May 10, 2021

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
regan.michael@epa.gov

Via Certified Mail and Email

Re: 60-Day Notice of Intent to Sue the U.S. Environmental Protection Agency for Failure to Perform Nondiscretionary Duties to Implement the 2015 SSM SIP Call Rule under the Clean Air Act

Dear Administrator Regan:

This letter is submitted on behalf of Sierra Club, Environmental Integrity Project, and Natural Resources Defense Council ("NRDC"), to provide notice under 42 U.S.C. § 7604(b) of our intent to sue for "a failure of the Administrator [of the U.S. Environmental Protection Agency] to perform any act or duty under [the Clean Air Act] which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). This notice is provided to you in your official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA") as a prerequisite to bringing a civil action. 42 U.S.C. § 7604(b)(2); 40 C.F.R. Part 54. As detailed below, EPA has failed to undertake mandatory duties to implement the startup, shutdown, and malfunction ("SSM") state implementation plan ("SIP") Call, 80 Fed. Reg. 33,840 (June 12, 2015), and prohibit dangerous air pollution spikes from SSM events at industrial facilities. This is a serious environmental justice issue that EPA has recognized disproportionately affects communities of color and low-income communities.

EPA should immediately fulfill these mandatory duties to make good on the Administration's promise to protect fenceline communities. The massive bursts of air pollution during SSM events profoundly affect nearby and downwind community members, harming their health and gravely diminishing their quality of life. Personal stories recounting the real-world consequences of SSM events are well-documented and recognized by EPA. *See e.g.*, 80 Fed. Reg. at 33,850 & n.21 ("the results of automatic and discretionary exemptions in SIP provisions, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public health.").

Through SIPs containing unlawful exemptions and affirmative defense provisions, states have allowed large polluters to violate Clean Air Act emission limitations and pollute surrounding communities during SSM events with impunity. In 2015, the Obama-Biden administration issued a nationwide rule making clear that state-created affirmative defenses, director's discretion provisions, and exemptions are not consistent with the Clean Air Act and issued a "SIP Call" requiring 36 states to eliminate these unlawful provisions. 80 Fed. Reg. 33,840. In doing so EPA relied on the D.C. Circuit's decisions in *Sierra Club v. EPA*, 551 F.3d

1019, 1027-28 (D.C. Cir. 2008), and *NRDC v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014), which confirmed that the Act prohibits SSM exemptions and affirmative defenses, respectively. *See, e.g.*, 80 Fed. Reg. at 33,874, 33,880. Since 2017, however, progress has stalled on the important work of implementing the SIP Call.

Removing SSM loopholes will build on important work the Obama-Biden administration began and help deliver cleaner air and safer neighborhoods for overburdened communities across the country.

I. FAILURE TO MAKE FINDING OF FAILURE TO SUBMIT FOR THIRTEEN STATES AND AIR DISTRICTS

The 2015 SSM SIP Call required states to submit their revised state plans to EPA within 18 months, by November 22, 2016. 80 Fed. Reg. at 33,840.

After states submit proposed SIPs to EPA, the next step is for EPA to determine whether a SIP submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B). If, six months after a submittal is due, a state has failed to submit any required SIP submittal, and there is no submittal that may be deemed administratively complete, EPA must make a determination that the state failed to submit the required SIP submittal. *Id.* This determination is referred to as a "finding of failure to submit."

As detailed in Exhibit 1 at Table 1, thirteen states and air districts have ignored the SSM SIP Call mandate and have not submitted SIP revisions to EPA in response to the SIP Call.[1] More than six months have passed since the November 22, 2016 due date for these submittals, yet EPA has not issued the statutorily mandated finding of failure to submit. EPA must immediately issue a finding of failure to submit for these states and air districts. 42 U.S.C. § 7410(k)(1)(B).

II. FAILURE TO APPROVE OR DISAPPROVE STATE IMPLEMENTATION PLAN SUBMISSIONS FOR 28 STATES AND AIR DISTRICTS

As shown in Exhibit 1 at Table 2, EPA has also failed to take final action upon 28 state or air district proposals submitted in response to the SIP Call.[2] If EPA fails to make a completeness finding six months after receipt of a SIP submission, the submission is "deemed by operation of law" to meet the minimum statutory criteria. 42 U.S.C. § 7410(k)(1)(B). Once that happens, EPA must act within 12 months to approve in part or in full, conditionally approve, or disapprove the

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[1] *See* Exhibit 1 at Table 1. These states and air districts are Alabama, Arkansas, California – San Joaquin, District of Columbia, Illinois, North Carolina – Forsyth County, New Jersey, Ohio, Rhode Island, South Dakota, Tennessee – Shelby, and two Washington state air districts.

