmental Protection Agency, several local mayors, Utah business leaders, media and concerned citizens to advocate for clean air and to advance efforts to reduce air pollution emissions. We have repeatedly submitted comments to state and federal regulators and decision makers relative to specific projects and rulemaking processes that impact and influence the condition of Utah's air quality, environment and the health of the people living here.

The organizations have a strong legal interest in the ultimate rejection of the proposed rule. The Clean Air Act, which largely governs the content of Utah's State Implementation Plan (SIP), and Utah Air Conservation Act have as goals the protection of public health and the environment. *E.g.* 42 U.S.C. § 7401(b)(1); Utah Code Ann. § 19-2-101(2). These statutes also guarantee the public a significant role in the government actions impacting air quality, including the drafting and review of SIPs. *E.g.* 42 U.S.C. § 7410(a)(1), (a)(2) & (a)(3)(B); 42 U.S.C. § 7410(l); *see also,* 42 U.S.C. § 7427; Utah Code Ann. § 63G-3-601(2); Utah Admin. Code R15-2-1 *et seq*. The organizations' staff and members, their families and their patients, who live, work, and recreate in the nonattainment areas, are harmed by air pollution, particularly concentrations of $PM_{2.5}$ that exceed the NAAQS and are entitled, by the Clean Air Act and Utah Air Conservation Act, to air quality that meets the NAAQS. 42 U.S.C. § 7513-7513b; 42 U.S.C. § 7501-7509a.

Where air quality exceeds the health-based standards, such as in the Salt Lake City, Provo and Logan nonattainment areas, the law requires that measures be taken immediately to bring air quality into compliance with NAAQS as expeditiously as practicable. *E.g.* 42 U.S.C. § 7502(a)(2)(A) & (a)(2)(B); 42 U.S.C. § 7513(c)(1) & (c)(2). Poor air quality and a failure to attain the NAAQS harm the organizations' staff and members, their families and patients

because air pollution adversely affects their health, quality of life, recreational pursuits and aesthetic sense. Therefore, the organizations have a protectable legal interest in ensuring that EPA rules and regulatory actions comply with the Clean Air Act, 42 U.S.C. § 7410; 42 U.S.C. § 7502; 42 U.S.C. § 7513a, and include the measures necessary to attain, *inter alia*, the 24-hour $PM_{2.5}$ NAAQS as expeditiously as practicable. 42 U.S.C. § 7502(a)(2)(A), (a)(2)(B) &(c)(1); 42 U.S.C. § 7513(c)(1) & (c)(2).[2]

I. The Proposal Unlawfully Undermines the Proposed Implementation Rule and the Attendant Public Process.

In the process of finalizing its $PM_{2.5}$ NAAQS Implementation Rule, EPA–HQ–OAR–2013–0691; FRL–9916–08–OAR, EPA proposed for public comment the exact issue it now plans to resolve for the purposes of the agency's proposal to "bump-up" the Three NAAs to "Serious Areas." *See* 57 Fed. Reg. 13498-01, 13506 (April 16, 1992) ("EPA uses the term "bump-up" to describe this reclassification process"). On March 23, 2015, EPA presented to the public various options to determine the due dates for various elements of the requisite Serious SIPs if and when EPA exercised its purported 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1) authority. 80 Fed. Reg. 15340, 15402 (March 23, 2015).

EPA first noted that the plain language of 42 U.S.C. § 7513a(b)(2), Clean Air Act § 189(b)(2) "requires the state to submit provisions to ensure timely implementation of best available control measures (BACM) and best available control technology (BACT) to the EPA within 18 months after reclassification." *Id.* As an emissions inventory is a necessary foundation for a state's BACM and BACT determination," the agency proposed that that element of the SIP would also be due 18 months after reclassification. *Id.* What was unclear, EPA maintained, was when the other elements of the Serious SIP would be due. *Id.*

