



December 16, 2014

**BY OVERNIGHT DELIVERY**

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

**Re: Notice of Intent to File Suit Over Failure to Promulgate Federal Implementation Plan Within Two Years of Disapproving the State of Utah's Regional Haze State Implementation Plan**

Dear Administrator McCarthy:

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). Specifically, the EPA has failed to promulgate a Federal Implementation Plan ("FIP") within two years of disapproving a State Implementation Plan ("SIP") revision from the State of Utah addressing the Clean Air Act's regional haze requirements, as required by Section 110(c)(1)(B) of the Clean Air Act. *See* 42 U.S.C. § 7410(c)(1)(B).

**Background**

On October 30, 2012, the EPA partially disapproved of a SIP revision submitted by the state of Utah addressing regional haze requirements under Section 169A of the Clean Air Act and regulations promulgated at 40 C.F.R. § 51.308. *See* 77 Fed. Reg. 74,355-74,372 (Dec. 14, 2012). The agency disapproved of the State of Utah's failure to adopt adequate best available retrofit technology requirements for two of the state's largest coal-fired power plants, Hunter and Huntington, which are primarily owned and operated by PacifiCorp, a Portland, Oregon-based utility. In its final rule, the agency stated:

We are disapproving the State's NO<sub>x</sub> and PM BART determinations and limits in section D.6.d of the SIP for the following four subject-to-BART EGUs [electric generating units]: PacifiCorp Hunter Unit 1, PacifiCorp Hunter Unit 2, PacifiCorp Huntington Unit 1, and PacifiCorp Huntington Unit 2. EPA is disapproving these BART determinations because they do not comply with our regulations under 40 CFR 51.308(e)(1). EPA is

also disapproving the State's SIP because it does not contain the provisions necessary to make BART limits practically enforceable as required by section 110(a)(2) of the CAA [Clean Air Act] and Appendix V to [40 CFR] part 51.

77 Fed. Reg. 74,357. This disapproval has since been upheld by the U.S. Court of Appeals for the 10<sup>th</sup> Circuit. *See Utah v. EPA*, \_\_\_ F.3d \_\_\_, Nos. 13-9535, 13-9536 WL 4345770 (10<sup>th</sup> Cir. Sept. 3, 2014).

Under the Clean Air Act, the EPA "shall promulgate a Federal implementation plan at any time within 2 years after...disapprov[ing] a State implementation plan submission in whole or in part." 42 U.S.C. § 7410(c)(1)(B). The only exception to this mandatory duty is where "the State corrects the deficiency, and the Administrator approved the plan or plan revision[.]" *Id.* Here, the EPA partially disapproved of Utah's SIP on October 30, 2012.<sup>1</sup> Thus, under the Clean Air Act, the agency was obligated to promulgate a FIP on October 30, 2014. As of the date of this notice letter, a FIP has not been promulgated and the State has not corrected the deficiency and the EPA has not approved the plan or plan revision.

### **Failure to Perform a Nondiscretionary Duty, Promulgation of FIP**

Under the Clean Air Act, the EPA was required to promulgate a FIP or approve a SIP revision within two years of partially disapproving of Utah's SIP revision to address regional haze requirements under the Clean Air Act. *See* 42 U.S.C. § 7410(c)(1)(B). This is a nondiscretionary duty under the Clean Air Act. Accordingly, EPA was required to promulgate a FIP or approve a SIP to address the deficiencies in Utah's regional haze SIP revision on or around October 30, 2014. As of the date of this letter, no such promulgation or approval has occurred. In accordance with the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a)(2), we therefore intend to file suit after 60 days if the EPA has not followed through with this nondiscretionary duty.

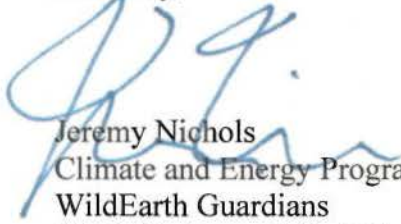
WildEarth Guardians is a New Mexico-based nonprofit organization with offices in several western states, including in Salt Lake City, Utah. WildEarth Guardians is dedicated to protecting and restoring air quality and health throughout the American West, including Utah, and has members throughout Utah who are harmed by the failure of the EPA to follow through with its mandatory duties under the Clean Air Act. 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, 516 Alto St., Santa Fe, NM 87501. For purposes of discussing this matter, please contact us at the information below.

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<sup>1</sup> According to EPA, promulgation of a rule "has been interpreted by the courts to be signature and dissemination of a rule." 73 Fed. Reg. 16,503, 16,436-16,514 (March 27, 2008); *see also* 74 Fed. Reg. 34,450, 34,404-34,466 (July 15, 2009). The partial disapproval of Utah's regional haze SIP was signed on October 30, 2012 by Howard Cantor, the Acting Regional Administrator for EPA Region 8, and disseminated shortly thereafter over the web and by e-mail. As EPA noted in its final rule, it was bound by a legal consent decree to sign a final rule by October 31, 2012. *See* 77 Fed. Reg. 74,356. Thus, although notice of its disapproval was published in the Federal Register on December 14, 2012, promulgation of the disapproval occurred on or shortly after October 30, 2012.

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

Sincerely,



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cc: Shaun McGrath, EPA Region 8 Administrator