[2] *See* Exhibit 1 at Table 2. These states and air districts are Alaska, Arizona, Arizona – Maricopa, California – Eastern Kern, California – Imperial, Colorado, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Dakota, New Mexico, New Mexico – Albuquerque-Bernalillo, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and West Virginia.

SIP revision. *See* 42 U.S.C. § 7410(k)(2)-(4). More than 18 months have passed since these 28 responsive SIP revisions were submitted. *See* Exhibit 1 at Table 2. Yet EPA has not taken any final action on them. EPA must act swiftly to review and take final action upon those state proposals for compliance with the 2015 SIP Call.

Many of the state's proposed responses to the SIP Call did not comply with the SIP Call rule's requirements and are not consistent with the Clean Air Act. In acting on the state proposals, Sierra Club urges EPA to take a close look at all proposed SIP revisions and, in doing so, consider comments submitted by environmental and community groups on the proposed SIP submittals, as well as EPA's own comments. For your convenience, attached are Sierra Club's comments on the proposed SSM SIP Call submittals for Alaska, Arizona, Delaware, the District of Columbia, Georgia, Louisiana, Minnesota, Mississippi, North Carolina, Oklahoma, Texas, and West Virginia, and EPA's comments on the proposed SSM SIP Call submittals for Colorado, Georgia, Mississippi, and West Virginia (*see* Exhibit 2). Attached are also the NAACP's comments on the Mississippi proposed SSM SIP Call submittal and Environmental Integrity Project's comments on the Texas proposed SSM SIP Call submittal.

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

Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612

Environmental Integrity Project
1000 Vermont Avenue, NW, Suite 1100
Washington, DC 20005

Natural Resources Defense Council
40 West 20th Street, 11th floor
New York, NY 10011

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

The above-listed organizations hereby give notice of their intent to file suit 60 days from the postmark of this letter to compel EPA to perform its mandatory duties under the Clean Air Act and promptly issue a finding of failure to submit to the 13 states and air districts that have ignored the SSM SIP Call mandate, and act to approve or disapprove the 28 SIP revisions submitted in response to the SSM SIP Call. We would welcome the opportunity to discuss the basis for this notice letter and explore options for resolution of these claims without litigation. If that is of interest to EPA, please contact the undersigned counsel.

Thank you for your prompt attention to this matter.

Sincerely,

/s/ Andrea Issod

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/s/ Emily Davis

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Counsel for Natural Resources Defense Council

Exhibit 1

Table 1: States That Did Not Respond to the 2015 SIP Call

State/County	Submitted Proposal to EPA (Y/N)
Alabama	No
Arkansas	No
CA – San Joaquin	No
District of Columbia	No
Illinois	No
North Carolina - Forsyth	No
New Jersey	No
Ohio	No
Rhode Island	No
South Dakota	No
Tennessee - Shelby (Memphis)	No
Washington – EFSEC	No
Washington - SWCAA	No

Table 2: States with Submitted SIP Proposals but No Final Rule

State/County	Submitted Proposal to EPA (Y/N)	Date of Submitted SIP Proposal	Federal Register Notice
Alaska	Yes	1/5/2017	N/A
Arizona	Yes	11/17/2016	Approval of Arizona Air Plan Revisions, Arizona Department of Environmental Quality and Maricopa County Air Quality Department, 82 FR 13084 (Mar. 09, 2017)
Arizona - Maricopa	Yes	11/18/2016	Approval of Arizona Air Plan Revisions, Arizona Department of Environmental Quality and Maricopa County Air Quality Department, 82 FR 13084 (Mar. 09, 2017)
California – Eastern Kern	Yes	12/6/2016	Approval of California Air Plan Revisions, Eastern Kern Air Pollution Control District and Imperial County Air Pollution Control District, 82 FR 20295 (May 01, 2017)
California - Imperial	Yes	3/28/2016	Approval of California Air Plan Revisions, Eastern Kern Air Pollution Control District and Imperial County Air Pollution Control District, 82 FR 20295 (May 01, 2017)
Colorado	Yes	11/21/2016	N/A
Delaware	Yes	11/26/2016	N/A
Florida	Yes	11/22/2016	N/A
Georgia	Yes	11/17/2016	N/A
Indiana	Yes	11/14/2016	N/A
Kansas	Yes	11/22/2016	N/A
Kentucky	Yes	11/17/2016	N/A
Louisiana	Yes	11/22/2016	N/A
Maine	Yes	05/21/2019	N/A
Michigan	Yes	2/7/2017 (Commitment to comply w/ SIP Call submitted on 11/15/2016)	N/A
Minnesota	Yes	11/22/2016	N/A
Missouri	Yes	11/28/2016	N/A
Mississippi	Yes	11/17/2016	N/A
Montana	Yes	7/6/2016	Montana Administrative Rule Revisions: 17.8.334, 82 FR 16770 (Apr. 06, 2017)
North Carolina	Yes	11/22/2016	N/A
North Dakota	Yes	10/27/2016	N/A
New Mexico	Yes	10/13/2016	N/A
NM - Albuquerque-Bernalillo	Yes	10/17/2016	N/A
Oklahoma	Yes	11/7/2016	N/A