Under one option, EPA proposed that a state would have until four years after its designation as serious to submit a new attainment demonstration. *Id.* Alternatively, the agency suggested that if "EPA finalizes its proposed Option 2 for determining BACM and BACT" – which asserts that an attainment demonstration would be necessary to determine the adequacy of BACM and BACT – both the attainment demonstration and BACM and BACT would be due within 18 months after reclassification. *Id.* EPA also contended that under this alternative, reasonable further progress (RFP), control measures beyond BACM and BACT, milestones and contingency measures would be due three years after reclassification. *Id.*

As explained in more detail below, at least in the present context, when the Moderate attainment date is weeks away, each of these alternatives conflicts sharply with the text and purpose of the Clean Air Act – as the options frustrate rather than advance the goal of

[2] We note that any decision relative to the Franklin County portion of the Logan UT/ID nonattainment area will necessarily impact citizens living and recreating in the Logan portion of that nonattainment area.

expeditious attainment. That said, EPA put these various alternatives out for public comment. Comments were submitted, including by WildEarth Guardians, that suggested, *inter alia*, more appropriate deadlines for any Serious SIP submission, contending that all plan elements, including provisions for RFP, milestones and contingency measures, be due at the same time. *E.g.* Center for Biological Diversity, et al. comments at 15-16 (EPA Docket No. OAR 2013-0691).

Therefore, at the very time that EPA proposes to make a final decision as to when the elements of Utah's Serious SIP will be due, the same issues – raised in a nationwide rulemaking process – are still pending. Also pending are all the public comments on those issues, including those made by WildEarth advocating that all Serious SIP components be due simultaneously and therefore within 18 months of reclassification. *See* 42 U.S.C. § 7513a(b)(2).[3]

The EPA's approach to rulemaking – proposing to make a Utah-only rule when a decision on the Implementation Rule is still pending – is arbitrary and capricious and otherwise unlawful. To reach a conclusion on the Three NAAs now would undermine the Implementation Rule process. Arguably, declaring that the various serious SIP elements for the Three NAAs are not due until December 2018 is also sealing the fate of the Implementation Rule. A determination here could prejudice EPA's review of comments and final decision on the Implementation Rule. Moreover, EPA could well be precluded by *Motor Vehicles Manufacturers Assoc. v. State Farm*, 463 U.S. 29 (1983) and its progeny from adopting an alternative position in the Implementation Rule. After all, what could justify this change in the course of agency rulemaking?[4]

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[3] As discussed below, in the context of Moderate SIPs, EPA maintained in the proposed Implementation Rule that the section 189(a)(2)(B) deadline for meeting the planning requirements in subpart 4 should also inform the deadline for complying with the other elements of the attainment plan required under subpart 1. 80 Fed. Reg. at 15362. EPA contended that these subpart 1 elements are necessary components of the attainment and RACM demonstration under section 189(a)(1). *Id.* ("EPA presumes that development and submission of all of the attainment plan elements simultaneously will be most effective, both for the state in the first instance and for the EPA in reviewing the state's submission."); *Id.* at 15401 (coming to same conclusion relative to serious reclassifications made pursuant to section 189(b)(2)). Because there is nothing to distinguish the ability of the states to develop SIPs, EPA and the public to review SIPs or the effectiveness of those SIPs themselves, whether they are moderate or serious or whether the state was reclassified by operation of law or by the bump up process – particularly when the attainment date is days away – EPA's varying approach to these due dates is without foundation in reason.

[4] Importantly, there is nothing in the bump up proposal for the Three NAAs that suggests Utah is in a unique situation or that suggests that a decision on when Utah must submit its various SIP components would be different from any other state.

Alternatively, were the Implementation Rule to adopt a different position from the one EPA advocates here, significant doubt would be cast on the conclusion reached in the bump up proposal. In any case, the result is that a rule characterized as impacting Utah alone would have real influence on the national rule. Such a move would undermine the rulemaking process currently underway for the Implementation Rule and would make meaningless the comments submitted in that process.

