



January 22, 2019

*Submitted via electronic mail and
certified mail, return receipt requested*

U.S. Environmental Protection Agency
The Hon. Andrew Wheeler, Acting Administrator
1200 Pennsylvania Ave., NW, 1101A
Washington, D.C. 20460
wheeler.andrew@epa.gov

Re: 60-day Notice of Intent to File Clean Air Act Citizen Suit

Dear Acting Administrator Wheeler:

Pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, WildEarth Guardians hereby notifies you of its intent to file suit against the U.S. Environmental Protection Agency (“EPA”) over the agency’s “failure . . . to perform [an] act or duty under [the Clean Air Act] which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). As detailed below, EPA has failed make a determination on whether the Denver Metro-North Front Range Area of Colorado complied with the 2008 National Ambient Air Quality Standards (“NAAQS”) for ozone by the attainment date of July 20, 2018. 42 U.S.C. § 7511(b)(2)(A). If the aforementioned duty is not performed within 60 days, we intend to file suit in federal court to compel the EPA to act.

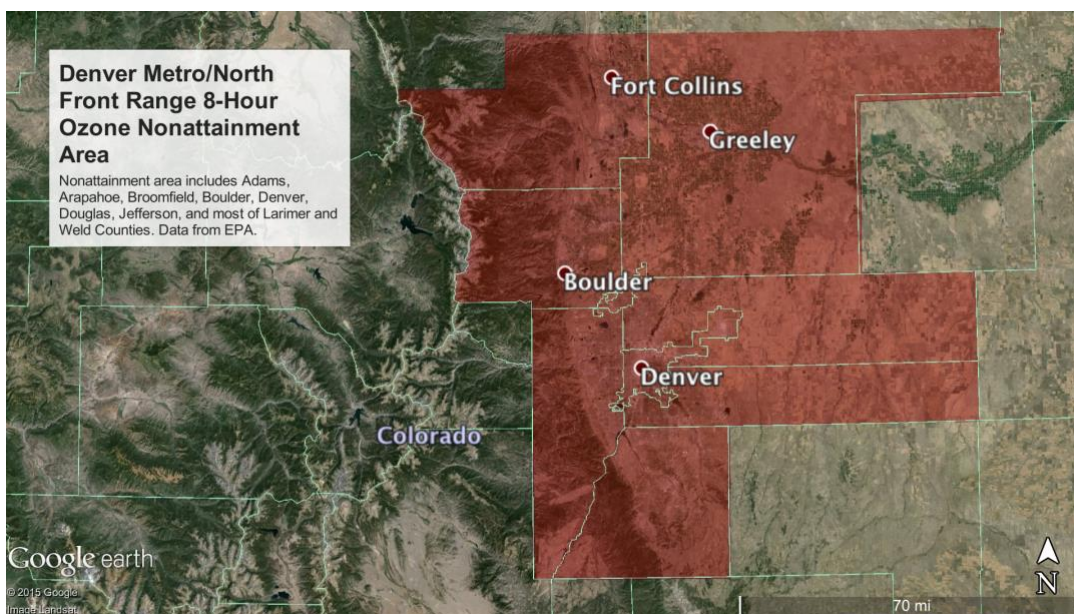
I. BACKGROUND

Congress passed the Clean Air Act in order “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b). To meet this goal, EPA is required, among other things, to set NAAQS to protect public health and welfare. *Id.* § 7409.

At issue here is the 2008 ozone NAAQS issued by EPA on March 27, 2008. EPA, NAAQS for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008).¹ Ozone, the key ingredient of smog, is a poisonous gas that is created when pollution from tailpipes, smokestacks, and oil and gas production in the form of volatile organic compounds (“VOCs”) and nitrogen oxides (“NOx”), reacts with sunlight. *See* EPA, *Ground-Level Ozone*, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics#wwh> (last visited Jan. 18, 2019). Ozone poses myriad adverse health and environmental impacts, including respiratory irritation, defoliation of trees and crops, and increased risk of premature death. *Id.*

¹ Available online at: <https://www.gpo.gov/fdsys/pkg/FR-2008-03-27/pdf/E8-5645.pdf>.

EPA originally designated the Denver Metro-North Front Range area of Colorado as in marginal² nonattainment with the 2008 ozone NAAQS, effective July 20, 2012. EPA, Air Quality Designations for the 2008 Ozone NAAQS, 77 Fed. Reg. 30,088, 30,110 (May 21, 2012).³ EPA has since reclassified the area as in moderate nonattainment with the 2008 NAAQS because of consistent ozone exceedances. *See* EPA, Reclassification of Several Areas for the 2008 Ozone NAAQS, 81 Fed. Reg. 26,697, 26,699.⁴ The current nonattainment area includes the entirety of the counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson, and portions of the counties of Larimer and Weld. *See* 40 C.F.R. § 81.306; *see also* figure below.



