



June 26, 2024

VIA CERTIFIED MAIL

Administrator Michael S. Regan
United States Environmental Protection Agency
William Jefferson Clinton Building
Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Clean Air Act Notice of Intent to Sue pursuant to 42 U.S.C. § 7604(b)(2) for failure to take final action on a Colorado State Implementation Plan submittal under 42 U.S.C. § 7410(k)(2)–(4)

Dear Administrator Regan:

On behalf of the Center for Biological Diversity and the Center for Environmental Health, I am writing to inform you that we intend to file suit against you for “a failure of the Administrator [of the United States Environmental Protection Agency (“EPA” or “Administrator”)] to perform any act or duty under this chapter which is not discretionary with the Administrator” pursuant to 42 U.S.C. § 7604(a)(2).

EPA is in violation of its duties under the Clean Air Act by failing to take final action under 42 U.S.C. § 7410(k)(2)-(4) on the Attainment Demonstration and Reasonably Available Control Measure elements of the State Implementation Plan (“SIP”) submittal Colorado submitted to EPA on March 22, 2021, to meet the requirements of the Denver Metro / North Front Range nonattainment area’s classification as a serious nonattainment area for the 2008 ozone National Ambient Air Quality Standards (“NAAQS”), *see* 42 U.S.C. §§ 7502(c)(1), 7511a(c).

I. Ground-level ozone pollution is harmful to public health and the environment.

EPA must remedy the violations of its mandatory duties to better protect the public and natural systems from the harmful effects of ground-level ozone, which is commonly referred to as smog, and other dangerous air pollutants.

Ozone pollution negatively affects human health. EPA has found that ozone “pose[s] multiple, serious threats to health” including: worsening respiratory and cardiovascular health, increased likelihood of early death, increased asthma-related hospital admissions, increased likelihood of children developing asthma as adolescents, and lower birthweights and decreased

lung function in newborns.¹ The people most impacted by even “low” levels of ozone are “children and teens; anyone 65 and older; people who work or exercise outdoors; people with existing lung diseases, such as asthma and chronic obstructive pulmonary disease; and people with cardiovascular disease.”²

Ozone is also harmful to vegetation and ecosystems.³ 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.⁴ Ozone pollution can also indirectly harm soils, water, and wildlife, and their associated ecosystems, leading to diminished clean air and water.⁵

Finally, ozone pollution contributes to the climate crisis. Ozone is itself a greenhouse gas, and ozone pollution hinders plant growth throughout a plant’s lifecycle, thereby shrinking the carbon sequestration potential of plants.⁶

II. EPA violated the Clean Air Act by failing to take final action on the Attainment Demonstration and Reasonably Available Control Measures in Colorado’s serious 2008 ozone NAAQS nonattainment SIP submittal.

After a state provides EPA with a SIP submittal, EPA is required to determine whether the SIP submittal is administratively complete.⁷ If EPA has not made a completeness finding, a SIP submittal will be deemed complete by operation of law six months after its submittal pursuant to 42 U.S.C. § 7410(k)(1)(B). EPA then has a nondiscretionary duty to take final action to approve, disapprove, or conditionally approve a SIP submittal within twelve months of the submittal being deemed or found complete pursuant to 42 U.S.C. § 7410(k)(2)–(4).

Colorado provided EPA with a SIP submittal on March 22, 2021.⁸ The SIP submittal addressed Clean Air Act Section 172(c)(1) and Section 182(c) requirements for the Denver Metro/North Front Range Serious nonattainment area under the 2008 Ozone NAAQS. In addition to other elements, the March 22, 2021 submittal contained the serious Attainment Demonstration and Reasonably Available Control Measures.⁹ In a completeness determination letter dated June 2, 2021, EPA determined the SIP submittal fulfills the completeness criteria.¹⁰

¹ American Lung Association, *Ozone*, <https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone> (summarizing the results of Table 1-1 in EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants* EPA/600/R-10/076F (2013) at 1-5) (hereinafter “American Lung Association”).

² *Id.*

³ EPA, *Ecosystem Effects of Ozone Pollution*, (last updated Mar. 8, 2022) <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>.

⁴ *Id.*; see also EPA, *Integrated Assessment for Ozone and Related Photochemical Oxidants* EPA/600/R-20/012 (Apr. 2020) at 8-42, <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=348522>.

⁵ 73 Fed. Reg. 16,436, 16,485–86.

⁶ *Id.* at 16,486; see generally UC Davis, *Biological Carbon Sequestration*, <https://climatechange.ucdavis.edu/climate/definitions/carbon-sequestration/biological>.

⁷ 42 U.S.C. § 7410(k)(1)(B).

⁸ Completeness Determination Letter from Carl Daly, Acting Director Air and Radiation Division, EPA Region 8 to Garry Kaufman, Division Director, Air Pollution Control Division Colorado Dep’t of Pub. Health and Env’t (Jun. 1, 2021) (on file with the Center for Biological Diversity).