II. The "Bump-Up" Proposal Is Contrary to Language and Purpose of the Clean Air Act and an Abuse of Discretion.

A. EPA Has Misinterpreted 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1).

EPA has erred in interpreting 42 U.S.C. § 7513(b)(1) as authorizing the agency to designate areas as "Serious" weeks or days before the Moderate nonattainment date. Rather, as the statute plainly states, EPA may only utilize its 42 U.S.C. § 7513(b)(1) authority **within 18 months** after the required date for the State's submission of a" Moderate SIP. 42 U.S.C. § 7513(b)(1)(B), Clean Air Act § 188(b)(1)(B). In the case of the Three NAAs, which were designated as not attaining the 2006 24-hour $PM_{2.5}$ NAAQS in December 2009,[5] 18 months after the date the Moderate SIP was due is December 2012. 74 Fed. Reg. at 58768-70; *see also* 42 U.S.C. § 7513a(a)(2)(B) (Moderate SIP due 18 months after designation as nonattainment area). Therefore, the window during which the EPA was authorized to use section 188(b)(1) to bump up the Three NAAs to serious has long been closed.

EPA wrongly contends that what section 188(b)(1) really means is that, in the case of the Three NAAs, prior to December 2012, the agency has a mandatory duty to bump up the areas should the agency deem that they "cannot practicably attain" the NAAQS. After that, but before the Moderate nonattainment date, EPA claims it has the discretion to bump up the Three NAAs. 80 Fed. Reg. 69173, 69175 (Nov. 9, 2015). This interpretation of the statute is incorrect because, for reasons enumerated below, it leads to a result that conflicts with the language and the goals of the Clean Air Act. Under EPA's flawed reading of section 188(b)(1), the agency maintains that it has the option of bumping up the Three NAAs to "Serious" days or weeks before the Moderate attainment date, thereby authorizing Utah to postpone critical elements of the SIP – including the **attainment demonstration** – intended to ensure expeditious attainment of the NAAQS.

Plainly, in setting forth the "schedule[s] for plan submissions" for Serious Areas, Congress created a framework that acknowledged it was necessary to expeditious attainment that both Moderate and Serious SIPs be due 18 months after an area is designated or reclassified and at least 2.5 years **before** the corresponding attainment data. 42 U.S.C. § 7513a(a)(2) & (b)(2). Any scheme must be rejected that would upset this legal structure, designed to expeditiously attain the NAAQS and to place plan due dates well before nonattainment dates. Thus, the Clean Air Act may not be read as EPA presumes in its bump up proposal to thwart progress toward

[5] 74 Fed. Reg. 58688, 58768-70 (November 13, 2009).

attainment by a purportedly discretionary decision just weeks or days before the Moderate nonattainment date.

This is particularly true because the plain reading of the statute leads to a reasonable outcome that **does** advance attainment and protect public health. EPA may only utilize its 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1), authority **within 18 months** after the required date for the State's submission of a" Moderate SIP. 42 U.S.C. § 7513(b)(1)(B), Clean Air Act § 188(b)(1)(B). The date of the State's submission of the Moderate SIP is determined by statute and not by rule. *See* 42 §7513a(a)(2)(B). If section 188(b)(1) is properly read, and in the case of the Three NAAs, the June 2011 deadline imposed, the general requirement that a Serious SIP be submitted no later than the 18 months after the Moderate attainment date and 2.5 years **before** the Serious attainment date is preserved.

Any proper interpretation of section 188(b)(1) may not allow EPA arbitrarily and capriciously to use its supposed discretion to simultaneously acknowledge that a moderate area "cannot practicably attain" the NAAQS and to **delay** the very SIP that will ensure expeditious attainment of the NAAQS. Rather, the section 188(b)(1) must require submission of all elements of the plans simultaneously within 18 months of the reclassification. EPA has characterized this prompt and simultaneous submission of all SIP components as the most efficient and effective way to achieve the Clean Air Act goals and to promote meaningful EPA and public review of the SIPs. Plainly, when EPA determines an area "cannot practicably attain" the NAAQS, the only appropriate response is a mandate calling for the prompt and simultaneous submission of all SIP components.

B. By Postponing Critical Elements of the Serious SIP, the Bump-Up Proposal Conflicts with the Language and Purpose of the Clean Air Act.

