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June 14, 2017

VIA HAND DELIVERY AND EMAIL (A-AND-R-DOCKET@EPA.GOV)

Hon. Scott Pruitt
Administrator
Environmental Protection Agency
EPA Docket Center
WJC West Building, Room 3334
1301 Constitution Avenue, N. W.
Washington, DC 20004

Re: Petition for Error Correction in Final Rule Designating Williamson County, Illinois as Nonattainment under Air Quality Designations for the 2010 Sulfur Dioxide (SO2) National Ambient Air Quality Standard - Round 2

EPA Docket ID No. EPA-HQ-OAR-2014-0464

Dear Administrator Pruitt:

The Southern Illinois Power Cooperative (SIPC) petitions the Environmental Protection Agency (EPA) to correct errors in its designation of Williamson County, Illinois as a nonattainment area under the sulfur dioxide (SO_2) National Ambient Air Quality Standard (NAAQS). EPA finalized this action on January 18, 2007, two days before the previous administration left office. In designating Williamson County as nonattainment, EPA made two fundamental errors stemming from its reliance on faulty air quality modeling supplied by the Sierra Club and its rejection of modeling provided by the Illinois Environmental Protection Agency (Illinois EPA) and an independent modeling consultant retained by SIPC. First, it erred in concluding that the public has access to the Marion Station, a coal-fired electric generating

facility owned by SIPC and located in Williamson County. Second, it erred by misinterpreting its own policy as to when the public should be deemed to have access to emitting facilities. Given these errors, EPA mis-designated Williamson County as nonattainment; it should be designated attainment.

There is, in fact, no SO_2 air quality problem in Williamson County justifying the nonattainment designation. By contrast, EPA's nonattainment designation threatens severe economic consequences, including the loss of hundreds of jobs at the Marion Station, in an area of southern Illinois that is already economically stressed. EPA should therefore exercise its authority under section 110(k)(6) of the Clean Air Act by convening a notice-and-comment rulemaking proceeding to correct these errors and designate Williamson County as attainment. Additionally, EPA should move the United States Court of Appeals for the Seventh Circuit to place in abeyance pending litigation between SIPC and EPA concerning the legal validity of EPA's nonattainment designation.[1]

I. Background

On June 22, 2010, EPA promulgated a primary SO_2 NAAQS at a one-hour SO_2 concentration of 75 parts per billion (ppb) (196.5 ug/m3) (establishing a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations).[2] EPA, however, failed to marshal sufficient resources to meet Clean Air Act deadlines for making attainment/nonattainment designations under these new standards. As a result, EPA failed to

[1] *See SIPC v. EPA*, Case No. 16-3398 (7th Cir.). In filing this petition, SIPC incorporates by reference and relies on its more extensive September 12, 2016 Petition for Reconsideration that asked EPA to reconsider its designation of Williamson County as nonattainment. SIPC cites to specific exhibits set forth in that Petition below.
[2] *See* Primary National Ambient Air Quality Standards for Sulfur Dioxide, 75 Fed. Reg. 35,520 (Jun. 22, 2010).

make timely designations for numerous areas, including Williamson County, leading to litigation by environmental groups. EPA then entered into an inappropriate sue-and-settle consent decree providing for an artificial, accelerated timeline that required EPA to designate by July 2, 2016 any undesignated area under the SO_2 NAAQS that contain any large stationary sources of SO_2 emissions.[3]

As a consequence, EPA had but 16 months to solicit and attempt to evaluate any available data upon which to base its attainment/nonattainment designations. EPA's historic practice in making these designations has been to use actual monitoring data, but 16 months was insufficient time to gather the necessary data.[4] As a result, EPA decided to base it designations on air quality modeling.

