

Bryan W. Shaw, Ph.D., P.E., *Chairman*
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Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 1, 2014

Mr. Mike Thrift
Air and Radiation Law Office (2344A)
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: Comments on the Proposed Consent Decree, Clean Air Act Citizen Suit
(Docket No. EPA-HQ-OGC-2014-0421)

Dear Mr. Thrift:

The Attorney General for the State of Texas joined Attorneys General for the State of Arizona, the Commonwealth of Kentucky, the State of Louisiana, the State of Nevada, the State of North Dakota, and the State of South Dakota in submitting comments in response to the above-noted U.S. Environmental Protection Agency's (EPA) Notice of Proposed Consent Decree, published on June 2, 2014 (Notice).¹ The Texas Commission on Environmental Quality (TCEQ) concurs with the comments provided by the state Attorneys General. Additionally, as the agency responsible for developing designation recommendations for Texas, the TCEQ also provides the following additional comments to this Notice.

As detailed in the Notice, EPA seeks public comment on a proposed consent decree to settle the suit brought by the Sierra Club and the Natural Resources Defense Council in the matter of *Sierra Club et al. v. McCarthy*, Civil Action No. 3:13-cv-3953-SI (N.D. Cal.). Sierra Club et al.'s suit alleges that EPA Administrator McCarthy failed to discharge her nondiscretionary duty pursuant to the Clean Air Act (CAA) to designate all areas of the country for the sulfur dioxide (SO₂) national ambient air quality standard (NAAQS) within three years from the promulgation of the SO₂ NAAQS. In response to Sierra Club's allegations, EPA confessed to the Court that the Administrator failed to discharge her nondiscretionary duty to act. However, the proposed consent decree is not the remedy for such a failure as I've outlined below.

Substantively, the proposed consent decree violates § 107(d) of the CAA. EPA may only designate areas as violating or complying with a NAAQS where relevant data indicates. Where no data exists, the statute provides an "unclassifiable" designation. Nothing in § 107 allows EPA, whether through rule or settlement agreement, to designate an area based solely on the presence of large emitting sources without any indication of their contribution to violation of a NAAQS. It must be noted as well that the proposed consent decree conflicts with EPA's 2010 SO₂ rule establishing the revised standard. Adopted 40 C.F.R. § 50.17(b) clearly states that the revised 1-

¹ 79 *Fed. Reg.* 31325

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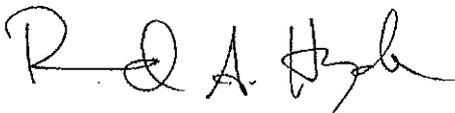
hour SO₂ NAAQS "...is met at an ambient air quality monitoring site..." Nothing in EPA's rule allows for determination of attainment or nonattainment based only on an SO₂ source's location.

The CD further violates the statute by allowing EPA to issue initial designations well beyond the date of promulgation of the SO₂ standard. EPA should have designated all areas of the country by June 2013, three years after the 2010 promulgation of the revised SO₂ NAAQS. TCEQ, through the Governor's office, timely submitted monitoring data recommending attainment and unclassifiable designations for all areas of the state, yet EPA, by its own admission, failed to act within its statutorily required window. This proposed consent decree gives EPA up to an additional four and a half years after the statutory deadline to make all designations for the SO₂ NAAQS.

This consent decree also proposes a significantly different schedule, and requirements for designations than does the data requirements rule proposed May 13, 2014.² To propose this settlement agreement immediately after proposing the data requirements rule undermines the state's ability to provide effective comments on the data requirements proposal. The data requirements rule proposal notice gave no indication the litigation could result in a different schedule or designation requirement. It is unclear from the Notice, or the data requirements proposal, which action takes precedent. EPA is not obligated to respond to comments on the proposed consent decree in the data requirements action because it is not in the record; however, the proposed consent decree will significantly alter the data requirements rule if entered by the court. EPA has not given proper notice in either the Notice or the data requirements proposal of its intended path.

For the foregoing reasons, TCEQ respectfully requests that EPA not enter into this proposed consent decree.

Sincerely,

A handwritten signature in black ink, appearing to read "R. A. Hyde". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Richard A. Hyde, P.E., Executive Director
Texas Commission on Environmental Quality

² Data Requirements Rule for the 1-Hour Sulfur Dioxide (SO₂) primary National Ambient Air Quality Standard (NAAQS); Proposed Rule, 79 *Fed. Reg.* 27446.