Utah Physicians urges EPA to reject the proposal to reclassify the Three NAAs as "Serious" nonattainment areas pursuant to 42 U.S.C. § 7513(b)(1) to the extent the agency also delays the due date for critical SIP components. Clean Air Act § 188(b)(1). As it stands, the proposed rule is contrary to the purposes of the Clean Air Act and frustrates the goal of protecting public health and the environment and of expeditious attainment of the NAAQS. According to EPA, the only discernable outcome of the proposal to "bump-up" the Three NAAs to "Serious Areas" pursuant to 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1), would be to **delay** by **1.5 years** the date on which Utah will be required to submit critical elements of the State Implementation Plan (SIP) that will chart the course for bringing these areas into compliance with the 24-hour $PM_{2.5}$ NAAQS. EPA proposes that core parts of the Serious SIPs be due December 2018, just one year before the attainment date of December 2019. In contrast, the appropriate provision under which to designate the Three NAAs as "Serious" areas – 42 U.S.C. § 7513(b)(2), Clean Air Act § 188(b)(2) – plainly mandates that all components of the Serious SIPs would be due mid-2017, 18 months after the operation of section 7513(b)(2) would function to designate them as serious.

EPA explains that under its November 9, 2015 "bump-up" proposal, 80 Fed. Reg. 69173 (Nov. 9, 2015), Utah would be required to submit **portions** of its nonattainment SIP – the updated emission inventory, the optional precursor insignificance demonstration and the provisions to assure implementation of BACM by the deadline – in June 2017. *E.g.* 80 Fed. Reg. 69173, 69178 (Nov. 9, 2015). The Nonattainment New Source Review (NNSR) SIP revisions would also be due 18 months following reclassification. *Id.*

However, the "due date for the **remaining** Serious area plan elements w[ould] be three years after the effective date of the final action or December 31, 2018, whichever is earlier[.]" *Id.* Thus, EPA's proposal serves to postpone the submission of the most critical components of the SIP – the attainment demonstration and attendant modeling, the attainment projected inventory, a showing of RFP, the quantitative milestone requirements and the contingency measures – by 18 months. *E.g.* 80 Fed. Reg. 15340, 15465 (March 23, 2015).

In authorizing that crucial elements of the SIPs are not due until one year before the final date for attainment, the proposal undercuts the very purpose of planning. It almost guarantees that Utah will not meet the $PM_{2.5}$ standard **sooner** than December 2019 and undermines the goal of expeditious attainment. Postponing the final plan also makes it more likely that Utah will miss the December 2019 deadline and defers pubic involvement in the attainment strategy. The delay also means that EPA will not review core portions of the SIP until after the attainment date has passed. Finally, the EPA proposal serves to bifurcate the SIP – an outcome that the agency itself deemed inappropriate. *Id.* at 15401

In contrast, were EPA to wait a few days or weeks to acknowledge the reclassification of the Three NAAs "by operation of law after the applicable attainment date" – in this case, December 31, 2015 – Utah would be required to "submit **both** the BACM provisions and the Serious area attainment demonstration no later than 18 months after reclassification." 80 Fed. Reg. 69173, 69177, fn. 11. In other words, were EPA to use the path created by 42 U.S.C. § 7513(b)(2), Clean Air Act § 188(b)(2), to confirm as soon as possible after December 31, 2015 that by operation of law, the Three NAAs failed to attain the 24-hour $PM_{2.5}$ NAAQS, the entirety of the SIP – designed to assure that Utah will attain the NAAQS as expeditiously as practicable – would be due June 2017 or shortly thereafter.

C. The Record Provides No Basis for the EPA Proposal to Delay Submission of the Attainment Demonstration and Other Critical Aspects of a Complete SIP.

Importantly, EPA maintains that, in the present context, its decision to proceed under 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1), is discretionary. 80 Fed. Reg. 69173, 69177 ("Section 188(b)(1) provides EPA with discretionary authority to reclassify an area as Serious nonattainment at any time before the applicable attainment date"). Therefore, to the extent that section 188(b)(1) is ambiguous, EPA's interpretation of the provision in its bump-up proposal must be reasonable and within the bounds of EPA's statutory authority. Here, by neglecting to explain why it proceeded under section 188(b)(1) and to consider the alternative 188(b)(2) path,

EPA has failed to demonstrate reasonableness. Moreover, because the bump-up proposal conflicts with the language and purpose of the Clean Air Act and expeditious attainment, the rule is contrary to the statute.

