

## Law Office of Robert Ukeiley

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### **VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

June 1, 2015

Gina McCarthy  
Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

**Re: Clean Air Act Notice of intent to sue pursuant to 42 U.S.C. § 7604(b)(2) for failure to take final action on 2008 ozone NAAQS infrastructure state implementation plan submittals and failure to promulgate Federal Implementation Plans**

Dear Administrator McCarthy:

Pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Sierra Club is notifying you that they intend to file suit against you for "a failure of the Administrator [of the United States Environmental Protection Agency ("EPA")] to perform an[] act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act. 42 U.S.C. § 7604(a)(2). Specifically, EPA is required to promulgate Federal Implementation Plans (FIPs) within two years of disapproving a state implementation plan submittal or finding that a state has failed to submit a state implementation plan submittal for the 2008 ozone NAAQS infrastructure state implementation plan by the required deadline. 42 U.S.C. § 7410(c)(1). EPA is also required to take final action on 2008 ozone NAAQS infrastructure state implementation plan submittals within 12 months after each is deemed administratively complete. 42 U.S.C. § 7410(k)(2) and (3). As explained below in detail, EPA has violated these mandatory duties.

Public health and welfare protection from the harmful impacts of ground-level ozone, often referred to as smog, will be closer to the protection envisioned by Congress once EPA remedies these violations of its mandatory duties. Ozone has numerous harmful effects on human respiratory systems which include inducing asthma attacks in asthmatics and aggravating chronic lung diseases like emphysema and bronchitis. EPA, Smog—Who Does it Hurt?, 2-3

(available at <http://www.epa.gov/air/ozonepollution/pdfs/smog.pdf>). Long-term exposure to ozone may result in the permanent scarring of lung tissue. EPA, Ozone and Your Health, U.S. Environmental Protection Agency (available at <http://www.epa.gov/air/ozonepollution/pdfs/health.pdf>).

Ozone can be particularly harmful to adolescents as exposure to ozone can also lead to “chronic, adverse effects on lung development in children from the age of 10 to 18 years....” See Gauderman, W. James, *et al.*, *The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age*, N. Engl. J. Med. 351:11, at 1057 (Sept. 9, 2004). However, the greatest harm “may occur later in life, since reduced lung function is a strong risk factor for complications and death during adulthood.” *Id.* at 1063.

Moreover, ozone’s detrimental effects are not limited to human health. Ozone also interferes with the ability of vegetation to properly function, damaging commercial crops and natural ecosystems alike. See 62 Fed. Reg. 38855, 38875 (July 18, 1997). Thus, it is imperative that EPA remedy its failure to perform its mandatory duties in order to strengthen protection of public health and welfare against ozone.

On March 27, 2008, EPA published promulgation of an 8-hour national ambient air quality standard (“NAAQS”) for ozone. 73 Fed. Reg. 16,436 (March 27, 2008). The Clean Air Act requires states to submit state implementation plans that provide for the “implementation, maintenance, and enforcement” of a new or revised NAAQS within three years of the standard’s promulgation. 42 U.S.C. § 7410(a)(1). These are known as “infrastructure” state implementation plans. States were required to submit these 2008 ozone NAAQS infrastructure SIPs by no later than March 27, 2011.

Under the Clean Air Act, if a state submits a SIP submittal and six months after that submittal, EPA has not made a completeness finding and has not found the submittal to be incomplete, the submittal is deemed administratively complete by operation of law. 42 U.S.C. § 7410(k)(1)(B). *Id.* EPA must take final action on an administratively complete submittal by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of the completeness finding. 42 U.S.C. §§ 7410(k)(2) and (3). If EPA disapproves a SIP submittal, EPA must promulgate a Federal Implementation Plan to take the place of the disapproved SIP submittal within two years of the disapproval. 42 U.S.C. § 7410(c)(1). Similarly, if EPA finds that a state has failed to submit a SIP by the required deadline, EPA must promulgate a Federal Implementation Plan to fill in the gap of the missing SIP submittal within two years of the finding of failure to submit.