⁹ *Id.*

¹⁰ *Id.*

Pursuant to 42 U.S.C. § 7410(k)(2), EPA had a mandatory duty to take final action on the serious Attainment Demonstration and Reasonably Available Control Measures, in addition to the other elements in Colorado’s submittal, by no later than June 2, 2022. However, EPA has not taken final action on the serious Attainment Demonstration and Reasonably Available Control Measures in Colorado’s March 22, 2021 SIP submittal. Therefore, EPA is in violation of its nondiscretionary duty under 42 U.S.C. § 7410(k)(2)–(4) with respect to the serious Attainment Demonstration and Reasonably Available Control Measures.

III. Colorado’s purported “withdrawal” of the Attainment Demonstration and Reasonably Available Control Measures in the SIP submittal does not nullify EPA’s obligation to take final action.

In closely related litigation—*Center for Biological Diversity, et al. v. EPA*, Case No. 22-cv-3309-RS (N.D. Cal. June 7, 2022)—the Center for Biological Diversity, Center for Environmental Health, and EPA settled on a deadline of September 29, 2023, for EPA to take the final action described herein: taking final action on Colorado’s serious Attainment Demonstration and Reasonably Available Control Measures pursuant to 42 U.S.C. § 7410(k)(2)–(4).¹¹ After this deadline passed without EPA action, and the plaintiffs filed a motion with the court requesting enforcement of this provision of the consent decree,¹² EPA argued that it no longer has an obligation to act on the Attainment Demonstration and Reasonably Available Control Measures because Colorado purportedly “withdrew” these SIP elements from EPA’s consideration, through a letter date July 5, 2023.¹³

However, neither the Clean Air Act nor EPA’s regulations provide for the “withdrawal” of SIP submissions, nor the resultant nullification of EPA’s mandatory duty to act on complete SIP submittals within 12 months pursuant to 42 U.S.C. § 7410(k)(2)–(4). The unsupported mechanism of withdrawal directly undermines the clear requirements and deadlines in the Clean Air Act. The delays resulting from allowing for withdrawal are causing harms that are irreversible for the millions of people living in the Denver Metro / North Front Range nonattainment area. Colorado’s withdrawal of the Attainment Demonstration and Reasonably Available Control Measures did not eliminate EPA’s obligation to take action on these elements. Nor does Colorado’s rationale for withdrawing these elements have any consequence for EPA’s clear duty to act on complete SIP submittals within 12 months of the completeness finding under 42 U.S.C. § 7410(k)(2)–(4).

The District Court in Case No. 22-cv-3309 determined that the consent decree did not resolve the question of withdrawal and EPA’s subsequent responsibilities, but that plaintiffs could bring a new action on the issue.¹⁴

¹¹ *Center for Biological Diversity, et al. v. EPA*, Case No. 22-cv-3309-RS, Dkt. No. 37, Condition 1(a) (N.D. Cal. June 15, 2023).

¹² *Id.*, Plaintiffs’ Motion to Enforce Consent Decree, Dkt. No. 49.

¹³ *Id.*, Defendant’s Opposition to Plaintiffs’ Motion to Enforce Consent Decree, Dkt. No. 50; *see also* Letter from Executive Director Jill Ryan, Colorado Dep’t of Pub. Health and Env’t, to Regional Administrator KC Becker, EPA Region 8 (July 5, 2023) (on file with the Center for Biological Diversity) (Colorado’s withdrawal of its serious Attainment Demonstration and Reasonably Available Control Measures).

¹⁴ *Center for Biological Diversity, et al. v. EPA*, Case No. 22-cv-3309-RS, Order Denying Motion to Enforce Consent Decree and Motion to Intervene, Dkt. No. 59, at 4 (N.D. Cal., Jan. 23, 2024).

As EPA is aware, the Center for Biological Diversity and Center for Environmental Health appealed the District Court's January 23, 2024 Order setting forth this conclusion to the United States Court of Appeals for the Ninth Circuit.¹⁵ As requested in the Petitioners' unopposed motion, the 9th Circuit has stayed this appellate proceeding until the resolution of the separate district court case that this notice of intent to sue is the first step in initiating.¹⁶

IV. Conclusion

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

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1411 K Street NW, Suite 1300
Washington, DC 20005
Attn: Ryan Maher
Tel: 781-325-6303

Center for Environmental Health
2201 Broadway, Suite 580
Oakland, CA 94612

However, if you wish to discuss this matter, please direct all correspondence and communications regarding this matter to the undersigned counsel. The Center for Biological Diversity, the Center for Environmental Health, and their counsel would prefer to resolve this matter without the need for litigation. Please contact the undersigned if you would like to discuss a path to resolution. If we do not hear from you within 60 days, we will be forced to assume that you are not interested in settling this matter and will file our complaint.

Sincerely,

/s/ Ryan Maher

Ryan Maher
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*Counsel for Center for Biological Diversity and
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¹⁵ See *Center for Biological Diversity, et al. v. Regan*, Case No. 24-1874 (9th Cir. Mar. 28, 2024).

¹⁶ See *id.*, Order, Dkt. No. 10 (Apr. 29, 2024).