



COUNTY ATTORNEY

1150 "O" STREET
P O BOX 758
GREELEY CO 80632
www.co.weld.co.us
Direct Line: 970.336.7235
FAX: 970.352.0242

November 19, 2021

VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL

Administrator Michael S. Regan
Office of the Administrator, Code 1101A
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Regan.Michael@epa.gov

Re: Request for Administrative Stay of the EPA's Decision to Redesignate the Northern Portion of Weld County as Nonattainment for the 2015 Ozone NAAQS, Docket No. EPA-HQ-OAR-2017-0548-0459

Dear Administrator Regan,

The Board of County Commissioners of Weld County, Colorado ("Weld County") respectfully requests that the EPA administratively stay pending judicial review its recent Decision to Redesignate the Northern Portion of Weld County as Nonattainment for the 2015 8-hour ozone National Ambient Air Quality Standard ("Redesignation Rule") that you signed on November 17, 2021, and which is posted at <https://www.epa.gov/ozone-designations/final-rule-additional-revised-air-quality-designations-2015-ozone-national>. Weld County makes this request pursuant to 5 U.S.C. § 705.¹

Weld County intends to file a petition for review in the D.C. Circuit challenging the Redesignation Rule on the grounds it is arbitrary, capricious, and contrary to law. While judicial review is pending, Section 705 of the APA allows the EPA to administratively stay the effective date of a final rule if it finds "that justice so requires." 5 U.S.C. § 705. To determine whether "justice so requires" a stay of agency action pending review, agencies and courts consider four factors: (1) a likelihood of success on the merits of the judicial challenge, (2) irreparable harm to the moving party if the stay is not granted, (3) the potential for harm to others if the stay is granted,

¹ Due to the imminent compliance deadlines for certain requirements in the Redesignation Rule, Weld County submits this request today and reserves the right to supplement with additional material.

and (4) whether the public interest weighs in favor of granting the stay. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Weld County requests that the EPA find “justice so requires” a stay of the Redesignation Rule. As set forth below, each of the applicable four factors weighs in favor of staying the Redesignation Rule pending judicial review, and we therefore urge the EPA to grant this request for administrative stay.

I. Weld County Is Likely to Succeed on the Merits.

As set forth in Weld County’s detailed comment letter submitted on July 14, 2021, the EPA’s decision to include northern Weld County in the Denver Metro/North Front Range (“DM/NFR”) nonattainment area for the 2015 ozone NAAQS is arbitrary and capricious for the numerous reasons detailed in the letter and summarized in part herein. Chief among these reasons are (1) the EPA’s decision to ignore the last four years of available monitoring, weather, and emissions data and photochemical modeling employing them; (2) the lack of evidence that sources in northern Weld County contribute to ozone formation at violating monitors on high ozone days, regardless of whether the last four years of data are considered; (3) the EPA’s failure to reevaluate all five factors required by EPA guidance in deciding to move the boundary for the 2015 ozone NAAQS on remand; and (4) the comparability of northern Weld County to other whole and partial counties that will remain outside the nonattainment area boundary for any of the ozone NAAQS (2015 or 2008) after Redesignation Rule becomes effective. Accordingly, Weld County is likely to succeed on the merits of its challenge to the Redesignation Rule.

The EPA issued the proposed rule redesignating northern Weld County as nonattainment for the 2015 ozone NAAQS in response to *Clean Wisconsin v. EPA*, 964 F.3d 1145 (D.C. Cir. 2020). In that case, the D.C. Circuit remanded the EPA’s 2018 designation decision for further explanation regarding two of the five factors the EPA considered in making its previous designation: the emissions factor and the geography/topography factor. To determine the nonattainment area boundaries for the 2015 8-hour ozone National Ambient Air Quality Standard (“NAAQS”), the EPA must conduct a weight of evidence analysis, evaluating the following five factors: (1) air-quality data, (2) emissions and emissions-related data, (3) meteorology, (4) geography/topography, and (5) jurisdictional boundaries. *See* Memorandum from Janet G. McCabe, Acting Assistant Adm’r, to Reg’l Adm’rs, Area Designations for the 2015 Ozone National Ambient Air Quality Standards (Feb. 25, 2016), <https://www.epa.gov/sites/production/files/2016-02/documents/ozone-designations-guidance2015.pdf> (“Guidance Memo”). In this case, rather than relying on the best available data and modeling to conduct this analysis in response to the D.C. Circuit’s remand, the EPA arbitrarily limited its decision to data in the original record and intentionally ignored the last four years of best available data and the most advanced source apportionment modeling using those best available data.

