

May 30, 2013

**Via Electronic and Certified Mail**

Bob Perciasepe, Acting Administrator  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1101A  
Washington, D.C. 20004

**Re: 60-Day Notice of Intent to Sue Under Administrative Procedure Act, 5 U.S.C. § 706(a)(1): Unreasonable Delay in Responding to a Petition to the Administrator to Make a Finding that Pennsylvania Is Failing to Implement Its State Implementation Plan; To Make a Determination that Pennsylvania Is Not Adequately Administering and Enforcing Its Clean Air Act Title V Permitting Program; and to Apply Sanctions Against Pennsylvania for These Failures**

Dear Acting Administrator Perciasepe,

On February 16, 2012, the Clean Air Council (“the Council”) formally petitioned the United States Environmental Protection Agency (“EPA”) pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e), and the Clean Air Act (“CAA”), 42 U.S.C. § 7401, *et seq.*, to (1) make a finding that the Commonwealth of Pennsylvania is not implementing requirements of its state implementation plan (“SIP”); (2) determine that the Commonwealth of Pennsylvania is not adequately administering and enforcing its CAA Title V permitting program; and (3) apply sanctions against the Commonwealth of Pennsylvania for failure to implement its SIP and to adequately administer and enforce its Title V permitting program. The Council has not yet received a response to its petition. Should EPA fail to respond to this notice within sixty days, the Council will initiate litigation in a U.S. District Court pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a), based on a claim of unreasonable delay under the Administrative Procedure Act, 5 U.S.C. § 706(1).

The Council’s petition was filed in response to the Pennsylvania Department of Environmental Protection’s (“PA DEP”) ongoing failure to perform legally adequate and complete single source determinations for the oil and gas industries. PA DEP’s failure violates the CAA’s purpose, which is “to protect and enhance the quality of the Nation’s air resources so as to promote the

public health and welfare.”<sup>1</sup> The petition requested that EPA expedite resolution of this matter and respond within sixty days.<sup>2</sup>

On March 7, 2012, the Council received a letter from EPA Region III acknowledging receipt of the Council’s petition. EPA Region III also followed up with a voicemail indicating that it was still reviewing the petition and deciding what action, if any, to take. The Council, receiving no response from EPA by August 28, 2012, filed a supplement to its petition of February 16, 2012. In the supplement, the Council noted that over six months had elapsed since its initial petition. The August 28, 2012, supplement requested that EPA take action within thirty days, by September 27, 2012.

As of the date of this notice, EPA has neither responded to the Council’s supplement nor taken steps to address PA DEP’s failures under its SIP and the CAA, which the Council brought to EPA’s attention in its petition and supplement of February 16, 2012 and August 28, 2012, respectively. For the reasons provided below, should EPA fail to respond to this notice within sixty days, the Council will initiate litigation in a U.S. District Court pursuant to 42 U.S.C. § 7604 to compel a response from EPA, in accordance with the APA and EPA’s statutory duties.

### **EPA’s Unreasonably Delayed Response**

EPA’s failure to respond to the Council’s February 16, 2012, petition calling attention to PA DEP’s failure to meet basic CAA requirements constitutes unreasonable delay. Pursuant to APA § 553(e), “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”<sup>3</sup> (“APA Petition”). “With due regard for the convenience and necessity of the parties . . . and within a reasonable time, each agency shall proceed to conclude a matter presented to it,” including an APA Petition.<sup>4</sup> If an agency fails to respond within a “reasonable time,” an aggrieved party may seek judicial review to “compel agency action unlawfully withheld or unreasonably delayed.”<sup>5</sup>

When assessing whether agency action has been “unreasonably delayed” under 5 U.S.C. § 706(1), the court will consider (1) “the length of time that has elapsed since the agency came under a duty to act,” (2) “the context of the statute authorizing the agency’s action,” (3) “the consequences of the agency’s delay,” and (4) “any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.”<sup>6</sup>

#### (1) Length of Time

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<sup>1</sup> 42 U.S.C. § 7401(b)(1) (2006).

<sup>2</sup> In accordance with the provisions of the APA. See 5 U.S.C. §§ 553(e), 555(b), 706(1) (2006) (discussed under “Background” below).

<sup>3</sup> 5 U.S.C. § 553(e) (2006).

<sup>4</sup> 5 U.S.C. § 555(b) (2006).

<sup>5</sup> 5 U.S.C. § 706(1) (2006).

<sup>6</sup> *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998).

In its original petition dated February 16, 2012, the Council stated that it would consider the EPA's failure to make the petitioned findings within sixty days unreasonable. Sixty days was a reasonable timeline, given the negative public health effects of PA DEP's continued failure to correctly administer its SIP and Title V permitting program. In the intervening year, EPA has provided only a cursory acknowledgement of the February 16, 2012 petition, and has taken no action requested in the petition.

As a result of EPA's failure to act on the petitioned actions, PA DEP has continued to improperly carry out its SIP and disregard law and longstanding EPA practice, leading to continued health dangers to the citizens of Pennsylvania. As of the date of this Notice of Intent, it is clear that Pennsylvania continues its failure to implement its SIP with regard to the permitting of stationary sources in nonattainment areas in accordance with 42 U.S.C. §§ 7502(c)(7) and 7503 under Title I, Part D of the CAA. PA DEP also continues its failure to appropriately permit oil and gas operations consistent with the definitions of stationary source and major source as applied under the Title V permitting program.

