

Fri Aug 15 10:31:49 EDT 2014  
Postell-Glover.Eliska@epamail.epa.gov  
FW: CAA notice of intent to sue regarding 2008 ozone Infrastructure SIPs mandatory duty  
To: CMS.OEX@epamail.epa.gov

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**From:** Robert Ukeiley [mailto:[rukeiley@igc.org](mailto:rukeiley@igc.org)]  
**Sent:** Thursday, August 14, 2014 10:09 PM  
**To:** Mccarthy, Gina  
**Cc:** Schneeberg, Sara; Hill, Leslie (ENRD)  
**Subject:** CAA notice of intent to sue regarding 2008 ozone Infrastructure SIPs mandatory duty

Dear Administrator McCarthy:

Attached, please find a CAA notice of intent to sue regarding mandatory duties with regard to 2008 ozone Infrastructure SIP submittals. Should you have any difficulties with this file, please do not hesitate to contact me.

Respectfully submitted,

Robert Ukeiley

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255 Mountain Meadows Road

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*Counsel for Sierra Club*

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### **VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

August 15, 2014

Gina McCarthy  
Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 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 2008 ozone NAAQS infrastructure state implementation plan submittals and failure to make finding of failure to submit**

Dear Administrator McCarthy:

Pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Sierra Club is notifying you that they intend to file suit against you for "a failure of the Administrator [of the United States Environmental Protection Agency ("EPA")] to perform an[] act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act. 42 U.S.C. § 7604(a)(2). Specifically, EPA is required to take final action on 2008 ozone NAAQS infrastructure state implementation plan submittals identified below within 12 months after each was deemed administratively complete. 42 U.S.C. § 7410(k)(2) - (4). As explained below in detail, EPA has violated these mandatory duties.

Public health and welfare protection from the harmful impacts of ground-level ozone, often referred to as smog, will be closer to the protection envisioned by Congress once EPA remedies this violation of its mandatory duties. Ozone has numerous harmful effects on human respiratory systems which include inducing asthma attacks in asthmatics and aggravating chronic lung diseases like emphysema and bronchitis. EPA, Smog—Who Does it Hurt?, 2-3 (available at <http://www.epa.gov/air/ozonepollution/pdfs/smog.pdf>). Long-term exposure to ozone may result in the permanent scarring of lung tissue. EPA, Ozone and Your Health, U.S.

Environmental Protection Agency (available at <http://www.epa.gov/air/ozonepollution/pdfs/health.pdf>).

Ozone can be particularly harmful to adolescents as exposure to ozone can also lead to “chronic, adverse effects on lung development in children from the age of 10 to 18 years....” *See* Gauderman, W. James, et al., *The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age*, N. Engl. J. Med. 351:11, at 1057 (Sept. 9, 2004). However, the greatest harm “may occur later in life, since reduced lung function is a strong risk factor for complications and death during adulthood.” *Id.* at 1063. Moreover, ozone’s detrimental effects are not limited to human health. Ozone also interferes with the ability of vegetation to properly function, damaging commercial crops and natural ecosystems alike. *See* 62 Fed. Reg. 38855, 38875 (July 18, 1997). Thus, it is imperative that EPA remedy its failure to perform its mandatory duty in order to strengthen protection of the public’s health and welfare against ozone.

On March 27, 2008, EPA promulgated an 8-hour national ambient air quality standard (“NAAQS”) for ozone. 73 Fed. Reg. 16,436 (March 27, 2008). The Clean Air Act requires states to submit state implementation plans that provide for the “implementation, maintenance, and enforcement” of a new or revised NAAQS within three years of the standard’s promulgation. 42 U.S.C. § 7410(a)(1). These are known as “infrastructure” state implementation plans. States were required to submit these 2008 ozone NAAQS infrastructure SIPs by no later than March 27, 2011.

Under the Clean Air Act, EPA is required to determine whether a state implementation plan (SIP) submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B). If a state does submit a SIP submittal and six months after that submittal, EPA has not made a completeness finding and has not found the submittal to be incomplete, the submittal is deemed administratively complete by operation of law. *Id.* EPA must take final action on an administratively complete submittal by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of the completeness finding. 42 U.S.C. §§ 7410(k)(2) and (4).

## **I. FAILURE TO TAKE FINAL ACTION**

EPA has failed to take final action on Iowa’s infrastructure state implementation plan submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(A) – (C), (D)(i)(II), (D)(ii), (E) – (H), (J) – (M) elements. By no later than July 17, 2013, either EPA or operation of law deemed Iowa’s state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2) (A) – (C), (D)(i)(II), (D)(ii), (E) – (H), (J) – (M) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Iowa (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/ia\\_infrabypoll.html#x110\\_a\\_2\\_ozone\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/ia_infrabypoll.html#x110_a_2_ozone_2008_) (last viewed July 14, 2014)). Under the Clean Air Act, EPA is required to take final action on Iowa’s submittal that addresses these infrastructure requirements by approving in full, disapproving in full, or approving in part and disapproving in part by July 17, 2014. *See* 42 U.S.C. § 7410(k)(2) - (4). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on Montana's infrastructure state implementation plan submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(A) – (C), (D)(i)(II), (D)(ii), (E) – (H), (J) – (M) elements. By no later than July 8, 2013, either EPA or operation of law deemed Montana's state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(A) – (C), (D)(i)(II), (D)(ii), (E) – (H), (J) – (M) elements (A) – (H), (J)-(M) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Montana (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/mt\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/mt_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed July 14, 2014)). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than July 8, 2014. *See* 42 U.S.C. § 7410(k)(2) - (4). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on Nebraska's infrastructure state implementation plan submittal for the 2008 ozone 8-hour NAAQS. By no later than August 11, 2013, either EPA or operation of law deemed Nebraska's state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(A) – (H), (J)-(M) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Nebraska (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/ne\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/ne_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed July 14, 2014)). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than August 11, 2014. *See* 42 U.S.C. § 7410(k)(2) - (4). EPA has failed to do so in violation of its mandatory duty.

EPA has failed to take final action on Utah's infrastructure state implementation plan submittal for the 2008 ozone 8-hour NAAQS. By no later than July 31, 2013, either EPA or operation of law deemed Utah's state implementation plan submittal that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(A) – (H), (J)-(M) administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Utah (available at [http://www.epa.gov/air/urbanair/sipstatus/reports/ut\\_infrabypoll.html#x110\\_a\\_\\_2\\_\\_ozone\\_\\_2008\\_](http://www.epa.gov/air/urbanair/sipstatus/reports/ut_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed July 14, 2014)). Under the Clean Air Act, EPA is required to take final action on this submittal by approving in full, disapproving in full, or approving in part and disapproving in part by no later than July 31, 2014. *See* 42 U.S.C. § 7410(k)(2) - (4). EPA has failed to do so in violation of its mandatory duty.

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

Sierra Club  
85 Second St. 2<sup>nd</sup> Floor  
San Francisco, CA 94105  
Phone: (415) 977-5500

While EPA regulations require this information, please direct all correspondences and communications regarding this matter to the undersigned counsel.

Administrator Gina McCarthy

8/15/2014

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Sierra Club and their counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting undersigned counsel to resolve this matter. If we do not hear from EPA in 60 days, however, we will have to assume that you are not interested in settling this matter and file or amend a complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Ukeiley". The signature is written in a cursive, flowing style.

Robert Ukeiley  
Counsel for Sierra Club