Regarding the air quality factor, the EPA failed to consider updated information that better represents the current air quality in the nonattainment area.

Regarding the emissions factor, data are now available for the first time that isolate emissions from northern Weld County and northern Larimer County from other emissions. These data show that northern Weld County's anthropogenic emissions of ozone precursors comprise no more than 4% of the nonattainment area NO_x emission inventory and just 2.6% of the nonattainment area VOC emissions inventory. Moreover, even these low percentages of ozone precursor emissions likely overestimate the true level of NO_x and VOC emissions in northern Weld County, because a portion of these emissions are emitted in Larimer County. In addition, the EPA's decision does not account for the fact that oil and gas emissions will continue to decrease, given recent state legislation and regulations requiring statewide NO_x and VOC emissions controls and methane emission reductions. Weld County's July 14, 2021 comment letter provided a detailed assessment of the current state regulatory requirements for oil and gas sources, which demonstrated that existing and new sources have virtually identical regulatory control requirements inside the nonattainment area as outside the nonattainment area. Therefore, expanding the nonattainment area boundary would provide virtually no emissions reductions from stationary sources, as state regulations are already applicable.

Regarding the meteorology factor, the EPA presented a meteorological analysis to support its proposed designation that selectively removed information that did not support its decision to extend the nonattainment boundary for the 2015 ozone NAAQS north to the Weld County and Wyoming border. For example, the EPA removed from the 2021 Technical Support Document ("TSD") a back trajectory analysis prepared using the HYSPLIT model—a composite plot—in the remanded TSD. Importantly, this composite plot does not support the EPA's conclusion that northern Weld County emissions significantly contribute to ozone levels measured at violating monitors on high ozone days. Additional analysis done with HYSPLIT for the DM/NFR nonattainment area shows that emissions from northern Weld County do *not* significantly contribute to ozone, even when there are differences in time periods, monitors, and meteorological datasets. In other words, the results of the composite HYSPLIT modeling analysis are robust and consistent, and the EPA should have considered this analysis in making its designation decision. The EPA's Final TSD, which was released with the Redesignation Rule, is virtually identical to the previous version of the Proposed Rule's TSD. Once again, the EPA has failed to include the composite HYSPLIT plot, and despite Weld County's extensive comments, the EPA did not alter or expand on its rationale for excluding this analysis in the Final TSD.

Regarding the geography/topography factor, the EPA wholly failed to address the court's concerns about this factor on remand. In its analysis, the EPA did not substantiate its analysis of the Cheyenne Ridge, and the location of the ridge identified by the EPA in the 2021 TSD supporting the Redesignation Rule is inaccurate.

Finally, regarding the jurisdictional factor, the Redesignation Rule does not fully consider the jurisdictional factors listed in the Guidance Memo. Among other shortcomings, the EPA did not explicitly consider the large size of northern Weld County, its rural characteristics, and its physical and geographic isolation from the rest of the county due to the sharply climbing terrain north of the existing nonattainment area boundary.

By ignoring the best available data and relying on its incorrect analysis of the geology/topography factor, the EPA failed to conduct an adequate weight of evidence analysis in response to the court's remand. Indeed, to include northern Weld County in the DM/NFR nonattainment area is contrary to the most current data and photochemical modeling, previous analyses, and past regulatory decisions. Accordingly, Weld County's timely judicial challenge of the decision to now include northern Weld County within the nonattainment boundary for the 2015 ozone NAAQS is likely to succeed on the merits.

