



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**

October 26, 2017

Scott Pruitt
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 Plans for Good Neighbor provision requirements for the 2008 ozone NAAQS

Dear Administrator Pruitt:

The State of New York respectfully requests that the Environmental Protection Agency (EPA) take immediate steps to remedy its breach of an absolute duty under the Clean Air Act (the Act) to promulgate federal implementation plans (FIPs) that fully address the interstate transport of pollution from sources in states upwind of New York, specifically sources in Illinois, Michigan, Pennsylvania, Virginia, and West Virginia, that contribute significantly to nonattainment in, or interfere with maintenance by, New York with the 2008 ozone national ambient air quality standards (NAAQS). EPA's failure to promulgate FIPs that fully address interstate transport of pollution from sources in those upwind states violates the Clean Air Act and harms the health and welfare of New York's citizens. Therefore, unless EPA promptly remedies this failure, at the expiration of the required notice period New York intends to file suit against you in your official capacity as the Administrator of the EPA and against EPA for failure to perform a non-discretionary duty under the Clean Air Act.

Background

Under the cooperative federalism framework of the Clean Air Act, to protect public health and welfare, both EPA and the states are required to work together to achieve healthy air

quality throughout the country. To promote this, the Act requires EPA to establish and periodically revise NAAQS, which establish maximum allowable ambient air concentrations for certain pollutants. 42 U.S.C. §§ 7408-7409. States are then primarily responsible for ensuring that their air quality meets the NAAQS. *Id.* § 7407(a).

Ground-level ozone is not emitted directly into the air, but is a secondary air pollutant that forms when other atmospheric pollutants, known as ozone “precursors,” such as nitrogen oxides (NO_x) and volatile organic compounds (VOCs), react in the presence of sunlight. 80 Fed. Reg. 65,292, 65,299 (Oct. 26, 2015). EPA has found significant negative health effects in individuals exposed to elevated levels of ozone, including coughing, throat irritation, lung tissue damage, and aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema. *Id.* at 65,302-11. Exposure to ozone has also been linked to premature mortality. *Id.* Some subpopulations are particularly at risk from exposure to ozone pollution, including children, the elderly, and those with existing lung diseases, such as asthma. *Id.*

EPA promulgated a revised NAAQS for ozone on March 12, 2008, 73 Fed. Reg. 16436 (Mar. 27, 2008) (2008 ozone NAAQS). The formation and transport of ozone occurs on a regional scale (i.e., hundreds of miles) over much of the eastern United States. EPA has for decades known of the regional nature of the ground-level ozone air quality problem, and that pollution from sources located in multiple upwind states contributes to downwind states’ problems attaining and maintaining the ozone NAAQS, with those sources in upwind states routinely contributing to multiple downwind air quality problems in varying amounts. Thus, EPA knows that downwind states cannot on their own comply with the ozone NAAQS, and that reducing ozone concentrations in downwind states such as New York requires a reduction in what EPA calls the “interstate transport” of ozone precursors in upwind states.

The Clean Air Act requires each state to submit a state implementation plan (SIP) for every promulgation or revision of a NAAQS, within three years of that standard’s promulgation or revision, that provides for the “implementation, maintenance, and enforcement” of the standard. 42 U.S.C. § 7410(a)(1). These plans are often referred to as “Infrastructure” SIPs. An Infrastructure SIP must meet the requirements listed under 42 U.S.C. § 7410(a)(2), including the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(I), referred to as the Good Neighbor Provision. The Good Neighbor Provision requires that each state’s Infrastructure SIP contain adequate provisions to prohibit emissions that will significantly contribute to nonattainment of a NAAQS, or interfere with maintenance of a NAAQS, in a downwind state. Section 110(c)(1) of the Act, 42 U.S.C. 7410(c)(1), requires EPA to promulgate a FIP if EPA disapproves the Good Neighbor elements of a state’s SIP. Section 110(c)(1) requires EPA to promulgate FIPs to satisfy the Good Neighbor Provision obligation within two years of disapproving or issuing a finding of failure to submit a state’s SIP. EPA’s absolute statutory duty to promulgate FIPs within two years was recently recognized by the United States Supreme Court in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014) (“*Homer City*”).

Because of the regional nature of ozone pollution, EPA has in the last two decades promulgated four federal rules to address the regional transport of ozone pursuant to the Good Neighbor Provision. The latest rule, the Cross-State Air Pollution Rule Update (CSAPR Update), which addresses interstate transport of ozone pollution with respect to the 2008 ozone NAAQS,

81 Fed. Reg. 74,504 (Oct. 26, 2016) (effective Dec. 27, 2016), did not completely fulfill EPA's outstanding obligation under the Act to prohibit interstate transport of air pollution that significantly contributes to nonattainment or interferes with maintenance of the NAAQS in downwind states. *Id.* at 74,506 ("The FIPs being promulgated partially address the EPA's outstanding CAA obligations to prohibit interstate transport of air pollution which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to the 2008 ozone NAAQS."); *see also id.* at 74-521-22.

