

## Law Office of Robert Ukeiley

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

August 16, 2016

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 perform mandatory duties for PM2.5**

Dear Administrator McCarthy,

On behalf of the Center for Biological Diversity (CBD) and the Center for Environmental Health (CEH), I am writing to inform you that CBD and CEH intend to file suit against you for “a failure of the Administrator [of the United States Environmental Protection Agency (“EPA”)] to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). As explained below, EPA has failed to perform a mandatory duty with regard to particulate matter less than 2.5 microns in diameter (“PM2.5”) to protect the state of Wisconsin.

EPA should remedy its violation of these mandatory duties to better protect the public from the harmful effects of PM2.5. PM2.5 is “produced chiefly by combustion processes and by atmospheric reactions of various gaseous pollutants,” thus “[s]ources of fine particles include... motor vehicles, power generation, combustion sources at industrial facilities, and residential fuel burning.” 71 Fed. Reg. 61,144, 61,146 (Oct. 17, 2006). The effects of PM2.5 on human health are profound. For example, long-term exposure has been associated “with an array of health effects, notably premature mortality, increased respiratory symptoms and illnesses (e.g. bronchitis and cough in children), and reduced lung function.” 62 Fed. Reg. 38,653, 38,668 (July 18, 1997).

PM2.5 also adversely impacts wildlife. EPA has explained “a number of animal toxicologic . . . studies had reported health effects associations with high concentrations of numerous fine particle components[.]” 71 Fed. Reg. 2,620, 2,643 – 2644 (Jan. 17, 2006). PM2.5

also causes direct foliar injury to vegetation. *Id.* at 2,682. As to broader ecosystem impacts, EPA has explained that the nitrogen and sulfur “containing components of PM have been associated with a broad spectrum of terrestrial and aquatic ecosystem impacts that result from either the nutrient or acidifying characteristics of the deposited compounds. *Id.* These impacts include nitrogen saturation which “causes 1) Decreased productivity, increased mortality, and/or shifts in terrestrial plant community composition, often leading to decreased biodiversity in many natural habitats wherever atmospheric [reactive nitrogen] deposition increases significantly and critical thresholds are exceeded; (2) leaching of excess nitrate and associated base cations from terrestrial soils into streams, lakes and rivers and mobilization of soil aluminum; and (3) alteration of ecosystem processes such as nutrient and energy cycles through changes in the functioning and species composition of beneficial soil organisms (Galloway and Cowling 2002).” *Id.* EPA has described this impacts on terrestrial ecosystems as “profound and adverse[.]” *Id.* EPA has also determined that PM<sub>2.5</sub> adversely impacts aquatic ecosystems via excess nutrient inputs and acid and acidifying deposition. 71 Fed. Reg. at 2,682 – 2,683. “Data from existing deposition networks in the U.S. demonstrate that N and S compounds are being deposited in amounts known to be sufficient to affect sensitive terrestrial and aquatic ecosystems over time.” 71 Fed. Reg. at 2,683.

Moreover, PM<sub>2.5</sub> adversely affects the aesthetics of our natural surroundings. For example, Regional haze is caused in part by particulates in the air scattering sunlight. EPA, Haze- How Air Pollution Affects the View (available at [http://www.epa.gov/ttn/oarpg/t1/fr\\_notices/haze.pdf](http://www.epa.gov/ttn/oarpg/t1/fr_notices/haze.pdf)). It is vital that EPA take the required actions in order to strengthen protection of public health and welfare against PM<sub>2.5</sub>.

## I. PM<sub>2.5</sub> INCREMENTS

On October 20, 2010, EPA published the final rule on the “Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)” 75 Fed. Reg. 64,864 (Oct. 20, 2010). This rule established several components for making PSD permitting determinations for PM<sub>2.5</sub>, including a system of “increments” which is the mechanism used to estimate significant deterioration of ambient air quality for a pollutant. These increments are codified in 40 CFR 51.166(c) and 40 CFR 52.21(c), and are included in the table below.

TABLE 1—PM<sub>2.5</sub> INCREMENTS ESTABLISHED BY THE 2010 NSR RULE IN MICROGRAMS PER CUBIC METER

	Annual <u>arithmetic</u>	<u>24-hour max</u>
Class I .....	1	2
Class II .....	4	9
Class III .....	8	18

EPA required that states submit a SIP amendment including these PM<sub>2.5</sub> increments by July 20, 2012. 75 Fed. Reg. at 64,898. *See also* 40 C.F.R. § 51.166(a)(6)(i).

#### **IV. FAILURE TO ISSUE 2006 PSD INCREMENT FIP FOR WISCONSIN**

EPA has a mandatory duty to promulgate a Federal Implementation Plan (FIP) no later than two years after finding that a state has failure to submit a SIP submittal by the required deadline. 42 U.S.C. § 7410(c)(1). EPA found that “Wisconsin failed to submit a SIP revision, addressing the required PM<sub>2.5</sub> PSD elements establishing increments and the implementing regulations by the specified deadline of July 20, 2012, as required by the 2010 PM<sub>2.5</sub> PSD Increments—SILs—SMC Rule.” 79 Fed. Reg. 46,703, 46,705 (Aug. 11, 2014). This rule was effective August 11, 2014. Thus, EPA’s FIP establishing PM<sub>2.5</sub> increments and the implementing regulations which are still valid as required by the 2010 PM<sub>2.5</sub> PSD Increment – SILs- SMC Rule was due no later than August 11, 2016. EPA has not promulgated a FIP and thus is in violation of its mandatory duty.

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

The Center for Biological Diversity  
1212 Broadway, Suite 800  
Oakland, CA. 94612  
Attn: Jonathan Evans  
Tel: (510) 844-7100 x318

Center for Environmental Health  
2201 Broadway, Suite 302  
Oakland, CA 94612  
Attn: Caroline Cox  
Tel: (510) 655-3900

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

Administrator Gina McCarthy

August 16, 2016

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CBD, CEH and their counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting us within 60 days about coming into compliance. If you do not do so, however, we will have to file or amend a complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Rob Uj", is centered on a light gray rectangular background.

Robert Ukeiley  
Counsel for CBD & CEH