Contrary to legal requirements under the CAA, PA DEP claims that it treats all properties located within a quarter mile of each other as contiguous or adjacent properties on a *per se* basis, and analyzes properties that are beyond this quarter mile range on a case-by-case basis.<sup>7</sup> However, it is apparent that PA DEP is now using this quarter-mile range as a *per se* rule.<sup>8</sup> For example, PA DEP did not aggregate the Central Compressor Station with other properties commonly owned by Williams Field Services because the Central Compressor Station "will not be located within a quarter of a mile of another air emissions source" under their control.<sup>9</sup> As the EPA has made clear, the quarter-mile limit is not a *per se* rule, and any single source determination should be conducted on a case-by-case basis, taking into account the totality of the circumstances.

## (2) EPA's Statutory Authorization

The actions for which the Council petitioned are firmly within EPA's statutory authority under the CAA. The Administrator is authorized to make a finding that a state is failing to implement its SIP when the Administrator "finds that any requirement of an approved plan" required under Title I, Part D of the CAA, pertaining to nonattainment areas, is not being implemented.<sup>10</sup> Further, the Administrator is authorized to make a finding of failure to implement any plan required under Subchapter 1 of the CAA.<sup>11</sup> The Administrator is also authorized to make a determination that a permitting authority is not adequately administering and enforcing its permitting program, or a portion thereof.<sup>12</sup> In making a finding of failure to implement SIP requirements or a finding of failure to adequately administer or enforce under Title V, the Administrator must impose sanctions against the state that is subject of such findings.<sup>13</sup>

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<sup>7</sup> See PA DEP'T ENVTL. PROT., RESPONSE TO PUBLIC TESTIMONY RECEIVED AT PUBLIC HEARING ON AUGUST 28, 2012 5 (Jan. 4, 2012) (responding to comments concerning the approval of the Central Compressor Station run by Williams Field Services Co., LLC).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See 42 U.S.C. § 7509(a)(4) (2006).

<sup>11</sup> See 42 U.S.C. § 7410(m) (2006).

<sup>12</sup> See 42 U.S.C. § 7661a(i) (1990).

<sup>13</sup> See 42 U.S.C. §§ 7509(a)(4), 7661a(i); See also 40 C.F.R. § 52.31 (1997).

Thus, the Administrator has both the statutory authority and obligation to take the petitioned actions:

- Pursuant to 42 U.S.C. §§ 7410(m) and 7509(a)(4), find that PA DEP is not implementing the required SIP for Pennsylvania with regard to the permitting of stationary sources within the oil and gas sector, both inside and outside of nonattainment areas, within the Commonwealth of Pennsylvania;
- Pursuant to 42 U.S.C. § 7661a(i), determine that PA DEP is not adequately administering and enforcing its Title V permitting program with regard to the permitting of stationary sources within the oil and gas sector, both inside and outside of designated nonattainment areas, within the Commonwealth of Pennsylvania; and
- Apply the sanctions set forth in 42 U.S.C. § 7509(b) against the Commonwealth of Pennsylvania in accordance with requirements of 42 U.S.C. §§ 7410(m), 7509(a)(4) and 7661a(i) to:
  - Withhold CAA § 105 grant funding from Pennsylvania, as authorized by 42 U.S.C. § 7509(a)(4), unless and until Pennsylvania rectifies both its failure to implement its SIP and failure to adequately administer and enforce its Title V permitting program.
  - Partially withdraw Title V permitting program approval from Pennsylvania with regard to the permitting of oil and gas operations subject to Title V or improperly permitted as minor sources, and promulgate, administer, and enforce a Federal Title V permitting program as authorized by 40 C.F.R. §§ 70.10(b)(2)(ii) and (iii).

### (3) Consequences of EPA's Delay

EPA's inaction represents a continuing failure to properly regulate emissions of volatile organic compounds ("VOCs"), nitrogen oxide ("NO<sub>x</sub>"), particulates ("PM"), and hazardous air pollutants ("HAPs"). The pernicious emissions of VOCs and NO<sub>x</sub> inevitably mix with air and sunlight to produce ground-level ozone, which causes a variety of respiratory problems. The emission of HAPs is linked to elevated levels of cancer and neurological health issues. Complaints from citizens living near natural gas operations range from respiratory infections, headaches, neurological impairment, nausea, and skin rashes, to more serious issues including; miscarriages, tumors, benzene poisoning, and cancer.<sup>14</sup>

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<sup>14</sup> See generally Aviva Litovitz et al., *Estimation of Regional Air-Quality Damages from Marcellus Shale Natural Gas Extraction in Pennsylvania*, 8 *Envtl. Research Letters* (2013), [http://iopscience.iop.org/1748-9326/8/1/014017/pdf/1748-9326\\_8\\_1\\_014017.pdf](http://iopscience.iop.org/1748-9326/8/1/014017/pdf/1748-9326_8_1_014017.pdf) (evaluating the economic and health damages created from Marcellus Shale natural gas extraction).

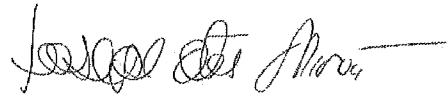
(4) Administrative Pleas

EPA has provided no indication of administrative errors, inconvenience, or practical difficulties in fulfilling these legislative mandates that would provide a reasonable justification for its delayed action.

**Conclusion**

For the above stated reasons, EPA's response to the Council's February 16, 2012, petition has been unreasonably delayed. Should EPA not respond to this notice *within sixty days*, the Council will initiate litigation in a U.S. District Court pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a), based on a claim of unreasonable delay under the Administrative Procedure Act, 5 U.S.C. § 706(1).

Sincerely,



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Joseph Otis Minott, Esq.

cc: Shawn M. Garvin, Regional Administrator, U.S. Environmental Protection Agency,  
Region III  
Chris Abruzzo, Acting Secretary, Pennsylvania Department of Environmental Protection  
Kathleen G. Kane, Attorney General, Commonwealth of Pennsylvania