EPA Has Failed to Perform a Non-Discretionary Duty to the Detriment of Downwind States Such as New York

On July 13, 2015, EPA published in the Federal Register a finding that the Good Neighbor elements of the SIPs for 24 states, including several states upwind of New York (Illinois, Michigan, Pennsylvania, Virginia, and West Virginia), failed to satisfy the Clean Air Act with respect to the 2008 ozone NAAQS. *See* 80 Fed. Reg. 39,961 (July 13, 2015). The effective date of that final action was August 12, 2015. Thus, EPA's finding triggered a two-year deadline for the agency to promulgate FIPs to address the Good Neighbor Provision requirements for those states by August 12, 2017. *See Homer City*, 134 S. Ct. at 1600.

To date, EPA has failed to promulgate FIPs that fully address the interstate transport of pollution from emission sources located in those states that contribute significantly to nonattainment in, or interferes with maintenance by, New York of the 2008 ozone NAAQS. In such FIPs, EPA is required to identify the sources of air pollution in those upwind states that are significantly contributing to nonattainment or interfering with maintenance of the ozone NAAQS in New York and to establish the requisite level of pollution abatement in those states to address interstate pollution transport. Thus, EPA is in violation of its mandatory duty set forth in 42 U.S.C. § 7410(c)(1).

EPA modeling for the CSAPR Update shows that the interstate transport of air pollution from emission sources in Illinois, Michigan, Pennsylvania, Virginia, and West Virginia, as well as other states upwind from New York, contribute significantly to violations of the ozone NAAQS in the New York City metropolitan area. *Id.* at 74,538. EPA has determined that, even after implementation of the emission reductions measures required by the CSAPR Update, downwind receptors located in Suffolk County, New York (Long Island) and Richmond County, New York (Staten Island) will continue to have problems attaining the 2008 ozone NAAQS in 2017. *Ozone Transport Policy Analysis Final Rule Technical Support Document for the CSAPR Update*, Docket ID No. EPA-HQ-OAR-2015-0500 (Aug. 2016).¹ EPA has further determined that emissions from sources in Illinois, Michigan, Pennsylvania, Virginia, and West Virginia are expected to continue to exceed the threshold amount that EPA considers to significantly interfere with maintenance of the NAAQS at those downwind receptors. *Id.*

EPA's failure to fully address requirements under the Good Neighbor Provision for those states is a clear breach of EPA's statutory duty and harms the public health and welfare of New

¹ Available at https://www.epa.gov/sites/production/files/2017-05/documents/ozone_transport_policy_analysis_final_rule_tsd.pdf.

York's citizens. New York has a sovereign duty and responsibility to protect the health and welfare of its citizens and the quality of its environment. Both short-term and prolonged exposures to ambient ozone have been linked to a number of adverse health effects, including reduced lung function and increased asthma attacks. As many as 12.7 million New Yorkers continue to breathe unhealthy air despite New York's progressive air quality regulations. The higher concentrations of ozone in the New York City metropolitan area from transported ozone will cause a greater number of New York citizens to be exposed to higher pollutant levels for a longer period of time, meaning more harmful health impacts to those citizens. Thus, without an effective solution to the ozone transport issue, public health and welfare in New York remains at risk.

EPA's failure to comply with its non-discretionary duty also places unfair economic and administrative burdens on downwind states like New York. New York is required, subject to punitive consequences, to timely meet its attainment obligations under the Act. Pursuant to a SIP Requirements Rule for the 2008 ozone NAAQS, New York is required to attain the NAAQS of 0.075 parts per million by a statutory deadline of July 20, 2018. See 80 Fed. Reg. 12,264 (Mar. 6, 2015). New York has some of the strictest air quality regulations in the country and pollutants, such as NO_x and VOCs, which cause the formation of ground-level ozone, are well controlled. Statewide emission rates of NO_x and VOCs are among the lowest in the country. Notwithstanding New York's best efforts to comply with the Act, the New York City metropolitan area has struggled for years to attain the ozone NAAQS. EPA air quality modeling demonstrates that emissions from sources in upwind states such as Illinois, Michigan, Pennsylvania, Virginia, and West Virginia are significantly contributing to New York's ozone problem. 81 Fed. Reg. at 74,538-39. Thus, New York needs EPA to fully address interstate transport from these and other states upwind from New York, to meet its ozone NAAQS requirements under the Act.

In the absence of additional emission reductions from sources within those upwind states, the New York State Department of Environmental Conservation must promulgate new, more stringent control measures for already well-controlled local sources of ozone precursors such as NO_x and VOCs. As EPA recognized in the CSAPR Update, requiring downwind areas to plan for attainment and maintenance before requiring upwind reductions is contrary to the Act's statutory structure and places an "inequitable burden" on downwind areas. 81 Fed. Reg. at 74516 ("If states or the EPA waited until Moderate area attainment plans were due before requiring upwind reductions, then these upwind reductions would be delayed several years beyond the mandatory CAA schedule. Further, the CAA implementation timeline implies that requiring local reductions first would place an inequitable burden on downwind areas by requiring them to plan for attainment and maintenance without any upwind actions."); *see also North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008) (EPA must coordinate interstate transport compliance deadlines with downwind attainment deadlines).

To date, EPA has failed to perform its mandatory duty to take final action to promulgate FIPs to fully address the Good Neighbor Provision obligations for the 2008 ozone NAAQS for Illinois, Michigan, Pennsylvania, Virginia, and West Virginia. EPA's failure to fulfill its mandatory duty violates the Clean Air Act and harms New York and its citizens. 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 FIPs for those states that fully address the Good Neighbor obligations 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 of the Act for EPA's failure to perform the non-discretionary duties mandated by 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,

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