Denver Metro-North Front Range 8-hour Ozone NAAQS Nonattainment Area.

The 2008 NAAQS limits ozone concentrations in the air to no more than 0.075 parts per million (“ppm”) (also expressed as 75 parts per billion (“ppb”)) on an eight hour basis. 40 C.F.R. § 50.15(a).⁵ A violation occurs at a monitoring site when the three-year average of the annual fourth highest eight-hour ozone concentration exceeds 0.075 ppm, or 75 ppb. *See id.* § 50.15(b).

² Ozone nonattainment classifications initially depend on the severity of an area’s ozone violations. *See* 42 U.S.C. § 7511(a)(1). In order from lowest to highest, ozone nonattainment classifications include marginal, moderate, serious, severe, and extreme. *Id.*; *see also* EPA, Implementation of the 2008 NAAQS for Ozone: State Implementation Plan Requirements, 80 Fed. Reg. 12,264, 12,313 (Mar. 6, 2015).

³ Available online at: <https://www.govinfo.gov/content/pkg/FR-2012-05-21/pdf/2012-11618.pdf>.

⁴ Available online at: <https://www.govinfo.gov/content/pkg/FR-2016-05-04/pdf/2016-09729.pdf>.

⁵ Although EPA finalized a new ozone NAAQS in 2015, limiting concentrations to no more than 0.070 ppm over an eight hour period, *see* EPA, NAAQS for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-10-26/pdf/2015-26594.pdf>, EPA retained the 2008 standard in addition to the 2015 standard. EPA, Implementation of the 2015 NAAQS for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements, 81 Fed. Reg. 81,276, 81,278 (Nov. 17, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-11-17/pdf/2016-27333.pdf>.

II. VIOLATION OF THE CLEAN AIR ACT

The State of Colorado was required to bring the Denver Metro-North Front Range marginal nonattainment area into compliance with the 2008 ozone NAAQS within six years after the effective date of EPA's initial designation of nonattainment or by July 20, 2018. *See* 42 U.S.C. § 7511(a)(1). EPA was then required to determine whether the area attained the NAAQS within six months after July 20, 2018 or by January 20, 2019. *Id.* § 7511(b)(2)(A). EPA's determination is a nondiscretionary duty. As of the date of this letter, EPA has yet to make such a determination.

Although EPA has proposed to grant the State of Colorado a one-year extension to demonstrate attainment, *see* EPA, Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. 56,781 (Nov. 14, 2018),⁶ EPA has not finalized this rule. Proposed Rule, NAAQS: Determinations of Attainment, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone Standards, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0226-0001> (last visited Jan. 21, 2019). Thus, EPA is required to make a determination as to whether the Denver Metro-North Front Range region is continuing to violate ozone standards.

The failure of EPA to make its legally-required determination is delaying clean air for the Denver Metro-North Front Range region. If the agency finalized its determination that the area failed to attain, it would “bump up” the classification of the area from “marginal” to “moderate” as a matter of law. *See id.* § 7511(b)(2)(A)(i). This change in classification would require the State of Colorado to adopt more stringent clean air safeguards to reduce ozone pollution, to submit a plan to clean up the region's unhealthy air, and set a new deadline for the area to come into attainment with the NAAQS. In essence, EPA's delay is forcing the Denver Metro-North Front Range region to endure greater air pollution and public health risks.

III. WILDEARTH GUARDIANS INTENDS TO FILE SUIT

In accordance with the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a)(2), WildEarth Guardians intends to file suit in federal court after 60 days if the EPA has not remedied its failure to perform the aforementioned nondiscretionary duty. In keeping with the requirements under 40 C.F.R. § 54.3(a), you are hereby notified that the full name and address of the person giving the notice is WildEarth Guardians, 516 Alto St., Santa Fe, New Mexico 87501.

Guardians is an environmental nonprofit dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has thousands of members in Colorado and surrounding states who live and recreate in the Denver Metro-North Front Range Area. Guardians has a strong interest in ensuring the EPA protects the natural resources in this area, including the air quality.

⁶ Available online at: <https://www.gpo.gov/fdsys/pkg/FR-2018-11-14/pdf/2018-24816.pdf>.

Guardians would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting us to resolve this matter.

Sincerely,

A handwritten signature in cursive script that reads "Rebecca Fischer". The signature is written in black ink on a white background.

Rebecca Fischer, Climate & Energy Program Attorney
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