ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1309 (Lead) and Consolidated Cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JOINT BRIEF OF RESPONDENT-INTERVENORS STATE OF UTAH, UINTAH COUNTY, UTAH, UINTAH IMPACT MITIGATION SPECIAL SERVICE DISTRICT, UTAH ASSOCIATION OF COUNTIES, AND THE WESTERN ENERGY ALLIANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Respondent-Intervenors State of Utah, Uintah County, Utah, Uintah Impact Mitigation Special Service District and Utah Association of Counties (hereafter Uintah County) and Western Energy Alliance certify as follows:

A. Parties, Intervenors, and Amici Curiae

All parties and intervenors are identified in Petitioners' brief.

CORPORATE DISCLOSURE STATEMENT OF THE WESTERN ENERGY ALLIANCE

1. The Western Energy Alliance (the Alliance) is a non-profit trade association representing over 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and gas in the Western United States.

2. The Alliance does not have any parent corporations.

3. The Alliance is not a publicly-held company and no other company or corporation has a 10% or greater ownership interest in the Alliance.

B. Rulings Under Review

Respondent-Intervenors rely upon Respondent-EPA's Rulings Under Review.

C. Related Cases

All related cases have been consolidated under lead case no. 12-1309.

Respectfully submitted,

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Dated: January 15, 2014

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GLOSSARY

CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standard or Standards
Ozone Designations	Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30,088 (May 21, 2012) (DN0679); Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards for Several Counties in Illinois, Indiana, and Wisconsin; Corrections to Inadvertent Errors in Prior Designations, 77 Fed. Reg. 34,221 (June 11, 2012) (EPA-HQ-OAR-2008-0476-0690)
RTC	Responses to Significant Comments on the State and Tribal Designation Recommendations for the 2008 Ozone National Ambient Air Quality Standards, NAAQS (EPA-HQ-OAR-2008-0476-0675)
Petitioner-WEG	WildEarth Guardians, Utah Physicians for a Healthy Environment, and Southern Utah Wilderness Alliance
Respondent-Intervenors	State of Utah, Uintah County Utah, the Uintah Impact Mitigation Special Services District, and Utah Association of Counties, and the Western Energy Alliance
SIP	State Implementation Plan

The State of Utah; Uintah County, Utah, the Uintah Impact Mitigation Special Service District and Utah Association of Counties; and the Western Energy Alliance (collectively "Respondent-Intervenors") jointly submit this brief in support of Respondent, the U.S. Environmental Protection Agency ("EPA").

JURISDICTIONAL STATEMENT

Respondent-Intervenors agree with the Jurisdictional Statement in *Respondent's Initial Brief* ("EPA Brief") filed December 13, 2013.

STATEMENT OF THE ISSUES

Respondent-Intervenors agree with Respondent-EPA's third Statement of the Issues[1]:

> Whether EPA reasonably relied on monitoring data collected and submitted in accordance with EPA's regulations to identify areas in violation of the 2008 Ozone National Ambient Air Quality Standards [], and, therefore, properly determined that areas in the Uinta Basin, Utah should be designated as "unclassifiable."

EPA Brief at 3.

STATUTES AND REGULATIONS

For the statutory and regulatory provisions cited herein Respondent-Intervenors incorporate by reference Respondent's Statutory Addendum,

[1]EPA's second Statement of Issues addresses EPA's policy for considering 2011 monitoring data. As no certified, regulatory monitoring data existed for 2011 in the Uinta Basin the issue is not relevant to the matters addressed in this brief.

separately filed.

STATEMENT OF THE CASE AND FACTS

Respondent-Intervenors adopt EPA's Statement of the Case and Facts with respect to those portions addressing EPA's designation of the Uinta Basin. *See* EPA Brief, Statement of the Case and Facts, Parts I, II, III.A., III.B.1. The following additional facts are submitted:

I. STATUTORY BACKGROUND REGARDING A NONATTAINMENT DESIGNATION.

After National Ambient Air Quality Standards ("NAAQS") are established, the Clean Air Act ("CAA") directs states to adopt State Implementation Plans ("SIPs") to implement, maintain, and enforce the NAAQS. 42 U.S.C. § 7410.[2] A SIP details how a state plans to impose "enforceable emission limitations and other control measures" for pollutants to maintain or attain the NAAQS. 42 U.S.C. § 7410(a)(2)(A). Where an area has been designated as nonattainment for NAAQS, EPA must also classify the area as to the severity of the NAAQS exceedance. *Id*. § 7410.

