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MEMORANDUM

Dated: July 19, 2013

Issue: This memorandum addresses the issue of whether the establishment of a new National Park in areas east of Baxter State Park would result in either a mandatory or likely reclassification of the air quality standards applicable to that area under the federal Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401-7700.

Brief summary answer: No. Since the adoption of the Clean Air Act in 1977, no reclassification of the air quality standards under the Clean Air Act have occurred in areas where new national parks have been established.

Legal Analysis:

I. Overview of the Clean Air Act's Regulation of Air Quality Standards for Areas within a State.

In enacting the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401-7700, Congress declared that the purposes behind the Act included the protection and enhancement of the Nation's air resources so as to protect the health and welfare of its citizens while simultaneously promoting "the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Generally speaking, as of the 1970 amendments to the CAA, the Act established minimum national air quality standards and tasked federal and state governments with working to ensure that those minimum standards were met. 42 U.S.C. §§ 7401-7449.

The specific process by which this was to be accomplished under the CAA was through the EPA promulgating "a primary and a secondary National Ambient Air Quality Standard (NAAQS) for each air pollutant for which EPA has issued 'air quality criteria'" pursuant to 42 U.S.C. § 7408. *Environmental Defense v. E.P.A.*, 489 F.3d 1320, 1323 (D.C. Cir. 2007). Once NAAQS are established for a particular pollutant:

> [E]ach state is required [pursuant to 42 U.S.C. § 7407] to submit to EPA a list of all areas in the state, designating each area as "attainment" (i.e., it meets the NAAQS); "nonattainment" (i.e., it does not meet the NAAQS) or "unclassifiable" (i.e., it "cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]"). The state must then [pursuant to 42 U.S.C. § 7410(a)(1)] develop and submit to EPA a "State Implementation Plan" (SIP) which "provides for implementation, maintenance, and enforcement of [the NAAQS]."

Id.

The above procedure, however, left open the possibility that certain areas might meet the minimum national standards established by the CAA for pollutants by a wide margin, and that the established "pristine" air quality in these areas could be negatively impacted by a pollutant-emitting facility that nonetheless did not raise an issue under the CAA.

In part to address the above problem, the CAA was amended in 1977 to add a series of provisions, codified at 42 U.S.C. §§ 7470-7492, aimed at the "Prevention of Significant Deterioration of Air Quality" ("PSD"). The express purposes of these provisions include the following:

> (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
>
> (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources . . . .

42 U.S.C. § 7470; *see also Environmental Defense*, 489 F.3d at 1322 ("In 1977, the Congress amended the CAA to add the PSD provisions in order to protect the air quality in national parks and similar areas of special scenic or recreational value, and in areas where pollution was within the national ambient standards, while assuring economic growth consistent with such protection") (internal quotation marks omitted.)

Pursuant to the 1977 CAA amendments, each SIP ("State Implementation Plan") was now required to provide for a procedure by which areas classified as either "attainment" or "unclassifiable" would be protected from a significant deterioration of air quality. *Environmental Defense*, 489 F.3d at 1323. The 1977 Amendments further

provided for three potential classifications for such "attainment" or "unclassifiable" areas. 42 U.S.C. §§ 7472, 7474.

42 U.S.C. § 7472 designated certain areas as mandatory "Class I" areas subject to the highest level of protections against pollutants impacting air quality. Section 7472 also established "Class II" areas, subject to lower level protections. "Class III" areas, authorized by 42 U.S.C. § 7474, are those that are subject to the least restrictive protections against air quality deterioration. *See Environmental Defense Fund, Inc. v. Administrator, U.S. E.P.A.*, 898 F.2d 183, 184-85 (D.C. Cir. 1990).

II. Analysis Pertaining to Class I Areas.

Those areas designated as mandatory Class I areas by the explicit terms of the 1977 Amendments to the CAA, included the following:

- International parks; 42 U.S.C. § 7472(1)
- National wilderness areas which exceed 5,000 acres in size; *id.* § 7472(2)
- National memorial parks which exceed 5,000 acres in size; *id.* § 7472(3) and
- National parks which exceed six thousand acres in size, *id.* § 7472(4).

