



January 21, 2022

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

Re: Notice of Intent to File Suit Over Failure of EPA to Find that Denver Metro Area Has Failed to Attain Ozone Air Quality Standards

Dear Administrator Regan:

Pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(b)(2), WildEarth Guardians hereby notifies you of its intent to file suit against the U.S. Environmental Protection Agency (“EPA”) over the agency’s “failure . . . to perform [an] act or duty under [the Clean Air Act] which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). As detailed below, EPA has failed to determine whether the Denver Metro-North Front Range region of Colorado complied with the 2008 National Ambient Air Quality Standards (“NAAQS”) for ozone by the attainment date of July 20, 2021. If this mandatory duty is not performed within 60 days, we intend to file suit in federal court to compel the EPA to act.

I. BACKGROUND

Congress passed the Clean Air Act in order “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b). To meet this goal, EPA is required, among other things, to set NAAQS to protect public health and welfare. *Id.* § 7409.

At issue here is the 2008 ozone NAAQS, which were promulgated by the EPA on March 27, 2008. 73 Fed. Reg. 16,436 (Mar. 27, 2008). Ozone, the key ingredient of smog, is a poisonous gas created when pollution from tailpipes, smokestacks, and oil and gas production in the form of volatile organic compounds (“VOCs”) and nitrogen oxides (“NOx”), reacts with sunlight. See EPA, *Ground-level ozone basics*, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics>. Ozone poses myriad adverse health and environmental impacts, including respiratory irritation, defoliation of trees and crops, and increased risk of premature death. *Id.*

The 2008 ozone NAAQS revised the former standard from 0.08 parts per million over an eight-hour period to 0.075 parts per million. *See* 73 Fed. Reg. 16,435 (March 27, 2008). At the time, several monitors in the Denver Metro-North Front Range region were violating the NAAQS and had been violating the NAAQS for years earlier.

Under the Clean Air Act, the EPA was required to designate areas violating the 2008 ozone NAAQS as nonattainment within two years of promulgating the new standard. *See* 42 U.S.C. § 7407(d)(1)(B). Nonattainment designations trigger the deployment of more stringent air quality safeguards and oversight, providing heightened protection for public health.

The EPA did not make nonattainment designations for the 2008 ozone NAAQS until May 2012. *See* 77 Fed. Reg. 30,088 (May 21, 2012). At that time, the Denver Metro Area-North Front Range region was still violating the 2008 NAAQS and was designated nonattainment. The region was classified as a “marginal” nonattainment area.¹ The Denver Metro-North Front Range region, which encompasses all of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, Jefferson, and Weld Counties, as well as most of Larimer County. *See* 40 C.F.R. § 81.306.

Under the Clean Air Act, Colorado was required to attain the 2008 ozone NAAQS within three years of its nonattainment designation, so by 2015. *See* 40 C.F.R. § 51.1103(a). After the applicable attainment date, the Denver Metro Area-North Front Range region was still violating the 2008 ozone NAAQS. In August 2015, the EPA issued a finding that the area had failed to attain the NAAQS and reclassified the region as a moderate nonattainment area. *See* 80 Fed. Reg. 51,992 (Aug. 27, 2015).

After its reclassification, Colorado was required to attain the NAAQS in the Denver Metro-North Front Range moderate ozone nonattainment area “as expeditiously as practicable,” but no later than July 20, 2018. 80 Fed. Reg. 51,992, 51,994 (Aug. 27, 2015). July 20, 2018 passed and the Denver Metro-North Front Range region was still violating the 2008 ozone NAAQS. In December 2019, the EPA issued a finding that the area had failed to attain the NAAQS and reclassified the region as a serious nonattainment area. *See* 84 Fed. Reg. 70,897 (Dec. 26, 2019).