A SIP for a nonattainment "shall provide for implementation of all reasonably available control measures as expeditiously as practicable" so that

[2]Congress also included provisions to treat Indian tribes as states to implement the CAA within the boundaries of the tribe's jurisdiction. *Id.* § 7601(d); *see also* 40 C.F.R. § 49.3.

attainment of the NAAQS may be reached by a date certain. *Id*. § 7502(c)(1). The amount of emission controls imposed on a source are dependent upon six nonattainment classification levels - marginal to extreme. *See* 77 Fed. Reg. 8,197, 8,201-02 (Feb. 14, 2012). In other words, the higher the level of nonattainment, the more restrictive the control measures will be required.

II. UINTA BASIN DEMOGRAPHICS.

The Uinta Basin designation encompasses "Uintah County, Duchesne County, and the Ute Indian Tribe of the Uintah & Ouray Reservation" ("Ute Reservation"). 77 Fed. Reg. 30,088, 30,151 (May 21, 2012). The Ute Indian Tribe, or in the alternative EPA, has authority to implement the CAA on the Ute Reservation. 42 U.S.C. § 7601(d); 40 C.F.R. § 49.3.

Numerous oil and natural gas exploration/production companies hold federal, state and private mineral leases in Uintah County. Docket No. 1395291, *Motion for Leave to Intervene in Support of Respondents and Memorandum in Support of the Western Energy Alliance* (September 19, 2012), Declaration of Kathleen Sgamma ¶ 4. Essential government services in Uintah County are funded, in large part, from federal mineral leases within the County. Docket No. 1390268, *Motion for Leave to Intervene in Support of Respondents by Uintah County, Utah, Board of County Commissioners, the Uintah Impact Mitigation*

Special Service District, and the Utah Association of Counties ("Uintah Co. Intervention Motion") (August 20, 2012), Affidavit of Mike McKee ("McKee Aff.") ¶¶ 3, 5-6.

STANDARD OF REVIEW

EPA's ozone designation of the Uinta Basin must be upheld unless the Court finds EPA's designation to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Respondent-Intervenors adopt EPA's Standard of Review that the Court must affirm EPA's decision if a rational connection between relevant facts and its decision is articulated. *See* EPA Brief at 20-21 (citations omitted). This Court further emphasized that its role "is to determine neither whether EPA's approach was 'ideal,' nor whether it was the 'most appropriate,' but only whether it was reasonable." *See Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc).

SUMMARY OF THE ARGUMENT

In accordance with the CAA, EPA is required to establish standards limiting the amount of certain pollutants in the ambient air. These standards are called National Ambient Air Quality Standards or NAAQS. Once NAAQS are established for a pollutant, EPA must designate by rule whether geographical areas are in compliance with that standard based on air monitoring data. Areas with

pollutant levels that exceed the NAAQS, designated as nonattainment areas, are subject to significant restrictions on future emissions designed to bring the area into compliance with the NAAQS. To ensure designations are defensible under the CAA, EPA has rationally and consistently required the monitoring data to meet certain quality-assurance requirements, established by duly promulgated federal regulations, so that a NAAQS violation would be fundamentally supported by accurate and reliable data.

EPA considered data from nonregulatory ambient air monitoring sites but concluded that the data did not conform to quality-assurance rules and could not be the basis for a nonattainment determination. Lacking quality-assured regulatory monitoring data to determine a violation of the NAAQS for ozone, EPA, as it is obligated to do under the plain language of the CAA, designated the Uinta Basin, Utah, as "unclassifiable" – finding that the Uinta Basin is neither in attainment nor nonattainment. Petitioners-WildEarth Guardians, Utah Physicians for a Healthy Environment and the Southern Utah Wilderness Alliance (hereinafter "Petitioner-WEG") challenged EPA's "unclassifiable" designation erroneously arguing that EPA must accept *any* available monitoring data, regardless of whether the data failed to meet EPA's long standing quality-assurance criteria for determining NAAQS violations. Petitioner-WEG's arguments are without merit.