During the attainment/nonattainment designations rulemaking, the Illinois EPA submitted modeling data that supported that agency's recommendation that EPA designate Williamson County as attainment.[5] The Sierra Club submitted its own modeling data that it asserted supported a nonattainment designation. In response to EPA's request, the Illinois EPA informed EPA that the Sierra Club modeling did not produce results that were representative of air quality conditions and could not be relied on for a number of reasons.[6] SIPC subsequently provided Illinois EPA with further modeling from an independent modeling firm that corrected certain errors in the Illinois EPA modeling and that further demonstrated that Williamson County should

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[3] *See* March 2, 2015 Consent Decree in *Sierra Club v. McCarthy*, No. 13-CV-03953-SI, 2015 WL 889142 (N.D. Cal. Mar. 2, 2015), exhibit 2 to SIPC reconsideration petition.
[4] *See* SIPC's reconsideration petition at 13-14 and Exhibit 7 to reconsideration petition at 1.
[5] *See* Illinois EPA letter to EPA Region V re: Updated Recommendations for 2010 SO_2 NAAQS (September 18, 2015) and accompanying Illinois EPA Technical Support Document for SO_2 Designation Recommendations for Electric Power Facility Areas (September 18, 2015) (Exhibit 3 to SIPC's reconsideration petition).
[6] *See* Exhibits 4 and 6 to SIPC's reconsideration petition.

be designated nonattainment.[7] The Illinois EPA then informed EPA on April 19, 2016 that it "has reviewed and considered the modeling submitted on behalf of the Southern Illinois Power Cooperative (SIPCO), and agrees with the results that demonstrate Williamson County should be designated in Attainment " of the SO_2 NAAQS.[8]

EPA nevertheless, relying on the Sierra Club's modeling, designated Williamson County nonattainment.[9] Following SIPC's petition requesting that EPA reconsider this decision, EPA, on January 18, 2017, just two days before the prior administration left office, denied the petition. SIPC has appealed both the designation and the denial of its reconsideration petition into court, and those appeals have been consolidated and are currently pending.[10]

II. EPA's Errors

EPA's designation decision is the product of two basic errors, one involving whether, as a matter of fact, the public has access to the Marion Station property and the other involving the requirements of EPA's own policy in determining whether the public has access to emitting facilities. As to the factual error, as EPA recognizes, in measuring whether an area meets a National Ambient Air Quality Standard, only the quality of the *ambient* air is considered. By definition, the ambient air includes only the air to which the public has access. In determining that the ambient air quality in Williamson County fails to attain the SO_2 NAAQS, however, EPA included air within the plant boundary of the Marion Station to which the public does not have

[7] *See* Exhibit 8 to SIPC's reconsideration petition.
[8] *See* Exhibit 9 to SIPC's reconsideration petition.
[9] *See* Air Quality Designations for the 2010 Sulfur Dioxide (SO2) National Ambient Air Quality Standard - Round 2, 81 Fed. Reg. 45,039 (July 12, 2016). SIPC asked EPA to reconsider the designation on September 12, 2016.
[10] *See SIPC v. EPA*, Case No. 16-3398 (7th Cir.).

access. Indisputably, had EPA not included this air, Williamson County would attain the SO_2 NAAQS.[11]

Air quality modeling forecasts air quality at various "receptor" locations. The Sierra Club's air quality modeling on which EPA relied included receptor locations within the boundary of the Marion Station, specifically at an area within the plant boundary along the Lake Egypt Road known as the Northern Property. EPA agreed that these receptor locations should be included in the modeling analysis because it thought that, even though these receptors were located within the plant boundary, the public could still access the Northern Property along the Lake Egypt Road.[12]

In coming to this conclusion, EPA did not make a site visit or ask SIPC what measures were being taken to exclude the public from the plant. Instead, EPA personnel relied on a single Google "street view" image and a single Google satellite image to conclude that the public had "easy access" across the plant boundary closest to the receptors in question because the boundary was not fenced.[13] The images show a portion of the Lake Egypt road with a low guardrail but no other fencing.[14]

