

June 8, 2001

Mr. Thomas Diggs  
Chief, Air Planning Section  
Environmental Protection Agency, Region 6  
1445 Ross Ave., Ste. 700  
Dallas, TX 75202-2733

RE: Comments on Behalf of the Louisiana Environmental Action Network (LEAN) on EPA's "Clean Air Act Reclassification and Notice of Potential Eligibility for Extension of Attainment Date, Louisiana; Baton Rouge Ozone Nonattainment Area," 66 Fed. Reg. 23,646 (May 9, 2001)

Dear Mr. Diggs:

Please consider the following comments on EPA's proposed rule entitled "Clean Air Act Reclassification and Notice of Potential Eligibility for Extension of Attainment Date, Louisiana; Baton Rouge Ozone Nonattainment Area," 66 Fed. Reg. 23646 (May 9, 2001), submitted on behalf of the Louisiana Environmental Action Network ("LEAN"). LEAN is an incorporated, non-profit community organization which serves as an umbrella organization for environmental and citizen groups. LEAN was organized for the express purpose of preserving and protecting the state's land, air, water, and other natural resources, as well as protecting the organization's members and other residents of Louisiana from threats of pollution. LEAN members breathe air in and around the Baton Rouge area and are injured by the state's failure to attain national health-based standards.

### **Introduction**

EPA has admitted violating the Clean Air Act's ("CAA" or "the Act") command to determine, by May 15, 2000, whether the Baton Rouge area has attained the federal air quality standard for ozone.<sup>1</sup> More than a year after missing the Clean Air Act's deadline for making a determination, EPA has now announced an intent to delay compliance still further. EPA asserts that the purpose of this illegal delay is to provide Louisiana with more time to seek to extend a 1999 deadline for meeting the health-protection standard for ozone pollution in the Baton Rouge area. EPA has not even attempted to argue that the Clean Air Act allows it to delay its duty to make a determination of whether the Baton Rouge area has attained federal Clean Air standards while it waits for Louisiana to apply to extend a deadline that expired long ago.

According to EPA, Louisiana will base its application to delay complying with the ozone

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<sup>1</sup> EPA's Motion for Extension of Time at 4, LEAN v. Whitman, No. 00CV879 A-M3. (M.D. La., filed May 15, 2001).

health-protection standard on an argument that the Baton Rouge area's failure to attain federal standards results, not from the numerous pollution sources in the area's infamous "cancer alley," but from "ozone transport" from Houston, Texas. Even if this were true, such an extension would be illegal. Congress precisely specified the narrow circumstances under which EPA may extend the deadline for attainment of health-protection air quality standards and "ozone transport" is not among the grounds for a lawful extension.

EPA proposes in the alternative to determine that the Baton Rouge area has not attained federal standards. 66 Fed. Reg. 23,646 at 23,646 (May 9, 2001). EPA should immediately finalize its determination and publish notice of reclassification in the Federal Register as required by the Clean Air Act. 42 U.S.C. §7511(b)(2)(A) and (B). EPA has no good faith argument that the law permits further delay and EPA's continued illegal delay is a breach of EPA's duty to respect the rule of law.

### **I. EPA's Clean Air Act Violations Endanger the Public.**

The Clean Air Act Amendments, which President George P. Bush signed into law in 1990, required EPA to determine by May 15, 2000 whether the Baton Rouge area meets federal health-protection standards for ozone pollution. EPA has admitted violating this law and has now published notice that it intends to continue violating it. But, as an agency of the U.S. government, EPA has no possible justification for disobeying a valid U.S. law, even if EPA wishes the law were different. Our elected representatives in Congress write the laws; it is the duty of the unelected officials at EPA to faithfully carry those laws out. It is a fundamental and inexcusable breach of EPA's duty to the public for EPA to attempt to overrule Congress. Indeed, this type of behavior breeds contempt for the very laws that EPA is entrusted to enforce. Furthermore, EPA's willful violation of the Clean Air Act endangers the public. This is because Congress designed the Clean Air Act so that health-protection safeguards kick in automatically when EPA determines that an area has failed to attain federal health-protection standards. By illegally withholding a determination about whether the Baton Rouge area meets health-protection standards, EPA is denying Louisiana residents the protection that Congress intended to provide to all U.S. citizens.<sup>2</sup>

EPA has offered no legal argument to justify its refusal to determine whether the Baton Rouge area meets health based standards. Indeed, it is clear that air quality in the Baton Rouge area fails to meet health-protection standards. For example, in a May 10, 2000 letter to EPA, Louisiana Governor Mike Foster said: "the Baton Rouge ozone attainment area failed to attain the 1-hour ozone standard by the required date of November 15, 1999." EPA has admitted that it "was required