EPA is entitled to deference when establishing minimum requirements to ensure accurate monitoring data to determine compliance with an air quality standard. Moreover, EPA's technical decision to reject incomplete and non-quality-assured data is fully consistent with its established practice, is in accordance with the CAA, and is also entirely reasonable from a public-policy position. As no reliable quality-assured data was available, EPA's initial designation of the Uinta Basin as "unclassifiable" for ozone should be upheld.

ARGUMENT

Pursuant to the CAA, Congress mandated that EPA establish NAAQS for ozone and other criteria pollutants to protect public health. 42 U.S.C. § 7409. Subsequent to a NAAQS being established and on recommendations from states or tribes, Congress instructed EPA to designate whether areas are in attainment or nonattainment with that NAAQS. 42 U.S.C. §§ 7407(c)-(d). When there is insufficient available information to classify an area as either meeting or not meeting the NAAQS, as in this case regarding the Uinta Basin, an area must only be designated as "unclassifiable." 42 U.S.C. § 7407(d); *see also* EPA Brief at 4 (explaining EPA's mandate under the CAA).

Petitioner recognizes once a NAAQS was established for ozone, EPA was required to use ambient air monitoring data to determine whether the Uinta Basin

met that standard based on "the 3-year average of the annual fourth-highest daily maximum 8-hour average concentration." *Environmental Petitioners' Joint Opening Brief* ("WEG Brief") at 3 (citing 40 C.F.R. § 50.15(b)). Petitioner further recognizes that Congress intended the compliance determination be based on available "sound" data. WEG Brief at 24 (citing S. Rep. No. 101-228, at 15 (1989)).

"Congress did not specify the quality or quantity of data required for designations." EPA Brief at 44. Rather, it directed that any air quality monitoring system required by an implementation plan must utilize the standard criteria and methodology regulations promulgated by EPA. *See* 42 U.S.C. § 7601(a). In accordance with the CAA, EPA established by regulation what is required to ensure monitoring system data is of sufficient quality to be used for regulatory purposes (e.g., that the data is "sound"). *See* 40 C.F.R. pts. 50, -53, -58. It is entirely reasonable for EPA to require that the data used for making ozone designations comports with the existing requirements of those regulations.

I. EPA's "Unclassifiable" Designation of the Uinta Basin is Rationally Based on the Lack of Data to Determine a NAAQS Violation.

Subject to its obligations under the CAA, on May 21, 2012, EPA designated the Uinta Basin as "unclassifiable" for ozone because there was insufficient

quality-assured data to determine whether it was in violation of the applicable NAAQS. 77 Fed. Reg. at 30,151. Without sufficient sound data, EPA is obligated by the CAA to designate the area as "unclassifiable." *See* 42 U.S.C. § 7407(d).

At the time EPA promulgated its initial designation for ozone, two non-regulatory monitors located in the Uinta Basin, referred to as the Red Wash and Ouray (collectively "Red Wash/Ouray") monitors,[3] measured ozone levels in excess of the NAAQS. The Red Wash/Ouray data failed to meet EPA's minimum quality-assurance criteria. *See* RTC at 72-73, JA__; Cooley Ltr. Part V, JA__. Notably, monitoring data used to confirm a NAAQS violation must meet EPA quality-assurance regulations that specify "the minimum [quality control] requirements and performance evaluations needed to assess the data quality indicators of precision, bias, detectability, and completeness." 40 C.F.R. pt. 58; 71 Fed. Reg. 61,235, 61,254 (Oct. 17, 2006); *see also* EPA Brief at 44.