The public, however, does not have access to the plant along this road. EPA ignored the fact that traffic along this road routinely moves at or above the posted speed limit of 55 miles per hour and that the portion of the road shown in EPA's images sits on top of a spillway which is 30 feet above the plant boundary. EPA also ignored the existence of barbed-wire fencing along the

[11] See SIPC reconsideration petition at 21.
[12] *See* EPA Final Technical Support Document Illinois Area Designations for the 2010 SO2 Primary National Ambient Air Quality Standard at 22-25.
[13] *See id.* at 23-24.
[14] *See id.* at 24-25.

plant boundary above and below the portion of the road in the images, the fact that the boundary is posted with warning signs informing the public not to enter, and the fact that SIPC has a regularly-monitored security camera that provides a complete, unobstructed view of the plant boundary. Moreover, there are no pedestrian crossings or walkways that would allow the public access along this area of Lake Egypt Road.[15] *Most importantly, no one from the public has, in fact, ever entered within the boundary of the Marion Station except as specifically invited by plant personnel and then through the plant's normal access points.*

All of this was pointed out to EPA in SIPC's petition for reconsideration, but in responding to that petition, EPA made its second error, this time in interpreting EPA's policy as to whether the public has access to air within the boundary of a particular source. In denying SIPC's reconsideration petition, EPA relied exclusively on the fact that the Northern Property was not fenced off from the public. EPA did not consider the guardrail along Lake Egypt road to be a proper fence, and its discussion ignored all the evidence that SIPC submitted as to why the public, in fact, does not have access to the Northern Property.[16]

But EPA's policy does *not* provide that the only way to bar public access from an emitting facility is through fencing. Indeed, in denying SIPC's reconsideration petition, EPA itself cited what it called its "longstanding interpretation" that "'the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence *or other physical barrier*,'" citing a 1980 letter from the then Administrator to the then Chairman of the Senate Environment and Public Works

[15] *See* further discussion at SIPC reconsideration petition at 18-21 and exhibits cited therein.
[16] *Id.* at 13.

Committee.[17] (Emphasis added.) And EPA has been clear that "[t]he test for ambient air exclusion *does not require a continuous fence* around the perimeter of the property. *Other types of physical barriers can effectively preclude access.*").[18] (Emphasis added.)

Given its exclusive focus on fencing, EPA ignored the obvious fact that the combination of the road itself, sitting on a 30-foot embankment, the guardrail, the warning signs, the 24-hour surveillance, and the additional barbed-wire fencing together accomplish the goal of physically precluding public access. In order to gain access to the Northern Property, a member of the public would have to pull over on to the narrow gravel curb, exit the car into fast-moving vehicular traffic, jump over the guardrail, and scramble down the embankment, all the while ignoring the no-trespassing signs along the property and hoping not to be spotted by the surveillance camera. Under EPA's guidance, "'[p]reclude' does not necessarily imply that the public access is absolutely impossible, but rather that the likelihood of such access is small."[19] The likelihood that a member of the public would try to enter on to the Northern Property is obviously very small, a conclusion that is reinforced by the fact that it has never happened.

Indeed, EPA has also previously found that non-fence physical barriers, in conjunction with security sign postings and 24-hour security camera surveillance, are more than adequate to preclude public access. For instance, in EPA Model Clearinghouse Record, No. 99-V-03 (September 18, 1999), EPA stated that "[a] combination of fencing and other physical barriers, posting, and use of the 24-hour security camera surveillance and truck patrolling system should

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[17] See EPA January 18, 2017 response to SIPC reconsideration petition at 9.
[18] *See In the Matter of Hibbing Taconite Company*, PSD Appeal No. 87-3, at 17-18 (July 19, 1989).
[19] *See* June 22, 2007 Memorandum from Stephen D. Page, "Interpretation of 'Ambient Air' in Situations Involving Leased Land Under the Regulations for Prevention of Significant Deterioration (PSD)," attached "Support Document," p. 3, n. 1.

provide an adequate barrier to preclude public access to the public." EPA went so far in that case as to find that the use of video surveillance *alone* is sufficient to restrict access to the general public. As noted, whatever minute possibility exists that someone might want to enter the Northern Property over the guardrail and down the embankment is mitigated by SIPC's 24-hour surveillance system.

