

Law Office of Kathryn M. Amirpashaie, PLC
7556 Blanford Court, Alexandria, Virginia 22315

Kathryn M. Amirpashaie

Telephone: 703.851.9111
E-Mail: kmalawoffice@gmail.com

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VIA CERTIFIED MAIL

Administrator Gina McCarthy
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Notice of Intent to Sue under the Federal Clean Air Act

Dear Administrator Gina McCarthy:

This letter provides notice that the Sierra Club intends to file a citizen suit against the United States Environmental Protection Agency ("EPA") and the Administrator of the EPA, for "failure of the Administrator 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. § 7410(k)(1)(B), the Administrator has a nondiscretionary duty to issue a finding of failure to submit nonattainment area state implementation plan (SIP) submittals, and publish notice of that action in the Federal Register no later than 6 months after the date by which a state is required to submit a nonattainment SIP for the primary national ambient air quality standard ("NAAQS") for sulfur dioxide ("SO₂"), as revised on June 2, 2010. This duty is required for the 14 states containing nonattainment areas listed in Table 1 of this letter who have failed to submit nonattainment SIPs to EPA.¹ As explained in more detail below, EPA has failed to perform this mandatory duty. This notice is provided pursuant to 42 U.S.C. § 7604(b).

¹ Specifically: Arizona, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Montana, New Hampshire, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

I. Failure to Make Finding of Failure to Submit

Under Clean Air Act section 110, EPA is required to determine whether a state implementation plan submittal is administratively complete and meets established minimum criteria within a statutorily mandated timeframe. *See* 42 U.S.C. § 7410(k)(1)(B). Specifically, the Administrator must make this determination within 60 days of receipt of a plan or plan revision from a state. *Id.* Where a state fails to submit a required state implementation plan, the minimum criteria cannot have been met and EPA must make a determination stating so within six months of the submittal due date. *Id.* This is commonly referred to as a finding of failure to submit. A finding of failure to submit a required plan then triggers an obligation for EPA to promulgate a Federal implementation plan (“FIP”) “at any time within 2 years after the Administrator finds that a State has failed to make a required submission.” 42 U.S.C. 7410(c)(1)(A). As explained below, EPA has violated its mandatory duty to make a finding of failure to submit nonattainment SIPs for the 2010 SO₂ NAAQS with regard to areas in 14 states identified in Table 1 of this letter.

On June 2, 2010, EPA promulgated a revision of the primary NAAQS for SO₂, issuing a new one-hour standard set at 75 parts per billion (ppb). Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010). Section 107(d)(1)(B) of the CAA provides that upon promulgation or revision of a NAAQS, the Administrator shall promulgate designations of all areas (or portions thereof) as expeditiously as practicable, but in no case later than two years from the date of promulgation of the new or revised NAAQS. 42 U.S.C. § 7407(d)(1)(B)(i). On August 3, 2012, EPA announced in the Federal Register that it was using its authority under section 107(d)(1)(B)(i) of the Act to extend by one year the deadline for promulgating initial area designations for the June 2010 SO₂ NAAQS. Extension of Deadline for Promulgating Designations for the 2010 Primary Sulfur Dioxide National Ambient Air Quality Standard, 77 Fed. Reg. 46,295 (August 3, 2012).

Subsequently, on August 5, 2013, EPA published initial nonattainment designations for the 2010 SO₂ standard for areas in 16 states based solely on available ambient air quality monitoring data for the years 2009 – 2011 that showed these areas were violating the standard. Air Quality Designations for the Revised SO₂ NAAQS, 78 Fed. Reg. 47191 (August 5, 2013). These nonattainment designations became effective on October 4, 2013, *id.* at 47197, and EPA set the due date for states to submit necessary nonattainment SIPs within 18 months of the effective date, i.e. no later than April 6, 2015. *Id.* at 47193. Yet, as of the date of this letter, the states in Table 1 have failed to submit nonattainment SIPs for their designated nonattainment areas.

State	Area Name	Deadline	Submittal Date
Arizona	Hayden	04/06/2015	
Arizona	Miami	04/06/2015	
Illinois	Lemont	04/06/2015	
Illinois	Pekin	04/06/2015	
Indiana	Indianapolis	04/06/2015	
Indiana	Morgan County	04/06/2015	
Indiana	Southwest Indiana	04/06/2015	
Indiana	Terre Haute	04/06/2015	
Iowa	Muscatine	04/06/2015	
Kentucky	Campbell-Clermont Counties	04/06/2015	
Kentucky	Jefferson County	04/06/2015	
Louisiana	St. Bernard Parish	04/06/2015	
Michigan	Detroit	04/06/2015	
Montana	Billings	04/06/2015	
New Hampshire	Central New Hampshire	04/06/2015	
Ohio	Campbell-Clermont Counties	04/06/2015	
Ohio	Lake County	04/06/2015	
Ohio	Muskingum River	04/06/2015	
Ohio	Steubenville	04/06/2015	
Pennsylvania	Allegheny	04/06/2015	
Pennsylvania	Beaver	04/06/2015	
Pennsylvania	Indiana	04/06/2015	
Pennsylvania	Warren	04/06/2015	
Tennessee	Sullivan County	04/06/2015	
West Virginia	Marshall	04/06/2015	
West Virginia	Steubenville	04/06/2015	
Wisconsin	Rhineland	04/06/2015	