Petitioner-WEG asserts that the Red Wash/Ouray monitors measured several

[3]The Red Wash/Ouray monitors, operated by a private entity pursuant to a consent decree, were not intended to be used to determine compliance with a NAAQS. *See* Letter to Robin Cooley from Lisa P. Jackson (EPA-HQ-OAR-2008-0476-0751) ("Cooley Ltr."), December 14, 2012, Part IV, JA__; *Response to Significant Comments on the State and Tribal Designation Recommendation for the 2008 Ozone National Ambient Air Quality Standards, NAAQS,* (EPA-HQ-OAR-2008-0476-0685) ("RTC") at 72-73, JA__. These monitors are located within the boundaries of the Ute Reservation. Letter to Governor Gary Herbert from James B. Martin, (EPA-HQ-OAR-2008-0476-0215) December 8, 2011, at 2, JA__.

exceedances. WEG Brief at 10. It is important to re-emphasize that the standard is not based on individual exceedances, but an exceedance by the fourth-highest daily maximum 8-hour concentration, averaged over a three-year period. 40 C.F.R. § 50.15. Not only is it irrelevant to the determination if there are single exceedances on a given day or over a given period, but without three years of certified, quality-assured data, EPA cannot reach an attainment/non-attainment designation for ozone.

Indeed, EPA determined the available data was insufficient to technically support a nonattainment designation. As described in EPA's Brief and fully supported in the administrative record, Respondent-Intervenors agree with EPA's underlying basis and urge the Court to uphold EPA's rationale for the Uinta Basin ozone designation of "unclassifiable." *See* EPA Brief at 40-45, 51-62.

A. The Court Should Defer to EPA's Technical Expertise to Determine Necessary Monitoring Data Criteria.

Whether monitoring data is accurate and reliable is well within the scope of EPA's scientific and technical expertise. Because this Court has previously granted "an extreme degree of deference to [EPA] when evaluating scientific data within its technical expertise," EPA submits it is entitled to deference here. *See* EPA Brief at 21, 52 (quoting *City of Waukesha v. EPA,* 320 F.3d 228, 247-48

(D.C. Cir. 2003) (string cites omitted)). Establishing quality-assurance criteria for data used to designate nonattainment areas is within EPA's technical expertise. Accordingly, EPA should be granted deference in this matter.

B. It is Rational to Require Data Used to Determine Violations of NAAQS Meet Existing EPA Monitoring Data Regulations.

To support the enactment of the CAA, EPA regulations establish uniform data requirements which form the basis for determining compliance with the NAAQS for ozone. *See* EPA Brief at 44-45, 51; 40 C.F.R. pts. 50.15, -53, -58. EPA regulations, while complicated, provide minimum quality-assurance procedures to promote reliable and accurate monitoring data.

1. It is Rational that EPA Require Data to Comply With its Ambient Air Monitoring Regulations.

EPA's requirement that data used to designate a nonattainment area must meet the requirements of its ambient air monitoring rules is appropriate because the rules are based on principles of peer review and promulgated pursuant to the CAA. *See* 42 U.S.C. § 7601(a)(2)(A) (EPA must "assure fairness and uniformity in criteria, procedures, and policies . . . ."), 42 U.S.C. § 7619; 71 Fed. Reg. 61,235. EPA's multi-tiered quality-assurance approach, used in the promulgation of its air monitoring regulations, mirrors the commands of the Information Quality Act ("IQA"). 44 U.S.C. § 3516. The purpose of a multi-tiered quality-assurance

approach and a peer review policy is to ensure and maximize "the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency . . . ." *See e.g.* 44 U.S.C. § 3516(b)(2)(A).

This Court recently described the purpose and value of input from the Clean Air Science Advisory Committee ("CASAC"), authorized by Congress to advise EPA with respect to establishing the NAAQS. *Mississippi v. EPA*, 723 F.3d 246, (D.C. Cir. 2013), *amended by* 2013 WL 6486930, at *15-16 (Dec. 11, 2013). EPA must consider the CASAC's expert recommendations when promulgating the NAAQS. 42 U.S.C. § 7409(d)(2). Notably the CASAC also conducted expert scientific peer review of the methods, technologies, and approach for the air monitoring regulations that EPA requires the data meet if used for designation. 71 Fed. Reg. at 61,237.

