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AX-13-000-2365

February 15, 2013

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Bob Perciasepe, Acting Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of citizen suit under §304 of Clean Air Act --Phoenix PM₁₀ Serious Nonattainment Area

Dear Mr. Perciasepe:

Pursuant to 42 U.S.C. §7604(a)(2), we hereby provide notice of our intent to file a citizen suit to compel performance of certain nondiscretionary duties imposed upon you under the Clean Air Act (the CAA).

In 1996, the Phoenix area was classified as a serious PM-10 nonattainment area under the CAA and was required to develop a nonattainment plan that provided for expeditious attainment of both the annual and 24 hours PM-10 standards and met the other applicable CAA plan requirements for serious areas. See 61 FR 21372 (May 10, 1996). Since 1996, Arizona has made several SIP submittals and adopted various control measures but continues to violate the 24 hour standard.

A serious area PM₁₀ plan was first submitted on July 8, 1999. EPA found the plan "complete" on August 4, 1999 but in November 1999, EPA notified the state that additional work needed to be done in order for EPA to approve it. Consequently, on February 23, 2000, the state submitted a revised Serious Area PM₁₀ plan, which was found "complete" by EPA on February 25, 2000.

On April 13, 2000, EPA proposed to approve the Serious Area PM₁₀ plan for the annual standard, but took no action on the 24 hour standard. Consequently, in May 2001, this office filed a citizen suit in U.S. District Court on behalf of Phoenix residents to compel EPA to take action. *Bahr v. Whitman*, CIV 01-0835 PHX ROS (D. Ariz.) The parties entered into a Consent Decree requiring EPA to take action on the 24 hour standard on or before September 14, 2001, and to approve or disapprove the entire plan by January 14, 2002. *Id.*, consent decree entered October 2, 2001.

On July 25, 2002, EPA published its final approval of the Serious Area Plan. The approval also granted the Phoenix area the maximum five year extension of the attainment deadline, giving the area until December 31, 2006 to come into compliance with the NAAQS. On behalf of residents of the Phoenix area, this office filed a Petition for Review of the Serious Area Plan with the Ninth Circuit Court of Appeals. *Vigil v. Leavitt*, 381 F. 3d 826 (9th Cir. 2004). In ruling on that Petition, the Ninth Circuit held that EPA's approval of the Serious Area Plan was arbitrary and capricious and remanded the action to EPA for further consideration of whether Arizona's decision to reject CARB diesel as an emissions control measure satisfied BACM and MSM. The court also remanded the question of Arizona's eligibility for the extension of the attainment deadline insofar as that question depended on EPA's determination regarding MSM.

In June 2005, EPA proposed to reapprove the BACM and MSM demonstrations and finalized the re-approval in July 2006. This office again petitioned for review, however, that action was resolved through a voluntary remand when it became apparent that the state would not be able to meet the extended December 31, 2006 deadline for attainment. In March 2007 EPA filed a proposed finding of nonattainment and the final notice of nonattainment was published on June 6, 2007. (72 FR 31183)

Under section 189(d) of the CAA, serious PM-10 nonattainment areas that fail to attain are required to submit within 12 months of the applicable attainment date, "plan revisions which provide for attainment of the PM-10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area." 42 U.S.C. §7513a(d).

Arizona submitted its 5% plan to EPA by the December 2007 deadline and EPA had six months, or until June 30, 2008 to find the plan "complete." 42 U.S.C. §7410(k)(1)(b). Because EPA did not take action by that date, the plan was deemed "complete" by operation of law. *Id.* Once a plan is deemed complete, EPA then has 12 months to approve or disapprove the plan. *Id.* at (k)(2). Thus, in the case of the Phoenix area's 5% plan, EPA had until June 30, 2009 to approve or disapprove the submitted plan. When EPA had taken no action on the 5% plan by that date, this office filed an action in federal district court requesting enforcement of that deadline. *Bahr v. Jackson*, CV09-2511-PHX-MHM (D. Ariz.). Pursuant to the Consent Order filed in that case, on September 3, 2010, the EPA proposed action on the 5% plan. The EPA proposed to disapprove substantial parts of the plan finding that it was deficient. In response to EPA's proposed action, on January 25, 2011, the state withdrew its 5% plan. A few days later, on January 31, 2011, the EPA found that Arizona failed to make a SIP submittal required under the CAA for the Maricopa County PM-10 nonattainment area by the required deadline. 76 F. R. 8300-8303. This triggered the 18-month clock for mandatory sanctions and a two year clock for a Federal Implementation Plan ("FIP").

On May 25, 2012, the state submitted a replacement 5% plan to the EPA, which the EPA found complete on July 20, 2012. The EPA was required to approve the replacement plan by February 14, 2013 or promulgate a FIP and impose highway funding sanctions; however, the EPA has failed to do so. We contend that in failing to take final action with regard to the replacement plan or promulgate a FIP and impose highway funding sanctions, the EPA has failed to timely perform non-discretionary duties under the CAA. If EPA does not correct the above-described failure to perform

nondiscretionary duties within 60 days, be advised that we intend to initiate legal action under §304(a)(2) of the CAA to compel compliance. This notice is submitted on behalf of:

Sandra L. Bahr

[Redacted]

David Matusow

[Redacted]

I am acting as counsel for the above-named parties and ask that all communications regarding this matter be directed to me at the address shown in the letterhead.

Sincerely,



Joy E. Herr-Cardillo

Cc: Jared Blumenfeld, Regional Administrator, EPA Region 9
Colleen McKaughan, Associate Director, Air Division, EPA Region 9
Henry Darwin, Director, Arizona Department of Environmental Quality