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<sup>2</sup> Ground-level ozone is the smog that commonly shrouds urban and residential areas endangering public health. 65 Fed. Reg. 16,864 (Mar. 30, 2000). Ozone is created by the interaction of sunlight with volatile organic compounds and nitrogen oxides. *Id.* When inhaled, even at low levels, ozone produced from these emissions can cause and aggravate respiratory illnesses, including bronchitis and pneumonia. *Id.* Moreover, children are most at risk from ozone pollution. *Id.*

to make a determination” by “May 15, 2000.”<sup>3</sup> EPA stated it “is not disputing that it has a statutory duty to make [the] determination.”<sup>4</sup> Nonetheless, in its May 9, 2001 “proposed rule,” EPA has now announced that it does “not intend to take final action” on its determination “prior to allowing Louisiana an opportunity to qualify” to extend the attainment date. 66 Fed. Reg. 23646 (May 9, 2001). This is an announcement of EPA’s intent to ignore the law.

Regardless of whether Louisiana someday may qualify for an extension of the attainment date, the Clean Air Act requires that EPA make a determination *now* about whether the Baton Rouge area meets health protection standards. Indeed, EPA’s determination is more than a year overdue (which means that Louisiana has already had ample time to attempt to demonstrate that it qualifies for an extension). EPA cannot lawfully continue to ignore its duty to make a determination.

Whether the ozone in the Baton Rouge area comes from the many industrial facilities in Louisiana’s infamous “cancer alley,” or whether some of that ozone blows in from other states is not the issue that is now before EPA. Congress unambiguously required EPA to determine – one way or the other – whether the Baton Rouge area is in attainment. EPA’s clear duty is to promptly comply.

**II. EPA must immediately determine that the Baton Rouge area failed to attain the one hour standard for ozone by November 15, 1999, and must immediately publish its determination and any required notice of reclassification in the Federal Register.**

LEAN is submitting with these comments a copy of its Memorandum in Support of its Motion for Summary Judgement filed in LEAN v. Whitman, No. 00CV879 A-M3. (M.D. La., filed May 7, 2001). LEAN incorporates by reference that memorandum into these comments.

EPA has a mandatory duty to publish its determination without any further delay. EPA should not attempt to assert that the notice-and-comment rulemaking process justifies further delay. Instead, EPA has authority to use an “interim final rule” procedure to avoid delay. As EPA has explained:

APA section 553(b)(B) exempts from [notice-and-comment] requirements any rule for which the issuing agency for good cause finds that providing prior notice- and-comment would be impracticable, unnecessary or contrary to the public interest. Thus, *any rule for which EPA makes such a finding is exempt from the notice-and-comment requirements of both APA section 553(b) and CAA section 307(d).*

EPA, *Interim Final Rule*, 64 Fed. Reg. 3861, 3862 (Jan. 26, 1999) (emphasis added). Thus, this procedure allows EPA to provide for public participation without further contravening

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<sup>3</sup> EPA’s Motion for Extension of Time at 3, LEAN v. Whitman, No. 00CV879 A-M3. (M.D. La., filed May 15, 2001)

<sup>4</sup> Id. at 3-4.

Congressional commands. EPA may use this procedure to make a determination that is effective immediately and provide for subsequent public comment. See 64 Fed. Reg. at 3863 (“EPA will consider all written comments submitted in the allotted time period to determine if any change to this action is necessary.”).

### **III. Louisiana does not qualify for an extension under the Act.**

Congress delegated to EPA, in Section 181(a)(5) of the Clean Air Act, only one narrow provision to grant a State an extension to an ozone attainment deadline. 42 U.S.C. § 7511. In order to qualify for this extension, first, the State must have fully complied with its State Implementation Plan, and second, no air quality monitor in the area may record more than one exceedance of the federal ozone standard in the year preceding the extension. Even assuming that a State can meet this stringent standard, EPA can issue no more than two one-year extensions to a nonattainment area. 42 U.S.C. § 7511(a)(5). Because an ozone monitor recorded more than one exceedance in 1999, the Baton Rouge area failed to qualify for an extension of its 1999 deadline.

In a recent case the U.S. Supreme Court used § 181(a)(5) to illustrate its holding that the Act’s ozone attainment sections comprise “*carefully designed restrictions on EPA discretion.*” Whitman v. American Trucking Associations, 531 U.S. 457, 121 S.Ct. 903, 918 (2001) (emphasis added). The Court relied on the limiting language of § 181(a)(5) to determine that EPA “may grant *no more* than 2 years’ extension” of ozone attainment dates. Id. (emphasis added). EPA “may not construe the statute in a way that completely nullifies textually applicable provisions meant to *limit* its discretion.” Id. at 918-19 (emphasis added).