II. Weld County Will Suffer Irreparable Harm.

As noted above, available data clearly establish that northern Weld County does not materially contribute to ozone formation at violating monitors on high ozone days in the DM/NFR. Thus, including northern Weld County in the nonattainment area boundary will not provide meaningful ozone reductions. At the same time, the costs and regulatory burdens associated with an ozone nonattainment designation for northern Weld County are significant and will continue for many years, and perhaps even for decades. Moreover, even if the EPA were to later agree with Weld County that the best available data and photochemical modeling (information that EPA has presently chosen to ignore) do not support the Redesignation Rule, returning northern Weld County to attainment status is likely impossible in the near term, given the anti-backsliding provisions of the Clean Air Act at 42 U.S.C. § 7502(e), and promulgated in the EPA's rules implementing the ozone NAAQS. *See* 40 CFR Part 51, Subparts AA, CC. Once the EPA designates an area as nonattainment, if such designation is not stayed pending judicial review, its requirements go into effect quickly, and the EPA will likely maintain that it is constrained by anti-backsliding provisions to keep that area in the nonattainment area for years. Moreover, even the court saved northern Weld County from that fate, existing permittees and those pending issuance of an air permit are immediately and adversely affected by the imposition of nonattainment area requirements. Accordingly, if the effective date of the Redesignation Rule is not stayed, Weld County and its resident businesses and citizens will suffer irreparable harm.

The Redesignation Rule represents a significant regulatory shift, as the southwestern portion of the DM/NFR nonattainment area—an area far removed from northern Weld County—continues to struggle to attain the standard. Specifically, stationary sources will be subject to periodic lowering of major source thresholds, among other regulatory requirements for sources operating in a nonattainment area. This inevitable expansion of major source thresholds will trigger the need to comply with more onerous permitting requirements, reporting procedures, and testing standards applicable to major sources.

Without a stay and review on the merits, the Redesignation Rule condemns numerous sources in northern Weld County to nonattainment status for years, requiring these sources to expend significant time and resources in an attempt to comply with evolving ozone nonattainment regulations that will deliver no material ozone benefits. Given this substantial regulatory shift, businesses potentially affected by the Redesignation Rule have already begun reconsidering their

operations in northern Weld County, because doing so will expose them to these costly requirements in the near future. Moreover, businesses can reasonably expect the regulatory requirements based on the experiences in the current nonattainment area and evolving nonattainment area classification status. This is particularly so when businesses could easily avoid these requirements by moving their operations slightly north into Wyoming or into northern Larimer County or Morgan County, areas that are virtually indistinguishable from northern Weld County in terms of their lack of contribution to ozone concentrations at violating monitors but nevertheless are designated attainment or unclassifiable. As businesses move their operations or forego developing in the area due to these enhanced regulations, Weld County will suffer irreparable harm from the loss of economic and employment opportunities.

III. Staying the Redesignation Rule is in the Public Interest.

Staying the effectiveness of the Redesignation Rule pending judicial review is in the public interest. A stay would ensure the burdensome requirements of the Redesignation Rule would not be borne by extremely rural northern Weld County's resident businesses and citizens pending judicial review, particularly given the above-noted concerns of Weld County regarding the lack of substantial support in the record for the Redesignation Rule.

Moreover, staying the Redesignation Rule and maintaining the status quo pending judicial review will not pose a risk of harm to air quality, public health, and the environment. As set forth in Section I, the Redesignation Rule will not provide meaningful emissions reductions. Moreover, without even considering the best available data and photochemical modeling, the EPA took almost a year to issue the proposed rule in response to *Clean Wisconsin*, and another six months to publish the final rule. Because the EPA ignored over four years of data and more recent stringent regulation of oil and gas sources state-wide, including in northern Weld County, there is no material risk of harm to air quality associated with the requested stay pending judicial review of the final EPA re-designation. This is especially true given Colorado's stringent regulations of oil and gas sources in northern Weld County already in effect, and the more stringent GHG emission reduction measures likely to be adopted in the Colorado Air Quality Control Commission's December 2021 rulemaking. Thus, maintaining the status quo until the Redesignation Rule can be reviewed on its merits will not cause material harm to air quality in the existing or the expanded nonattainment area.

For the above reasons, Weld County respectfully requests that EPA administratively stay the effectiveness of the Redesignation Rule pending judicial review.

Administrator Michael S. Regan
November 19, 2021
Page 6

Respectfully submitted this 19th day of November, 2021.

BOARD OF COUNTY COMMISSIONERS
OF WELD COUNTY, COLORADO

s/Bruce T. Barker
Bruce T. Barker, Weld County Attorney

Cc: Jeffrey Prieto, General Counsel, EPA Office of General Counsel, Prieto.Jeffrey@epa.gov
Debra Thomas, Acting Regional Administrator, EPA Region 8, Thomas.Debra@epa.gov
Carl Daly, Deputy Regional Administrator, EPA Region 8, Daly.Carl@epa.gov