Taken From: National Status of State SIP Requirements,
http://www3.epa.gov/airquality/urbanair/sipstatus/reports/so2__2010_so2_nonattainment_nsr_enbystate.html.

In light of the failure of these 14 states to submit nonattainment SIPs for the above-identified nonattainment areas, the Administrator was required by law to make findings of failure to submit no later than six months after the April 6, 2015 date by which the states were required to submit their nonattainment SIPs for the 2010 SO₂ NAAQS. 42 U.S.C. 7410(k)(1)(B). On October 6, 2015, the statutory six month deadline passed, yet EPA has made no mandatory completeness determination as to whether the states identified above have met the minimum

criteria established pursuant to subparagraph (A), as required by section 110(k)(1)(B) of the Act. Clearly, without a submittal addressing the requisite nonattainment SIP elements, the minimum criteria cannot be met. Accordingly, EPA was required to issue a finding of failure to submit as to each of the states above. Because it failed to do so, EPA is in violation of its nondiscretionary duty under 42 U.S.C. 7410(k)(1)(B) to make a finding of failure to submit no later than six months after the date by which these states were required to submit nonattainment SIPs for the 2010 SO₂ NAAQS. Accordingly, the Sierra Club intends to commence a civil action to enforce this nondiscretionary duty as to each of the states identified above, unless EPA has fully performed these duties within 60 days of the postmark date of this letter.

II. Citizens May Sue EPA for Failure to Timely Make a Finding of Failure to Submit

Section 304(a)(2) of the CAA provides that any person can sue the Administrator of the EPA “where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.” 42 U.S.C. § 7604(a)(2). Section 110(k)(1)(B) of the CAA expressly provides that “[W]ithin 60 days of the Administrator’s receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met.” 42 U.S.C. § 7410(k)(1)(B) (emphasis added). This provision imposes a mandatory, nondiscretionary duty upon EPA to act within six months of a missed deadline for a plan submission under this section. Accordingly, in the event that the Administrator fails to perform this nondiscretionary duty, citizens may bring suit to compel such action.

III. Sierra Club Intends to File a Citizen Suit

As stated above, the Administrator had six months—until October 6, 2015—to make a finding of failure to submit with regard to each of the states identified in Table 1, above. See 42 U.S.C. § 7410(k)(1)(B). As of today, October 15, 2015, the Administrator has not yet made any such finding. Therefore, the Administrator has failed to perform her nondiscretionary duty to determine whether the minimum criteria established pursuant to subparagraph (A) have been met with regard to nonattainment SIPs for the 2010 SO₂ NAAQS for each of the areas identified above in the 14 states which failed to submit and is, therefore, in violation of 42 U.S.C. § 7410(k)(1)(B).

The CAA requires citizens to provide the Administrator with 60 days notice prior to bringing an action under Section 304(a)(2). 42 U.S.C. § 7604(b)(2); see also 40 C.F.R. 54.2(a). Accordingly, Sierra Club hereby notifies EPA and the Administrator of its intent to file suit against EPA and the Administrator of the EPA, under CAA section 304(a)(2) for failing to

perform the nondiscretionary duties described above. If these violations remain unresolved at the end of the 60-day notice period, Sierra Club intends to seek the following relief:

1. An order compelling EPA and the Administrator to issue findings of failure to submit with regard to nonattainment SIPs for the 2010 SO₂ NAAQS for those areas identified in Table 1 of this letter within 60 days from the date of the order;
2. Attorneys' fees and other litigation costs; and
3. Other appropriate relief as allowed.

If you would like to discuss the matters identified in this letter or offer a proposal for resolving these issues, please contact Sierra Club attorney Zachary Fabish directly at zachary.fabish@sierraclub.org or (202) 675-7917.

Sincerely,

/s Kathryn M. Amirpashaie

Kathryn M. Amirpashaie
Law Office of Kathryn M. Amirpashaie, PLC
7556 Blanford Court
Alexandria, VA 22315
Tel.: 703.851.9111
E-mail: kmalawoffice@gmail.com
Outside Counsel for the Sierra Club

Zachary M. Fabish
The Sierra Club
50 F Street NW, Eighth Floor
Washington, DC 20009
Tel.: 202.675.7917
E-mail: zachary.fabish@sierraclub.org
Counsel for the Sierra Club