### **IV. EPA lacks authority to create other extensions.**

“When Congress specifically enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.” Andrus v. Glover Constr. Co., 100 S.Ct. 1905, 1910 (1980). EPA’s proposed extension of the Baton Rouge area’s ozone attainment deadline is illegal because it contradicts the plain provisions of the Act. Congress recognized that some areas would need extensions and so included the extension provision found in Section 181(a)(5) of the Act. By specifically enumerating an exception to ozone attainment deadlines, through an extension, Congress neither implied nor expressed legislative intent to imply any additional exceptions to attainment deadlines. The type of agency activism that EPA proposes to engage in has been disapproved by the courts:

[W]hen an administrative agency seeks to improve legislation by altering the basic coverage provisions that Congress has written into the law, it has gone too far. The rule of law in general, and separation of powers principles in particular, require that such administrative hubris be reigned in, and that the task of improving the basic provisions of statutes be left to the same body that wrote them in the first place. Bungart v. BellSouth Telecomms., Inc., 231 F. 3d 791, 797 (11<sup>th</sup> Cir. 2000).

Our system of government provides that Congress creates the law, not administrative agencies. There is simply no language in the Act that supports EPA's vague interpretation and belief that it can create an entirely new exception to a provision of the Act.

#### **V. Congress addressed the problem of ozone transport in the Act.**

Congress clearly foresaw the problem of ozone transport and created a comprehensive ozone transport policy. One powerful way Congress chose to solve the problem of interstate ozone transport was by preventing upwind emissions that would affect downwind areas. Congress required each state to develop a plan containing provisions "prohibiting ... any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will contribute significantly to nonattainment or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard." 42 U.S.C. § 7410(a)(2)(D)(i)(I), CAA § 110(a)(2)(D)(i)(I). EPA, which approves each state's plan, has ultimate authority to determine whether a state plan adequately protects downwind states from an upwind state's pollution. 42 U.S.C. § 7410(k); CAA § 110(k). Thus, EPA had a duty to disapprove any upwind state's plan that contributed significantly to a downwind state's inability to meet attainment.

Should EPA fail to act, another section of the Clean Air Act, entitled "Interstate pollution abatement" specifically provides a remedy for downwind states affected by another state's pollution. 42 U.S.C. § 7426; CAA § 126. Section 126 requires upwind state plans to identify all major existing and proposed new stationary sources which may "significantly contribute to levels of air pollution in excess of the national ambient air quality standards in any quality control region outside the state." 42 U.S.C. § 7426. Affected downwind states may petition EPA for a finding that a major source or group of sources, **in another state**, emits air pollution in amounts which significantly contribute to nonattainment. 42 U.S.C. § 7426(b); CAA § 126(b); Appalachian Power Co. v. EPA, 2001 WL 505332 at \*3 (D.C. Cir. May 15, 2001). Louisiana never petitioned EPA for a finding that sources in Texas significantly contributed to ozone problems in Baton Rouge.

Congress clearly recognized the problem of interstate air pollution and provided several methods for addressing the problem in the Act. Had Congress determined that nonattainment areas would need extensions of attainment deadlines based on interstate pollution, it clearly could have and would have provided for such an extension in the Act.

#### **VI. Legislative history reveals that Congress squarely considered and rejected extensions due to interstate ozone transport.**

On two occasions, Congress considered and rejected amendments to the Clean Air Act to provide attainment extensions due to interstate ozone transport. Senator Kasten offered an amendment to the 1989 Clean Air bill specifically addressing this issue, but Congress chose not to include this measure in the Act. Specifically, Senator Kasten proposed a new Section 183(f) that would have provided for extensions based on ozone transport. The amendment was **not** enacted. 136 Cong. Rec. S399-02, at 14 (1990).

On August 3, 1994, Senator Levin sought a similar amendment that Congress also rejected. 140 Cong. Rec. S10538-05 (August 3, 1994).

### CONCLUSION

EPA cannot legally avoid its duty to make a determination and publish the reclassification of the Baton Rouge area. With another ozone season beginning in Baton Rouge, and a growing body of scientific consensus on the detrimental health effects of ozone, the longer EPA delays complying with its statutory duty, the longer EPA knowingly and intentionally jeopardizes the health of the citizens of Baton Rouge.

Respectfully submitted,

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By: \_\_\_\_/s/\_\_\_\_\_  
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