



VIA CERTIFICATED MAIL

January 21, 2022

Michael S. Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
regan.michael@epa.gov

Re: Clean Air Act Notice of Intent to Sue Pursuant to 42 U.S.C. § 7604(b)(2) and 42 U.S.C. §§ 7509(c)(2) & 7511(b)(2)(B) for Failure to “Bump Up” To Severe Under the 2008 Ozone NAAQS

Dear Administrator Regan:

On behalf of the Center for Biological Diversity, the Center for Environmental Health, and the Environmental Integrity Project (collectively, “Environmental Groups”), I write to inform 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 any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). Specifically, under 42 U.S.C. §§ 7509(c)(1) & 7511(b)(2)(A), EPA must determine by no later than January 20, 2022 whether the 2008 ozone National Ambient Air Quality Standard (NAAQS) serious nonattainment areas have attained the 2008 ozone NAAQS and for each area that failed to attain, reclassify such areas to a severe nonattainment area. Pursuant to 42 U.S.C. §§ 7509(c)(2) & 7511(b)(2)(B), EPA is then required to publish notice in the Federal Register of those determinations. As explained below, EPA has failed to perform these mandatory duties for the Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas; Greater Connecticut, Connecticut; Houston-Galveston-Brazoria, Texas; Nevada County (Western part), California; New York-North New Jersey-Long Island, New York-New Jersey-Connecticut; Ventura County, California; and Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado nonattainment areas.

I. Ground-Level Ozone Pollution is Harmful to Public Health and the Environment

EPA must remedy its violation of this mandatory duty to better protect public health and native ecosystems from ozone’s harmful effects. According to EPA’s exhaustive scientific review, ground-level ozone pollution—commonly referred to as smog¹—causes “adverse health effects

¹ See, e.g., EPA, “Ground-level ozone basics,” <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics> (“Ozone at ground level is a harmful air pollutant, because of its effects on people and the environment, and it is the main ingredient in “smog.””).

that range from decreased lung function and increased respiratory symptoms to serious indicators of respiratory morbidity,” such as emergency department visits and hospital admissions.² A recent peer-reviewed medical study found that even short-term exposure to high levels of ground-level ozone increases the risk of death.³ Those most at risk from ozone pollution are children and older adults; people who are regularly active outside, such as laborers; and individuals with pre-existing lung and heart diseases such as asthma.⁴

Ozone is also harmful to vegetation and ecosystems.⁵ Ozone can be especially harmful to sensitive vegetation—including trees such as the black cherry, quaking aspen, white pine, and ponderosa pine—during the growing season.⁶ Ozone pollution can also indirectly harm soils, water, and wildlife, and their associated ecosystems, leading to diminished clean air and water.⁷ And ozone pollution also contributes to the climate crisis, as ozone is itself a greenhouse gas and ozone pollution also hinders plant growth throughout a plant’s lifecycle, thereby shrinking the carbon sequestration potential of plants.⁸

II. EPA Violated the Clean Air Act by Failing to Make Bump Up Determinations for Areas Designated as Serious Nonattainment Areas for the 2008 Ozone NAAQS

Serious nonattainment areas for the 2008 ozone NAAQS have an attainment date of July 20, 2021. *See* 84 Fed. Reg. 44,238, 44,241 (Aug. 23, 2019). 42 U.S.C. §§ 7509(c)(1) & 7511(b)(2)(A) mandate that EPA must determine by no later than 6 months after the attainment date whether a nonattainment area has attained an area attained the NAAQS by its attainment date. For each area that failed to attain by its attainment date, it will be reclassified by operation of law to the next higher classification. Pursuant to 42 U.S.C. §§ 7509(c)(2) & 7511(b)(2)(B), EPA is then required to publish notice in the Federal Register of those determinations. Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas; Greater Connecticut, Connecticut; Houston-Galveston-Brazoria, Texas; Nevada County (Western part), California; New York-North New Jersey-Long Island, New York-New Jersey-Connecticut; Ventura County, CA; and Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado are serious nonattainment

² 73 Fed. Reg. 16,436 (March 27, 2008); *see also* EPA, “Health Effects of Ozone Pollution,” <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>.

³ “Increased exposure to ozone may increase the risk of death, Medical News Today (Feb. 2020), <https://www.medicalnewstoday.com/articles/increased-exposure-to-ozone-may-increase-the-risk-of-death#Ozone-pollution>, citing Ana M. Vicedo-Cabrera, et al., “Short term association between ozone and mortality: global two stage time series study in 406 locations in 20 countries,” *BMJ* 368 (Feb. 2020), <https://www.bmj.com/content/368/bmj.m108>.

⁴ 73 Fed. Reg. at 16,440.

⁵ EPA, “Ecosystem Effects of Ozone Pollution,” <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>.

⁶ *Id.*

⁷ 73 Fed. Reg. at 16,485-86.

⁸ *Id.* 16,486; *see generally* “Biological Carbon Sequestration,” UC Davis, <https://climatechange.ucdavis.edu/science/carbon-sequestration/biological/>.

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areas for the 2008 ozone NAAQS. As mentioned above, there attainment date is July 20, 2021. 6 months after July 20, 2021 is January 20, 2022. However, it is after January 20, 2022 and EPA has not made or published a determination of whether these serious nonattainment areas have attained by their attainment date. Thus, EPA is in violation of its mandatory duties in 42 U.S.C. §§ 7509(c)(1)-(2) and 7511(b)(2)(A)-(B).

III. Conclusion

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

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

The Groups and their counsel would prefer to resolve this matter without the need for litigation.

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Therefore, we look forward to EPA coming into compliance within 60 days. If you do not do so, however, we will have to file a complaint.

Respectfully submitted,

/s/ Robert Ukeiley

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