EPA fails to provide a basis for its proposed rule. The agency does not address the most crucial question raised by proposed rule – how does the agency's planned exercise of discretion under section 188(b)(1) comport with the Clean Air Act and in particular with 42 U.S.C. §§ 7513-7513b. As EPA does not discuss the foundation of its proposed rule in any way, the agency cannot defend its rule and the public cannot comment on the proposed action in a meaningful way.

Further, despite the significant difference between the two paths, EPA does not discuss or compare the consequences of the bump-up or 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1) and the "operation of law" or 42 U.S.C. § 7513(b)(2), Clean Air Act § 188(b)(2) paths to serious designation. The agency does not discuss the benefits or costs of proceeding under section 188(b)(1) or suggest why this path is appropriate. The agency barely mentions the section 188(b)(2) avenue to serious designation and does not discuss the benefits or costs of this approach. And certainly, EPA does not discuss and contrast the ramifications of the two provisions.

D. Contrary to the Requirements of 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1), the EPA Fails to Determine Whether Attainment Is "Practicable."

EPA bases is determination that the Three NAAs "cannot practicably attain the national ambient air quality standard for [$PM_{2.5}$] by the attainment date" exclusively on air quality data. 80 Fed. Reg. 69173, 69175 ("These [monitoring] data show that it is impracticable for these three areas to attain the 24-hour standard by the end of 2015."). Examination of the relevant docket, Docket ID No. EPA–R08–OAR–2015–0342, confirms that EPA has based its bump-up proposal only on air quality data.

However, 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1), requires a showing that the nonattainment areas cannot "practicably" attain the standards by December 31, 2015. EPA has interpreted section 7513(b)(1) as requiring an "**impracticability demonstration**," 80 Fed. Reg. 15340, 15376, fn. 106 ("The concept of an 'impracticability demonstration' is established in section 188(b), which addresses reclassifying Moderate $PM_{2.5}$ areas to Serious"), explaining "[s]ection 188(b)(1) describes the EPA's discretionary authority to reclassify an area upon a determination that an area cannot **practicably** attain by the Moderate area attainment date." *Id.*; *id.* at 15399 ("Pursuant to section 188 (b)(1), the EPA has general discretionary authority to reclassify from Moderate to Serious any area that the Administrator determines **cannot practicably** attain the NAAQS by the applicable Moderate area attainment date.").

While EPA contended that the Clean Air Act "does not specify the basis on which the EPA may make the determination that the area cannot practicably attain by the applicable

attainment date," *id.* at 15399, the agency did make some suggestions. These examples all require findings of impracticability, which entail a determination founded on considerably more than the basis the agency presents here. Rather than saying anything about what Utah has or has not done to attain the standard or what Utah was required to do to attain the standard by December 31, 2015, the EPA merely states that, based on monitoring data alone "it is impracticable for these three areas to attain the 24-hour standard by the end of 2015." 80 Fed. Reg. 69173, 69175. Thus, EPA has failed to support its proposed action.

E. Contrary to the Requirements of 42 U.S.C. § 7513(b)(1) and Its Previous Analysis, EPA Errs by Failing to Mention or Address the Impracticability Demonstration Submitted by Utah as Part of its 24-Hour $PM_{2.5}$ SIPs for the Three NNAs.

EPA's reliance on only air quality data to support its bump-up proposal is particularly problematic because EPA does not even **mention** whether Utah has submitted Moderate SIPs for the Three NAAs. In other words, the agency proceeds as though the existence of any Moderate SIPs and the content of these SIPs is irrelevant to the overall bump-up decision or specifically to the impracticability demonstration.