In sum, EPA erred in concluding that the public has access to the Northern Property. EPA was wrong as a matter of fact and as a matter of what its own policy provides.

III. Impact of Nonattainment Designation

As a result of the nonattainment designation, SIPC will be faced with the need to place SO_2 controls on the Marion Station's coal units. This will result in higher dispatch costs, causing the units to be uneconomic. If the units cannot run, the plant's 130 employees will lose their jobs, with a loss of $24 million in wages and benefits. Reductions in coal purchases from local mines would result in the loss of another $60 million. SIPC estimates that the indirect effects of closing the coal units at the Marion Station, including the cost to suppliers and trucking companies, to be another 800 jobs and $800 million to the local economy.

Moreover, if SIPC loses the Marion Station, it will have to replace it with higher cost sources of power. This will result in rate increases to SIPC's member-customers who, because they are among the poorest people in Illinois, can least afford it.

Beyond the impacts of the coal station, the nonattainment designation will require the State to develop an attainment plan and an attainment demonstration that could require additional

local controls. The nonattainment designation also creates a stigma and a potentially significant impediment to economic development in Williamson County.

Economic impacts, however, do not tell the whole story. It is now widely understood that job losses create health and welfare problems for the unemployed person and his or her family. Less money is available to pay for the necessities of life like food, energy and health care. Unemployment increases drinking and alcohol abuse, depression and suicide.

IV. The Clean Air Act Provides a Ready Mechanism to Correct the Errors and Make an Appropriate Attainment Designation

Under section 110(k)(6) of the Clean Air Act, "[w]henever the Administrator determines that the Administrator's action ... promulgating any ... area designation ... *was in error*, the Administrator may in the same manner as the ... promulgation revise such action as appropriate." (Emphasis added.) EPA's designation of Williamson County as nonattainment was clearly erroneous and should be corrected. Because EPA used notice-and-comment rulemaking to designate Williamson County as nonattainment, EPA must use notice-and-comment rulemaking to correct the erroneous designation. There is ample precedent for EPA to use its error-correction authority to correct an erroneous nonattainment designation, even when the error was made long ago, which is obviously not the case here. In one case, for instance, EPA used its error-correction authority to reverse nonattainment designations made nearly two

decades before.[20] In another, EPA used its error-correction authority to narrow the extent of a nonattainment area.[21]

V. Conclusion

EPA committed two clear errors in designating Williamson County as nonattainment. First, it erroneously concluded as a matter of fact that the public has access to the Northern Property. Second, it erroneously interpreted its policy as requiring that the public access be precluded by fencing rather than other reasonable physical barriers. EPA should exercise its error-correction authority under section 110(k)(6) of the CAA to correct these errors. It should issue a rulemaking proposal that (a) identifies the errors, (b) proposes to revoke the nonattainment designation and designate Williamson County as attainment, and (c) seeks public comment on the identified error and the proposed regulatory actions. If, after public comment, the evidence supports an attainment designation, which SIPC believes it overwhelmingly will, EPA should finalize that proposal. In the meantime, EPA should move the Seventh Circuit to place the pending litigation in abeyance.

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[20] *See* Designation of Areas for Air Quality Planning Purposes; Correction of Designation of Nonclassified Ozone Nonattainment Areas; States of Maine and New Hampshire, 62 Fed. Reg. 14,641 (Mar. 27, 1997).
[21] *See* Designation of Areas for Air Quality Planning Purposes; Arizona; Correction of Boundary of Phoenix Metropolitan 1-Hour Ozone Nonattainment Area, 70 Fed. Reg. 68,339 (Nov. 10, 2005)

Sincerely,

s/s/ Peter S. Glaser
Peter S. Glaser
Counsel for Southern Illinois Power Cooperative

cc: Southern Illinois Power Cooperative

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