Under the serious classification, Colorado was required to demonstrate attainment by July 20, 2021. Unfortunately, Colorado failed to attain the 2008 ozone NAAQS by that date. In a presentation given October 2021, Colorado regulators highlighted that five monitoring sites in the Denver Metro-North Front Range nonattainment are still violating the 2008 ozone NAAQS. These include monitors in the Chatfield area of Douglas County, in Golden, in Boulder, and in Fort Collins. *See* Colorado Air Pollution Control Division, “2021 Summer Ozone Season Review,” presentation given October 21, 2021, available online at <https://drive.google.com/drive/folders/1wwSV5OpVOU9FunspVlfm5dEMBWW8Uc9n>.

¹ Ozone nonattainment classifications initially depend on the severity of an area’s ozone violations. *See* 42 U.S.C. § 7511(a)(1). In order from lowest to highest, ozone nonattainment classifications include marginal, moderate, serious, severe, and extreme. *Id.*; *see also* EPA, Implementation of the 2008 NAAQS for Ozone: State Implementation Plan Requirements, 80 Fed. Reg. 12,264, 12,313 (Mar. 6, 2015).

By law, where an ozone nonattainment area fails to attain by the required deadline, the EPA must make a “determination” that the area has failed to attain the NAAQS and reclassify the area to “the next higher classification.” 42 U.S.C. § 7511(b)(2)(A). The agency must make this determination and reclassification “[w]ithin 6 months” after the applicable attainment date. *Id.* Here, even though Colorado failed to attain the 2008 ozone NAAQS in the Denver Metro-North Front Range nonattainment area by July 20, 2021, the EPA has yet to determine that the region has failed to attain and has yet to reclassify the nonattainment area.

Because the Denver Metro Area-North Front Range region continues to violate the 2008 ozone NAAQS, the area should be reclassified from a “serious” to a “severe” nonattainment area. Under a severe classification, Colorado would be required to adopt more stringent air quality safeguards, impose lower permitting thresholds, and further limit overall emissions of VOCs and NOx in the area. 42 U.S.C. § 7511a(d).

II. VIOLATION OF THE CLEAN AIR ACT

Colorado was required to bring the Denver Metro-North Front Range nonattainment area into compliance with the 2008 ozone NAAQS by July 20, 2021, or within nine years after the effective date of EPA’s initial designation of nonattainment. *See* 42 U.S.C. § 7511(a)(1). EPA was then required to determine whether the area attained the NAAQS within six months after July 20, 2021 or by January 20, 2022. *Id.* § 7511(b)(2)(A). EPA’s determination is a nondiscretionary duty. As of the date of this letter, EPA has yet to make such a determination.

The failure of EPA to make its legally-required determination is delaying clean air for the Denver Metro-North Front Range region. If the agency finalized its determination that the area failed to attain, it would “bump up” the classification of the area from “serious” to “severe” as a matter of law. *See id.* § 7511(b)(2)(A)(i). This change in classification would require Colorado to adopt more stringent clean air safeguards to reduce ozone pollution, to submit a plan to clean up the region’s unhealthy air, and set a new deadline for the area to come into attainment with the NAAQS. In essence, EPA’s delay is forcing the Denver Metro-North Front Range region to endure greater air pollution and public health risks.

III. WILDEARTH GUARDIANS INTENDS TO FILE SUIT

In accordance with the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a)(2), WildEarth Guardians intends to file suit in federal court after 60 days if the EPA has not remedied its failure to perform the aforementioned nondiscretionary duty. In keeping with the requirements under 40 C.F.R. § 54.3(a), you are hereby notified that the full name and address of the person giving the notice is as follows:

WildEarth Guardians
301 N. Guadalupe, Ste. 201
Santa Fe, New Mexico 87501.

Guardians is an environmental nonprofit dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has thousands of

members in Colorado and surrounding states who live and recreate in the Denver Metro-North Front Range nonattainment area.

Guardians would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting us to resolve this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Nichols', is positioned above the typed name.

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
(303) 437-7663
jnichols@wildearthguardians.org