



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499

The Honorable Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

January 2, 2018

RE: Notice of Intent to Sue Pursuant to 42 U.S.C. § 7604 for Failure to Perform Non-Discretionary Duty to Approve or Disapprove Delaware's Clean Air Act Section 126 Petition Regarding the Harrison Power Station, Located in Harrison County, West Virginia

Dear Administrator Pruitt:

The State of Delaware, Department of Natural Resources and Environmental Control respectfully gives notice of its intent to file suit against you pursuant to Section 304 of the Clean Air Act (42 U.S.C. § 7604) 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 (CAA).

On August 8, 2016, EPA received Delaware's Section 126 Petition regarding the Harrison Power Station, which Petition requires that EPA make a finding whether the Harrison Power Station, located in Harrison County, West Virginia, is operating in a manner that emits air pollution in violation of the provisions of Section 110(a)(2)(D)(i) of the CAA. Specifically, Delaware's Petition seeks a determination that the Harrison Power Station's electric generating units are emitting air pollutants in violation of the provisions of Section 110(a)(2)(D)(i) of the CAA with respect to the 2008 0.075 ppm ozone National Ambient Air Quality Standard (NAAQS) and the 2015 8-hour 0.070 ppm ozone NAAQS.

Congress recognized, through enactment of Section 126 of the CAA (42 U.S.C. § 7426), that interstate air pollution is a serious problem for downwind states that would otherwise have little authority to require sources of harmful air emissions in upwind states to reduce their emissions. Section 126 provides downwind states a mechanism to reach upwind sources by authorizing states and political subdivisions to petition the EPA “Administrator for a finding that any major source or group of sources emits or would emit any air pollutant in violation of the prohibition of section [7410(a)(2)(D)(i)]¹ of [the CAA] or this section.” If the Administrator makes such a finding, the Administrator then has the authority under Section 126(c) to require the upwind source to modify its operations or cease operating to bring about compliance.

Section 126(b) imposes a non-discretionary duty on the Administrator and EPA to act on such petitions within 60 days of receipt: “Within 60 days after receipt of any petition under [subsection 126(b) of the CAA] and after public hearing, the Administrator shall make such finding or deny the petition.” EPA, however, has failed to perform its non-discretionary duty to act on Delaware’s Section 126 Petition regarding Harrison Power Station within the required 60 days. Instead, as is EPA’s customary practice, on September 27, 2016, EPA, relying on CAA Section 307(d)(10) (42 U.S.C. 7607(d)(10)), granted itself a 6-month deferral to act on Delaware’s Section 126 Petition concerning Harrison Power Station.² (*See* 81 FR 66189). This 6-month deferral has since expired, and EPA has failed to take any action on Delaware’s Section 126 Petition regarding Harrison Power Station.³

Despite EPA’s clear statutory obligation to act on Delaware’s Section 126 Petition regarding Harrison Power Station within 60 days of receipt, EPA has not acted on the Petition, other than to grant itself the 6-month deferral. Consequently, the State of Delaware is writing to provide notice that it intends to file suit against Administrator Pruitt and the EPA for failing to perform their non-discretionary duty to timely act on Delaware’s Section 126 Petition regarding Harrison Power Station.

¹ Delaware notes that the cross-reference to section 7410(a)(2)(D)(ii) in Section 126(b) has been determined to be a scrivener’s error and the correct cross-reference in this provision is to section 7410(a)(2)(D)(i). *GenOn REMA, LLC v. U.S. E.P.A.*, 722 F.3d 513, 517 n. 3 (3d Cir. 2013) (citing *Appalachian Power Co. v. E.P.A.*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001)).

² Delaware is presently challenging EPA’s application of 42 U.S.C. § 7607(d)(10) to Section 126 Petitions in the Circuit Court of Appeals for the Third Circuit (C.A. No. 17-1644) and the D.C. Circuit Court of Appeals (C.A. No.:17-1099). Delaware maintains that EPA’s practice of granting itself a 6-month deferral is contrary to law, because § 7607(d)(10) only applies where EPA has first issued a proposed rule. EPA, however, has not issued a proposed rule or finding in response to Delaware’s Section 126 Petitions, and therefore, EPA lacks the statutory authority to defer acting on Delaware’s Section 126 Petition for 6-months.

³ See Docket ID No. EPA-HQ-OAR-2016-0509.

This letter provides notice, as required by Section 304 of the CAA and 40 C.F.R. Part 54. In keeping with the requirements of the federal regulations, you are hereby notified that the names and addresses of the parties giving the notice are as shown below.

Unless EPA takes the required actions before the end of the applicable notice period, the State of Delaware intends to bring suit against Administrator Pruitt and EPA in the United States District Court for the District of Delaware pursuant to Section 304 of the CAA for Administrator Pruitt's and EPA's failure to perform their non-discretionary duties outlined in Section 126.

Regards,

**STATE OF DELAWARE,
DEPARTMENT OF JUSTICE**



William J. Kassab (DE Bar Id. No. 5914)
Deputy Attorney General
Delaware Department of Justice
820 North French Street, 6th Floor
Wilmington, Delaware 19801
*Counsel for State of Delaware,
Department of Natural Resources &
Environmental Control*

Cc: The Honorable Jeff Sessions
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

**Continued on following page.*

The Honorable Jim Justice
Governor, State of West Virginia
State Capitol
1900 Kanawha Blvd. E
Charleston, WV 25305

William F. Durham,
Director, Division of Air Quality
West Virginia Department of Environmental Protection
Division of Air Quality
601 57th Street SE
Charleston, WV 25304

Cosmo Servidio
Administrator, U.S. E.P.A. Region III Office
1650 Arch Street
Mail Code: 3RA00
Philadelphia, PA 19103-2029

Correspondence Control Unit
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW.
Washington, DC 20460

Harrison Power Station
FirstEnergy Solutions Corp.
Registered Agent:
The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801