Consistent with the provisions of the IQA, EPA's monitoring rules that require quality-assurance procedures have undergone peer review from the independent CASAC and public scrutiny through rulemaking. Moreover, as this Court recognized, EPA "is by no means required to rely on [statistically uncertain results]," such as the data collected at the Red Wash/Ouray monitors. *Mississippi v. EPA*, 2013 WL 6486930, at *12. It is, therefore, only reasonable that EPA would require that data used to designate an area as nonattainment meet those

quality-assurance regulations which the Red Wash/Ouray data failed to meet.

2. EPA Consistently Specified its Quality-Assurance Data Requirements to Designate Areas for Ozone.

EPA advised in advance that its designation of areas for ozone would be based on "the most recent three years of certified, quality-assured monitoring data" from regulatory monitors that meet Part 58 requirements.[4] *See Area Designation for the 2008-Revised Ozone National Ambient Air Quality Standards*, (EPA-HQ-OAR-2008-0476-0002) December 4, 2008, at 2; JA__: *see also Implementation of the Ozone National Ambient Air Quality Standard*, Memorandum from Gina McCarthy, EPA Assistant Administrator for Air and Radiation to EPA Air Division Directors in Regions 1-10, (EPA-HQ-OAR-2008-0476-0105) September 22, 2011, JA__; RTC at 73-74; JA__; *see also* Letter to Governor Jon Huntsman, Jr. from Carol Rushin, (EPA-HQ-OAR-2008-0476-0042) December 11, 2008, JA__; Letter to Chairman Curtis Cesspooch, from Carol Rushin, (EPA-HQ-OAR-2008-0476-0059) December 12, 2008, JA__. To determine whether an area violates the NAAQS, EPA relies on "state-submitted air quality monitoring data

[4]Part 58 provides, in part, that: 1) monitors must be operated in accordance with an approved Quality Assurance Project Plan and Quality Management Plans that dictates how quality data will be generated; 2) the monitoring data quality must be assessed; 3) an approved sampling method must be used; 4) the monitors must be calibrated pursuant to a national standard; and 5) performance evaluations must be conducted. *See* 40 C.F.R. pt. 58, App. A.

obtained in accordance with EPA's regulations."[5] EPA Brief at 15 (citing 77 Fed. Reg, at 30,091-93; 2008 Guidance at 2), 44-45.

That Petitioner-WEG disagrees with the imposition of existing quality-assurance monitoring data regulations, or misunderstands the regulations, does not change the fact that the regulations exist, that they apply with the force of law, and that EPA was obligated to consider them when making its determination. Accordingly, EPA's designation should be upheld.

II. It is Necessary and Reasonable to Require Certification of Quality-Assured Data for a Nonattainment Designation as Nonattainment Triggers Significant Consequences.

Emission reduction of the pollutants are necessary, however, it is essential to ensure the monitoring data used for designation of a nonattainment area is an accurate measurement of the ambient air quality. Following a nonattainment designation, states must adopt and implement SIPs that impose enforceable emission controls and limits to reduce pollutant levels so that the area may achieve attainment of the relevant NAAQS in the near future. 42 U.S.C. §§ 7410, -7502(a)(2). The magnitude of control limits imposed by a nonattainment SIP, the breadth of the area impacted, and the effectiveness of a SIP, are dependent upon

[5]Note, that Indian tribes treated as a state (42 U.S.C. § 7601(d)) or EPA are responsible for administering the CAA in Indian Country.

the design value[6] and the classification of the severity of the nonattainment, and thus, directly dependent upon the accuracy and reliability of the data used to support the nonattainment designation. *See* 40 C.F.R. pt. 50, App. P; 42 U.S.C. § 7511a; 77 Fed. Reg. 8,197, 8,200-02.

The development of a SIP is both time and cost intensive for the responsible agency. Moreover, the imposition of nonattainment emission and control limits may significantly burden the quality-of-life and economic viability of individual citizens, local and state governments, and various businesses, each of whose interests are represented by one or more of the Respondent-Intervenors.