An important exception to this rule, also contained within 42 U.S.C. § 7472, however, is that the above categories of locations designated Class I under the statute *apply if such locations were "in existence on August 7, 1977." Id.* (emphasis added). Thus, by its plain terms, the CAA does not render mandatory the classification of any area not covered by the terms of 42 U.S.C. § 7472 as a Class I area. In particular, nothing in the CAA or otherwise renders mandatory the designation of all national parks as Class I areas.[1]

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[1] All areas not designated Class I areas by 42 U.S.C. § 7472(a) or redesignated as Class III at the request of a state's governor or Indian governing bodies as envisioned by 42 U.S.C. § 7474(a)(2), are considered Class II areas pursuant to 42 U.S.C. § 7472(b); *see also Adm'r, State of Ariz. v. U.S.E.P.A.*, 151 F.3d 1205, 1208 (9th Cir. 1998).

Of relevance to the present issue, of all the national parks presently established, none have been reclassified as Class I areas that were not automatically classified as such pursuant to the original enactment of 42 U.S.C. § 7472.[2] [3]

The full list of national parks established after the enactment of 42 U.S.C. § 7472 which were not at the time of their establishment designated as mandatory Class I areas is as follows: Biscayne, Channel Islands, Congaree, Cuyahoga Valley, Death Valley, Dry Tortugas, Gates of the Arctic, Glacier Bay, Great Basin, Great Sand Dunes NP & Preserve, Katmai, Kenai Fjords, Kobuk Valley, Lake Clark, National Park of American Samoa, and Wrangell-St. Elias National Parks. *See* 42 U.S.C. § 7472; The National Parks: Index 2009-2011 at 24, 27, 33, 78 (2011), *available at* http://www.nps.gov/history/history/online_books/nps/index2009_11.pdf (hereinafter "The National Parks Index"). None of these parks were redesignated as Class I areas upon achieving national park status, nor have they subsequently been so designated. *See* National Park Service Class I Areas *available at* http://www.nature.nps.gov/air/maps/NpsTextList.cfm (last visited January 23, 2013) (hereinafter "National Park Service Class I Areas"). Notably, Hot Springs National Park was established in 1921 but was not subject to mandatory classification as Class I because it had a land area of less than 6,000 acres. *See* 42 U.S.C. § 7472; The National Parks Index at 24. Hot Springs National Park, consistent with the universal pattern, has not been redesignated as a Class I area. *See* National Park Service Class I Areas.

Further, it is notable that a Class I designation for any area, including a national park, could not be required by a Federal agency, because 42 U.S.C.A. § 7474(a) delegates authority to the States to "redesignate such areas as it deems appropriate as class I areas." Such a redesignation, originating at the state level, would require an extensive procedural process including the following:

- notice to the public and subsequent public hearings conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation; 42 U.S.C. § 7474(b)(1)(A)

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[2] Badlands, Black Canyon of the Gunnison, Joshua Tree, and Saguaro National Parks were established as national parks after August 7, 1977 and are classified as Class I areas. Each of those parks, however, were national monuments which exceeded 5,000 acres in size at the time of enactment of 42 U.S.C. § 7472 and, therefore, were considered by EPA to be mandatory Class I areas already. *See* The National Parks: Index 2009-2011 at 24, 27, 33, 78 (2011), http://www.nps.gov/history/history/online_books/nps/index2009_11.pdf; 40 C.F.R. §§ 81.403, 81.405, 81.406, 81.427.

[3] Two tribal areas became Class I areas after 1977 because the tribes requested Class I status and followed the pathway laid out in the CAA.

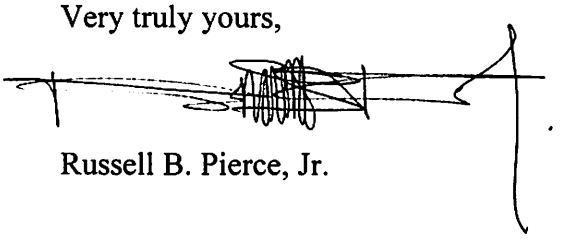
- prior to any such hearings, a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation prepared and made available for public inspection that has been reviewed and examined by the redesignating authorities; *id.*

- if the area includes any Federal lands, prior to such notice being issued the state would need to provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation; *id.* § 7474(b)(1)(B).

The Federal involvement in the process, through the Federal land manager's opportunity to submit recommendations, has been held, consistent with the language of 42 U.S.C. § 7474(b)(1)(B), to be strictly "advisory" in nature. *See Kerr-McGee Chemical Corp. v. U.S. Dept. of Interior*, 709 F.2d 597, 601 (9th Cir. 1983).

In short, not only has there never in the history of the CAA been an area that has been established as a national park subsequent to the 1977 enactment of statutory provisions at issue that has been redesignated as a Class I area, but even if there were an interest group that wished to do so, the procedural requirements would be tremendous and would ultimately be responding to desires and concerns raised at the state, not federal level.

Very truly yours,



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