EPA further errs by ignoring the 42 U.S.C. § 7513a, Clean Air Act § 189(a)(1)(B), "impracticability demonstrations" that Utah **did** submit as part of its 2014 $PM_{2.5}$ Moderate SIPs for the Three NAAs.[6] While EPA concluded that it could make a bump-up decision without the benefit of a 42 U.S.C. § 7513a, Clean Air Act § 189(a)(1)(B), "impracticability demonstration," the agency maintained that it would be preferable to base a bump-up decision on such an analysis:

> EPA believes that while a Moderate area impracticability demonstration as contemplated in section 189(a)(1)(B) is desirable in order to help the agency make a determination that the area cannot practicably attain by its attainment date, such a demonstration is not necessary to trigger action by the EPA to reclassify a Moderate area to Serious.

80 Fed. Reg. 15340, 15399.

Thus, where such an impracticability demonstration does exist, in this case in each of the 24-hour $PM_{2.5}$ SIPs for the Three NAAs, it is unreasonable for EPA to make an impracticability demonstration of its own without referencing, much less analyzing that aspect of Utah's SIPs. *Id.* ("If the state makes and the EPA concurs with an impracticability demonstration submitted as part of the attainment plan, then the demonstration could serve as the basis for the EPA initiating a notice and comment rulemaking to reclassify the area to Serious."). While EPA may have the

[6] Utah Division of Air Quality – 2014 Annual Report at 30 ("All three SIPs were again approved by the Utah Air Quality Board in December, 2014 and submitted to EPA."). *See* http://www.airquality.utah.gov/docs/2015/02Feb/2014DAQAnnualReport_FINAL.pdf

discretion to bump Utah up to serious without a state-authored impracticability demonstration, the agency does not have the discretion to fail to consider the demonstration Utah actually finalized and submitted to the agency.[7]

F. EPA's Proposal Eviscerates the RFP and the Quantitative Milestones Requirements.

There may be nothing more important in a SIP than the demonstration of RFP. As EPA explained "the purpose of requiring RFP is to ensure that states with nonattainment areas develop attainment plans that achieve generally linear progress toward attainment, rather than deferring emissions reductions until the applicable attainment date for the area." 80 Fed. Reg. 15340, 15385. Where an area has missed the Moderate attainment deadline and has been reclassified as a Serious area, certainly RFP is of even more import. *See id* at 15385 ("RFP analysis will be required as part of the Serious attainment plan for the area once the EPA reclassifies it to Serious.").

Citizens of a serious nonattainment area have been suffering unsafe and unhealthy air quality already for six years – if not longer – and are entitled to real quantifiable reductions in emissions and concentrations of air pollution every year. As EPA explains:

> [T]he primary approach for ensuring that RFP is met in a $PM_{2.5}$ nonattainment area is to require that the state reduce each pollutant—that is, direct $PM_{2.5}$ and all precursors not otherwise eliminated from control requirements—by some amount on an annual basis.

80 Fed. Reg. 15340, 153857; *see also id.* at 15471-72 (proposed language for RFP requirements).

Yet, EPA is proposing to delay the required submission of the RFP demonstration for the Three NAAs to December 2018, only one year before the final serious attainment date. 80 Fed. Reg. 69173, 69178. This means that Utah citizens will be denied a showing and guarantee of RFP until it is too late for RFP to have an impact on the air they breathe or to produce steady progress toward attainment. EPA does not address the issue of why the postponement of this crucial element of a complete SIP is necessary or how a presumably unnecessary delay can serve to protect public health or advance the goal of expeditious attainment, particularly in light of the agency's recent determination that the Three NAAs cannot meet the NAAQS. Moreover, given the purpose of RFP and the goal of expeditious attainment, it is certain that the delay only frustrates the language and the goals of the Clean Air Act.

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[7] Utah Physicians further notes that EPA may not now supplement the docket with information, data or analysis to support its impracticability demonstration as any such information or analysis would not subject to public notice and comment and the material and review would necessarily represent post-hoc rationalization of a decision already made.

Similarly, EPA is planning to postpone the deadline for the submission of the quantitative milestones until December 2018, only one year before the final serious attainment date. 80 Fed. Reg. 69173, 69178. Section 189(c)(1) requires "quantitative milestones which are to be achieved every 3 years until the area is redesignated to attainment and which demonstrate reasonable further progress. . . toward attainment by the applicable date." 80 Fed. Reg. 15340, 15390. In the Implementation Rule, EPA proposed that for an area reclassified as serious and assuming attainment by 2019, these enforceable milestones would be "achieved no later than…7.5 and 10.5 years…from the date of designation of the area." *Id.* at 15472. For the Three NAAs, this means that the milestones would be achieved by **mid-2016** and **mid-2019**.