In particular, Uintah County ("County") faces significant adverse economic and secondary impacts if the Uinta Basin is inappropriately designated as nonattainment for ozone. *Uintah County Intervention Motion* (Aug. 20, 2012), Docket No. 1390268 (herein incorporated by reference) at 5. The question of compliance with ozone NAAQS directly affects public land activities, particularly oil and gas production. *Id.* at 7. Using the non-quality-assured Red Wash/Ouray data, that Petitioner-WEG asks the Court to consider determinative, would set off a chain of regulatory consequences that entail substantial secondary economic and socioeconomic effects. A nonattainment designation for ozone triggers additional

[6]A design value is a statistic calculated using monitoring data to determine compliance with a NAAQS. 40 C.F.R. pt. 50, App. P.

time-consuming and costly regulatory measures for all current and future public and private land uses in Uintah County, including airport expansion, highway improvements, and future oil and gas or tar sands development. New control measures and permit reviews pursuant to a nonattainment SIP would manifest into a lengthy process costing millions of dollars. McKee Aff. ¶¶ 14-15. Nonattainment measures increase the regulatory burdens for all entities operating in the region and should not be adopted unless the data are without question, which is not the case here.

For example, oil and gas production in the County accounts for more than half of the production in the State and provide substantial revenue to the County. *Id*. With a nonattainment designation, the County would face a decline in mineral revenues and would have to make large cuts to fiscal budgets to account for decreased revenue.

Given the substantial impact on the rights and privileges of affected parties that may be imposed by a nonattainment designation, consequences based on non-quality-assured data are unwarranted. The data supporting a nonattainment designation must be accurate, reliable, and legally defensible. As this Court has expressed in the past, "garbage in; garbage out." *Mississippi v. EPA*, 2013 WL 6486930, at *13. Accordingly, it is not only reasonable, but essential that EPA

require monitoring data supporting a NAAQS violation or a nonattainment designation be certified to meet all applicable EPA quality-assurance requirements.

III. No Complete, Certified, Quality-Assured Data Existed When EPA Designated Uinta Basin.

The only ozone data available to EPA at the time of designation was incomplete, uncertified data generated from the Red Wash/Ouray monitors. Based solely on Red Wash/Ouray data that failed to meet EPA regulatory requirements, Petitioner-WEG proclaims the Uinta Basin is a nonattainment area for ozone. WEG Brief at 26-30.

Notwithstanding WEG's unsubstantiated claims that the Red Wash/Ouray data is quality-assured, EPA has identified multiple deficiencies, any one of which would render the data unreliable and inappropriate for use in a nonattainment designation. First, the sole fact that the Red Wash/Ouray data is uncertified, non-regulatory data disqualifies it to be used to designate an area as nonattainment. *See infra 8*. Additionally, the Red Wash/Ouray data is "incomplete" as it spanned only a 26-month period (RTC at 72, JA__), significantly less than the three consecutive years required to account for fluctuations in measurements over time. *See* 40 C.F.R. § 50.15(b).

The data also lacked quality-assurance because it was collected absent an

approved Quality Assurance Project Plan.[7] *See* EPA Brief at 55-60 (also specifying that only raw data was available for one of the years, and incomplete records failed to satisfy quality assurance criteria, etc.); RTC at 72-74, JA__. And finally, no authorized regulatory agency had oversight to direct necessary corrective action measures which, as EPA importantly noted, is necessary to correct errors in data collection and analysis. EPA Brief at 60.

Petitioner-WEG argues otherwise, proffering that the data from the Red Wash/Ouray monitors was of sufficient quality for designation purposes as EPA could have required that the data meet quality-assurance protocol. WEG Brief at 26-29 (arguing not that EPA did, but that it could have performed quality-assurance checks). Moreover, data quality performance requirements provide that "[d]ata quality objectives" must be included to "define the appropriate type of data to collect and [to] specify the tolerable levels of potential decision errors that will be used as a basis for establishing the quality and quantity of data needed to support the objectives." 40 C.F.R. pt. 58, App. A § 2.3.1. Data quality objectives predefine the data quality necessary to determine compliance with a NAAQS. *See* 71 Fed. Reg. at 61,254. It is irrelevant to speculate whether EPA "could" have

[7]Quality Management Plans and Quality Assurance Project Plans are "a formal document describing in sufficient detail the quality system that must be implemented to ensure that the result of work performed will satisfy" quality assurance requirements. 40 C.F.R. pt. 58, App. A(2) § 2.1.2.

required the necessary quality-assurance for the Red Wash/Ouray monitors because EPA did not. More significantly, the Red Wash/Ouray monitors were not established to collect the type of quality-assured data necessary to determine compliance.[8] *See* Cooley Ltr., Part IV. Thus, the quality of the data is uncertain.