South Carolina	Yes	11/4/2016	N/A
Tennessee	Yes	11/18/2016	N/A
Texas	Yes	11/18/2016	N/A
Virginia	Yes	8/1/2016	N/A
Washington	Yes	10/25/2019	N/A
West Virginia	Yes	6/29/2016	N/A

Exhibit 2

Comments on Proposed SSM SIP Call Submittals

Comments	State	Date	Page
Sierra Club	Alaska	10/14/16	001
Sierra Club	Arizona	10/20/16	005
Sierra Club	Arizona, Maricopa County	4/10/17	008
EPA Region 8	Colorado	11/12/15	012
Sierra Club	Delaware	10/25/16	019
Sierra Club	District of Columbia	3/24/17	031
Sierra Club, GreenLaw	Georgia	5/4/16	045
Sierra Club, GreenLaw (provided as Exhibit 1 to 5/4/16 GA Comments)	Georgia	3/8/16	050
EPA	Georgia	5/11/16	063
Sierra Club, Louisiana Environmental Action Network, Concerned Citizens of Murphy	Louisiana	8/3/16	067
Sierra Club	Minnesota	11/9/16	079
Sierra Club	Mississippi	9/15/16	088
EPA Region 4	Mississippi	9/16/16	097
NAACP	Mississippi	9/26/16	100
Sierra Club	Mississippi	10/6/16	107
Sierra Club (without attachments)	North Carolina	8/1/16	111
Sierra Club	Oklahoma	1/20/16	121
Sierra Club	Texas	8/8/16	131
Environmental Integrity Project	Texas	8/2/16	133

EPA Region 3	West Virginia	7/28/16	141
Sierra Club (without attachments)	West Virginia	8/1/16	144

SIERRA CLUB

Submitted via email to rebecca.smith@alaska.gov

October 14, 2016

RE: Sierra Club Comments on Alaska's Proposal to Revise 18 AAC 50.240(b), Excess Emissions Regulations and Removal of 18 AAC 50.240 from SIP

I. INTRODUCTION

Sierra Club appreciates the opportunity to provide these comments concerning Alaska's proposal to amend its State Implementation Plan (SIP) in response to EPA's SSM SIP Call.

Power plants and other facilities can emit massive amounts of particulate matter and other pollutants during periods of startup, shutdown, or malfunction. Indeed, as part of its SSM SIP Call rulemaking, EPA recognized the practical consequences of SSM exemptions, noting "one malfunction that was estimated to emit 11,000 pounds of [sulfur dioxide] SO2 over a 9-hour period when the applicable limit was 3,200 pounds per day." Memorandum dated Feb. 4, 2013, to EPA Docket No. EPA-HQ-OAR-2012-0322 at 23, *available at* https://www3.epa.gov/airquality/urbanair/sipstatus/docs/ssm_memo_021213.pdf. These large SSM pollution exceedances can occur many times each year. After reviewing data from numerous power plants as part of the Mercury and Air Toxics rulemaking, EPA found that the "average" electric generating unit (EGU) had between 9 and 10 startup events per year between 2011 and 2012, and that many EGUs had "over 100 startup events in 2011 and over 80 in 2012." Assessment of startup period at coal-fired electric generating units – Revised, at p. 4 (Nov. 2014). Given the huge emissions possible during startup and shutdown, reducing startup and shutdown emissions from fuel-burning sources, including power plants, should be a priority for ADEC.

II. EPA's SSM SIP CALL

EPA's SSM SIP Call requires 36 states, including Alaska, to remove from their SIPs exemptions and affirmative defenses that allow industrial facilities to pollute the air without consequences when those facilities start up, shut down, or experience malfunctions. 80 Fed. Reg. 33,840 (June 12, 2015). EPA found that SIPs with provisions that exempt emissions during such events—like Alaska's current SIP— are substantially inadequate to meet Clean Air Act requirements. *Id.* In addition to requiring the 36 states whose SIPs contain these exemptions or affirmative defense provisions to remove these provisions from their SIPs, the SIP Call also revises EPA's policy for SIP provisions addressing excess emissions during SSM events. *Id.* The SIP Call allows states 18 months to submit revised SIPs to EPA, which is the maximum time allowable under the statute. *Id.* at 33,848; 42 U.S.C. § 7410(k)(5).

Thank you, and please do not hesitate to contact the undersigned with any questions or to discuss the matters raised either here.

Sincerely,

/s/ Bridget Lee

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