Yet, EPA is proposing to delay the required submission of the milestones for the Three NAAs to December 2018, only one year before the final serious attainment date and well after the date the first milestones must be achieved – mid-2016. This means that Utah citizens will be denied the submission and guarantee of enforceable milestones in mid-2016 – and the report to EPA should the state fail to achieve those milestones – as Utah would not have to derive or submit this SIP component until after the first serious milestone. 80 Fed. Reg. 69173, 69178; 80 Fed. Reg. 15340, 15390 ("the CAA imposes requirements upon states not only to make 'reasonable further progress' toward attainment, but also to identify objective means (i.e., quantitative milestones) by which to measure this reasonable further progress every 3 years, and to submit them as part of the attainment plan for the nonattainment area."); *Id.* at 15472-73 (proposed language for quantitative milestone requirements).

EPA does not address the issue of why the postponement of this crucial element of a complete SIP is necessary or how a presumably unnecessary delay can serve to protect public health or advance the goal of expeditious attainment, particularly in light of the agency's recent determination that the Three NAAs cannot meet the NAAQS. Moreover, given the purpose of the milestones and the goal of expeditious attainment, it is certain that the delay only frustrates the language and the goals of the Clean Air Act.[8]

G. The Proposal Unreasonably Bifurcates the Serious SIP.

Based on the agency's own reasoning, the proposal to bifurcate the Serious SIPs for the Three NAAs is unreasonable. In the context of Moderate SIPs, EPA maintained in the proposed Implementation Rule that the section 189(a)(2)(B) deadline for meeting the planning requirements in subpart 4 should also inform the deadline for complying with the other elements of the attainment plan required under subpart 1. 80 Fed. Reg. at 15362. EPA contended that these subpart 1 elements are necessary components of the attainment and reasonably available control measures (RACM) demonstrations under section 189(a)(1). *Id.* ("EPA presumes that

[8] These arguments are equally applicable to other reasonable measures beyond BACM and BACT. Because EPA's proposal allows only a year to implement these measures before the attainment date, the bump up plan will undermine the effectiveness of these measures.

development and submission of all of the attainment plan elements simultaneously will be most effective, both for the state in the first instance and for the EPA in reviewing the state's submission."). EPA came to the same conclusion relative to serious reclassifications made pursuant to section 188(b)(2) and the applicable schedule for plan submission under 189(b)(2). *Id.* at 15401. Because there is nothing to distinguish the ability of the states to develop SIPs, EPA and the public to review SIPs or the effectiveness of those SIPs themselves, whether they are moderate or serious or whether the areas were reclassified by operation of law or by the bump up process – particularly when the attainment date is days away – EPA's varying approach to these due dates is without foundation in reason. Rather the 42 U.S.C. § 7513a(b)(2) deadline – "[a] State shall submit the provisions described under paragraph (1)(B) no later than 18 months after reclassification of the area as a Serious Area" – should likewise dictate when all the Serious SIP elements should be submitted.[9]

Thus, EPA readily acknowledges that simultaneous and prompt submission of all SIP components is the most effective and efficient way to carry out the Clean Air Act and secure expeditious attainment of the NAAQS. Indeed, EPA reached this conclusion in the context of a reclassification of an area to Serious under 188(b)(2) and the 189(b)(2) schedule for submission. This same reasoning applies to a Serious SIP for an area bumped up to serious. As repeated elsewhere, EPA did not consider requiring Utah to submit all SIP components by June 2017 or examine proceeding under 188(b)(2) and/or 189(b)(2), much less why it would not pursue these more credible avenues. In addition, EPA does not acknowledge the consequences of its proposal to bifurcate the Serious SIP submissions and does not explain why its bump up proposal remains valid despite concerns the agency itself identified. Finally, the Clean Air Act underscores the importance of each element of a Serious SIP and the interrelatedness of each component. Therefore, the proposal to decouple these interconnected components – particularly without explanation – is improper.