## **FAILURE TO TAKE FINAL ACTION**

EPA has failed to take final action on Louisiana’s infrastructure state implementation plan Good Neighbor element submittal for the 2008 ozone 8-hour NAAQS. On December 7, 2013, either EPA or operation of law deemed Louisiana’s state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(D)(i) administratively complete. See EPA, Status of State SIP Infrastructure Requirements—Louisiana (available at

[http://www.epa.gov/air/urbanair/sipstatus/reports/la\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/la_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed May 18, 2015). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than December 7, 2014. *See* 42 U.S.C. § 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on Montana's infrastructure state implementation plan Good Neighbor element submittal for the 2008 ozone 8-hour NAAQS. On July 8, 2013, either EPA or operation of law deemed Montana's state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(D)(i) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Montana (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/mt\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/mt_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed May 18, 2015)). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than July 8, 2014. *See* 42 U.S.C. § 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on Nevada's infrastructure state implementation plan Good Neighbor element submittal for the 2008 ozone 8-hour NAAQS. By no later than October 10, 2013, either EPA or operation of law deemed Nevada's state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(D)(i) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Nevada (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/nv\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/nv_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed May 18, 2015)). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than October 10, 2014. *See* 42 U.S.C. § 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on New York's infrastructure state implementation plan Good Neighbor element submittal for the 2008 ozone 8-hour NAAQS. On October 4, 2013, either EPA or operation of law deemed New York's state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(D)(i) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—New York (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/ny\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/ny_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed May 18, 2015)). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than October 4, 2014. *See* 42 U.S.C. § 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on South Dakota's infrastructure state implementation plan submittal for the 2008 ozone 8-hour Infrastructure SIP Good Neighbor elements. On November 30, 2013, either EPA or operation of law deemed South Dakota's state implementation plan submittal that included the infrastructure requirements under 110(a)(2)(D)(i)(I) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—South Dakota (available at

Administrator Gina McCarthy

June 1, 2015

Page 4

[http://www.epa.gov/air/urbanair/sipstatus/reports/sd\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/sd_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed May 18, 2015). Under the Clean Air Act, EPA is required to take final action on this submittal that addresses these infrastructure requirements by approving in full, disapproving in full, or approving in part and disapproving in part by November 30, 2014. *See* 42 U.S.C. § 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on Wisconsin's infrastructure state implementation plan Good Neighbor elements submittal for the 2008 ozone 8-hour NAAQS. On December 20, 2013, either EPA or operation of law deemed Wisconsin's state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(D)(i) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements— Wisconsin (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/wi\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/wi_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed May 18, 2015)). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than December 20, 2014. *See* 42 U.S.C. § 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

#### **FAILURE TO PROMULGATE FIP**

On January 15, 2013, EPA published notice of its finding that California had failed to submit a 2008 ozone Infrastructure SIP covering 42 U.S.C. § 7410(a)(2)(A) – (C), (D)(i)(II) – (H), & (J) – (M). 78 Fed. Reg. 2,882, 2,889 (Jan. 15, 2013). This rule was effective February 14, 2013. Therefore, by no later than February 14, 2015, EPA had a mandatory duty to promulgate a FIP for these elements. EPA has failed to do so in violation of its mandatory duty. 42 U.S.C. § 7410(c)(1).

On March 7, 2013, EPA published notice of its disapproval of Kentucky's 2008 ozone Infrastructure SIP covering 42 U.S.C. § 7410(a)(2)(D)(i)(I). 78 Fed. Reg. 14,681 (March 7, 2013). This rule was effective April 8, 2013. Therefore, by no later than April 8, 2015, EPA had a mandatory duty to promulgate a FIP for this element. EPA has failed to do so in violation of its mandatory duty. 42 U.S.C. § 7410(c)(1).

As required by 40 C.F.R. § 54.3, the person providing this notice is:

Sierra Club  
Joshua Berman  
85 Second St. 2<sup>nd</sup> Floor  
San Francisco, CA 94105  
Phone: (415) 977-5500

While EPA regulations require this information, please direct all correspondences and communications regarding this matter to the undersigned counsel.

Administrator Gina McCarthy

June 1, 2015

Page 5

Sierra Club and their counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting undersigned counsel to resolve this matter. If we do not hear from EPA in 60 days, however, we will have to assume that you are not interested in settling this matter and file a complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Ukeiley". The signature is written in a cursive, flowing style.

Robert Ukeiley  
Counsel for Sierra Club