



December 7, 2021

BY CERTIFIED MAIL

Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Re: Notice of Intent to File Suit, Failure to Promulgate Federal Implementation Plan to Address Interstate Transport of Air Pollution From New Mexico, a Nondiscretionary Duty Under the Clean Air Act

Dear Administrator Regan:

This letter is to inform you that WildEarth Guardians intends to file suit over the U.S. Environmental Protection Agency's ("EPA's") failure to promulgate a Federal Implementation Plan within two years after making a finding that New Mexico failed to submit a State Implementation Plan to address interstate transport of ozone air pollution as required under Section 110(a)(2)(D)(i)(I) of the Clean Air Act. Pursuant to the Clean Air Act's citizen suit provision, we intend to file suit to enforce EPA's duty to take mandatory action after 60 days. 42 U.S.C. § 7604(a)(2).

LEGAL BACKGROUND

Ground-level ozone is a harmful air pollutant that forms when sunlight reacts with pollution from smokestacks, tailpipes, and oil and gas extraction activities. Ozone is a respiratory irritant and is especially harmful to children, seniors, and even active adults. Exposure to ground-level ozone can:

- Cause coughing and sore or scratchy throat.
- Make it more difficult to breathe deeply and vigorously and cause pain when taking a deep breath.
- Inflammate and damage the airways.
- Make the lungs more susceptible to infection.
- Aggravate lung diseases such as asthma, emphysema, and chronic bronchitis.
- Increase the frequency of asthma attacks.

Because of its harmful health effects, the EPA has established a national ambient air quality standard (“NAAQS”) for ground-level ozone and has periodically revised the NAAQS in response to new science and understanding. The NAAQS were last revised in 2015. 80 Fed. Reg. 65,291 (Oct. 26, 2015). At that time, the EPA determined that to protect public health with an adequate margin of safety, ozone concentrations in the air that people breathe should be limited to no more than 0.070 parts per million over an eight-hour period. *See* 40 C.F.R. 50.19.

Upon the revision of a NAAQS, states must submit plans to provide for the “implementation, maintenance, and enforcement” of the revised standard. 42 U.S.C. § 7410(a)(1). These plans are referred to as state implementation plans, or SIPs. Among other things, states must ensure SIPs “contain adequate provisions” prohibiting air emissions in amounts that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in neighboring states. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Often described as the Clean Air Act’s “good neighbor” provision, this SIP requirement assures that air pollution from one state does not inappropriately jeopardize air quality in downwind states.

SIPs must be submitted within three years of the revision of a NAAQS. 42 U.S.C. § 7410(a)(1). When the ozone NAAQS was revised in 2015, states had until October 1, 2018 to submit SIPs to implement, maintain, and enforce the revised standard. 84 Fed. Reg. 66,612, 66,613 (Dec. 5, 2019).

If a state fails to submit all or a portion of a SIP within three years of the revision of a NAAQS, the EPA must make a finding that the state failed to make the required submission. Referred to as a “finding of failure to submit,” the EPA must make this finding within six months of the SIP submission deadline. 42 U.S.C. § 7410(k)(1).

Upon making a “finding of failure to submit,” the EPA has two years to either fully approve the required SIP or to promulgate a federal implementation plan (“FIP”). 42 U.S.C. § 7410(c)(1). Essentially, where a state fails to comply with the Clean Air Act, the EPA must assert federal oversight authority and take over regulation.

FACTUAL BACKGROUND

After the ozone NAAQS were revised in 2015, New Mexico failed to submit a SIP to comply with the Clean Air Act’s “good neighbor” provision set forth at 42 U.S.C. § 7410(a)(2)(D)(i)(I). On December 5, 2019, EPA promulgated a formal “finding of failure to submit,” identifying that New Mexico had “not submitted [a] complete interstate transport [SIP] to meet the requirements of CAA [Clean Air Act] section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS[.]” 84 Fed. Reg. 66,612, 66,614 (Dec. 5, 2019).

Pursuant to the Clean Air Act, the EPA’s promulgation of its finding triggered a two-year clock during which the agency would have to fully approve of New Mexico’s “good neighbor” SIP submissions or promulgate a FIP. The agency’s two-year deadline for action was no later December 5, 2021, two years after the EPA’s finding was published in the Federal Register.¹

¹ Although the EPA identified the “effective date” of its finding to be January 6, 2020, the EPA has explained that promulgation of a rule “has been interpreted by the courts to be signature and dissemination of a rule.” 73 Fed. Reg.

As of the date of this letter, EPA has neither proposed nor taken final action to fully approve a SIP submission from New Mexico or to promulgate a FIP.

NOTICE OF INTENT TO FILE SUIT

The Clean Air Act requires the EPA to promulgate a FIP anytime within two years after the Administrator “finds that a State has failed to make a required [State Implementation Plan] submission” under Section 110 of the Clean Air Act. *See* 42 U.S.C. 7410(c)(1)(A). This is a nondiscretionary duty under the Clean Air Act.

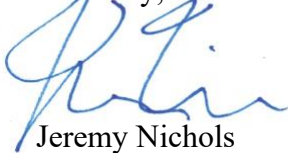
Pursuant to the Clean Air Act’s citizen suit provisions, any person may bring suit against the EPA and the EPA Administrator over the failure of the agency to perform a duty that is not discretionary. 42 U.S.C. § 7604(a)(2). No suit, however, may be commenced prior to giving the EPA and EPA Administrator 60-days notice. 42 U.S.C. § 7604(b)(2).

With this letter, WildEarth Guardians hereby notifies you and the EPA of its intent to file suit over your failure to promulgate a FIP or to fully approve a SIP submission to ensure New Mexico complies with the Clean Air Act’s “good neighbor” requirements. The EPA was required to promulgate a FIP or fully approve a SIP by December 5, 2021. Neither action has yet been taken, in violation of a nondiscretionary duty under the Clean Air Act.

WildEarth Guardians is a New Mexico-based nonprofit environmental and health advocacy organization. We are harmed by the failure of the EPA to follow through with duties under the Clean Air Act to ensure that states are adequately protecting clean air and public health.

In keeping with the requirements of federal regulations, you are hereby notified that the full name and address of the person giving the notice is WildEarth Guardians, 301 N. Guadalupe St., Ste. 201, Santa Fe, NM 87501. If you wish to discuss this matter, please contact me at the information provided below.

Sincerely,



Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
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16,503, 16,436-16,514 (March 27, 2008); see also 74 Fed. Reg. 34,450, 34,404-34,466 (July 15, 2009). Here, EPA actually signed its finding on November 22, 2019. The finding was subsequently disseminated via publication in the Federal Register on December 5, 2019. Accordingly, the agency’s two-year clock for action tolled from December 5, 2019 to December 5, 2021.