EPA considered the data, and also Petitioner-WEG's arguments, but ultimately rejected it because the data was incomplete and not capable of being quality-assured as required by EPA's regulations. As the accuracy and reliability of the Red Wash/Ouray data is indefinite, EPA could only designate the Uinta Basin as "unclassifiable."[9] To do otherwise would be arbitrary and inconsistent with EPA's longstanding practice. Therefore, EPA's decision is entirely reasonable and is entitled to deference and should be upheld.

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[8]Petitioner-WEG belabors the terms and provisions of the consent decree that governed the operation of the Red Wash/Ouray monitors and wrongly argues that the monitors produce regulatory data. WEG Brief at 9-12. These monitors do not fulfill the same purpose as regulatory monitors used in the EPA's attainment/nonattainment designation process and do not produce regulatory information. The purpose of the Red Wash/Ouray monitors specified in the consent decree is irrelevant because the data did not meet minimum quality-assurance standards and is therefore unreliable to determine compliance with a NAAQS.

[9]The fact that EPA designated the Basin as "unclassifiable" instead of "unclassifiable/attainment" is irrelevant to the question of whether the data in question is sound. The designation does not change the fact that the Basin is regulated as if in attainment, just as it would be if the designation was "unclassifiable/attainment." *See* Petitioner-WEG Brief at 5-6.

CONCLUSION

Congress directed EPA to designate whether areas, including the Uinta Basin, are in attainment with the NAAQS established by EPA. Congress left to EPA's discretion how best to determine attainment or nonattainment with each NAAQS. In accordance with the CAA, prior to its designation and consistent with its longstanding practice and rules, EPA determined and advised interested parties that designation decisions require regulatory air monitoring data to be certified to meet EPA quality-assurance regulations. Following both its existing rules and its articulated policy, EPA designated the Uinta Basin as "unclassifiable" for ozone in accordance with the provisions in the CAA.

In reaching its decision, EPA carefully considered that monitors in the Uinta Basin had measured ozone exceedances. Contrary to Petitioner-WEG's assertions, the available monitoring data failed to meet necessary EPA quality-assurance criteria. As clearly stated and explained by EPA, the available information warranted a finding of "unclassifiable," because the available information was insufficient to find attainment or non-attainment.

Accordingly, as Congress deferred to EPA's technical expertise to determine how nonattainment with a NAAQS should be established, Respondent-Intervenors urge the Court to similarly follow suit and grant EPA deference in this matter.

Moreover, requiring complete, regulatory data that is certified as meeting EPA quality-assurance rules to ensure an accurate, reliable, and legally defensible basis in which to make a designation is not only reasonable and consistent with EPA longstanding practices but necessary to protect the rights of parties potentially affected by a nonattainment designation based on non-quality-assured data. EPA thoroughly explained the basis for its "unclassifiable" designation, including how it applied its own pre-established quality-assurance criteria to the existing ozone data. Based on the preceding, this Court is urged to summarily uphold EPA's designation of the Uinta Basin and to reject Petitioner-WEG's petition.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains, in 14-point Times New Roman typeface, 4,187 words, excluding the components of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) as counted by the word count feature of WordPerfect Office X5.

/s/ *Connie S. Nakahara*
Connie S. Nakahara

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of January, 2014, the foregoing JOINT BRIEF OF RESPONDENT-INTERVENORS STATE OF UTAH, UINTAH COUNTY, UTAH, UINTAH IMPACT MITIGATION SPECIAL SERVICE DISTRICT, UTAH ASSOCIATION OF COUNTIES, AND THE WESTERN ENERGY ALLIANCE was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ *Connie S. Nakahara*
Connie S. Nakahara