H. The Record Does Not Support EPA's Reliance on 42 U.S.C. § 7513(b)(1), Clean Air Act § 188(b)(1), to Designate the Three NAAs as Serious Areas.

For the reasons stated above, the record does not support EPA's proposal to bump up the Three NAAs to Serious, given that the agency also plans to postpone the deadline for submission of critical components of the required Serious SIPs. The agency does not acknowledge the real ramifications of its proposal or consider and compare other paths, more in keeping with expeditious attainment. EPA does not explain how its proposal to postpone key elements of the Serious SIPs – particularly RFP, milestones and additional reasonable measures – is consistent with good planning and expeditious attainment. EPA fails to acknowledge that the public's ability to weigh in on critical SIP components is greatly diminished where public participation in these matters is delayed until one year before attainment. EPA does not discuss that the ability

[9] After all, 42 U.S.C. § 7513a(b)(2) provides that a "State shall submit the demonstration required for an area under paragraph (1)(A) no later than 4 years after reclassification of the area to Serious[.]"

of the agency itself to review and influence these critical SIP components is greatly diminished where EPA review of final plan elements is delayed until one year before attainment.[10] EPA does not address or try to mitigate the ills of bifurcating the Serious SIPs. EPA does not explain how a plan that is due one year before the final attainment date serves the purposes of planning and gives the state enough time to effectively implement its plan provisions. EPA fails to make an "impracticability demonstration" and improperly bases its bump up proposal on monitoring data alone. Therefore, EPA's proposal to postpone the due date of crucial SIP components at the same time it acknowledges the seriousness of Utah's failure to attain the NAAQS is not supported by the record and fails to comport with the text and purpose of the Clean Air Act.

Finally, EPA cannot support its contention, in the context of Executive Order 12898, that its proposed rulemaking "will not have potential disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment." 80 Fed. Reg. 69173, 69179. Although the proposed action would delay the due dates for critical components of the Serious SIPs, would eviscerate the RFP, additional measures and milestone provisions, would make it almost certain that the Three NAAs would not attain the standard sooner than December 2019 and would make it more likely that the areas would not attain the standard by December 2019, EPA failed to even address, much less resolve, any of these eventualities. As a result, there is not sufficient foundation in the record or in the proposed rule to support the Executive Order 12898 finding.

I. The Bump-Up Proposal Would Undermine the Expeditious Attainment of the NAAQS.

There is no question that the citizens of Utah and Idaho are entitled to expeditious attainment of the 24-hour $PM_{2.5}$ NAAQS. The assumption under the Clean Air Act is that this expeditious attainment can and should occur sooner than December 2019. Yet, EPA's postponement proposal frustrates both expedition attainment and attainment by December 2019. Therefore, for the reasons stated above, the proposed rule is arbitrary and capricious and otherwise unlawful.

The proposal to postpone key elements of the Serious SIPs – particularly RFP, milestones and additional reasonable measures – is not consistent with good planning and expeditious attainment. The public's ability to weigh in on critical SIP components is greatly diminished where public participation in these matters is delayed until one year before attainment. EPA's ability to review and influence these critical SIP components is greatly diminished where EPA

[10] Indeed, the most likely scenario is that EPA will not review and provide feedback on these SIP components until after the attainment deadline has passed. This is no way to expedite attainment.

review of final plan elements is delayed until one year before attainment.[11] Having key plan components due one year before the final attainment date does not serve the purposes of planning and does not give the state enough time to effectively implement these SIP provisions. The proposal improperly bifurcates the Serious SIPs, undermining the efficiency and effectiveness of the plans and the ability of EPA and the public to review them in a meaningful manner. Therefore, EPA's proposal to postpone the due date of crucial SIP components at the same time it acknowledges the seriousness of Utah's failure to attain the NAAQS does not comport with the text and purpose of the Clean Air Act.

Thank you for considering these comments as you review your proposal and make a final decision. Thank you as well for all you do to protect and improve air quality in Utah.

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[11] Indeed, the most likely scenario is that EPA will not review and provide feedback on these SIP components until after the attainment deadline has passed.