



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

**BY CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

**June 23, 2016**

Gina McCarthy  
Administrator  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N. W.  
Washington, DC 20460

**RE: Clean Air Act notice of intent to sue for failure to perform non-discretionary duty to promulgate Federal Implementation Plan for Kentucky's Good Neighbor provision requirements for the 2008 ozone NAAQS**

Dear Administrator McCarthy:

The State of New York respectfully gives notice of its intent to file suit against you in your official capacity as the Administrator of the Environmental Protection Agency (EPA) for failure to perform a non-discretionary duty under the Clean Air Act.

Pursuant to 42 U.S.C. § 7410(c)(1), EPA is required to "promulgate a Federal implementation plan [FIP] at any time within 2 years after the Administrator – (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or (B) disapproves a State implementation plan [SIP] submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan."

On March 7, 2013, EPA published notice of its disapproval of Kentucky's 2008 ozone infrastructure SIP addressing the requirements for Clean Air Act section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), i.e., the "Good Neighbor provision." *See* 78 Fed. Reg. 14,681 (Mar. 7, 2013). This rule became effective April 8, 2013. EPA therefore had a mandatory duty to promulgate a FIP for this element no later than April 8, 2015.

EPA has taken the position that the 2 year FIP “clock” for the Kentucky Good Neighbor provision did not begin to run until the Supreme Court issued its judgment in *EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014) on June 2, 2014. Assuming without admitting that EPA is correct, EPA agrees that it had a mandatory obligation to issue a FIP addressing Kentucky’s obligations under the Good Neighbor provision within two years of that date, or by June 2, 2016. *See, e.g.*, Joint Case Management Statement at 5-6, *Sierra Club v. McCarthy*, Case No. 3:15-cv-04328 (N.D. Cal., Feb. 3, 2016).

To date, EPA has failed to perform its mandatory duty to take final action to promulgate a FIP to address Kentucky’s good neighbor provision requirements for the 2008 ozone National Ambient Air Quality Standard (NAAQS). EPA’s failure to fulfill its mandatory duty harms New York because, as shown most recently in the technical support documents and associated data files for EPA’s proposed update to the Cross State Air Pollution Rule, 80 Fed. Reg. 75,706 (Dec. 3, 2015), Kentucky’s upwind emissions interfere with maintenance and/or contribute significantly to New York’s nonattainment of the 2008 ozone NAAQS.

Consequently, this letter provides notice as required under section 304 of the Act, 42 U.S.C. § 7604, and 40 C.F.R. part 54, that New York intends to file suit against you and EPA for failing to timely promulgate a FIP for Kentucky’s Good neighbor provision requirements for the 2008 ozone NAAQS. Unless EPA takes the required actions before the end of the applicable notice period, we intend to bring a suit in United States District Court under section 304 for EPA’s failure to perform the non-discretionary duties outlined in 42 U.S.C. § 7410(c)(1). The suit will seek injunctive and declaratory relief, the costs of litigation, and may seek other relief.

Sincerely,

ERIC T. SCHNEIDERMAN  
*Attorney General of New York*

By: 

MICHAEL J. MYERS  
MORGAN A. COSTELLO  
*Assistant Attorneys General*  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 776-2392  
[michael.myers@ag.ny.gov](mailto:michael.myers@ag.ny.gov)  
[morgan.costello@ag.ny.gov](mailto:morgan.costello@ag.ny.gov)