

**ATTORNEYS GENERAL OF THE
STATES OF NEW YORK, CONNECTICUT AND NEW JERSEY**

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

July 26, 2019

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

**Re: Notice of Intent to Sue for Failure to Perform
Nondiscretionary Duties under the Clean Air Act to Issue
Determinations of Failure to Submit State Implementation
Plans Addressing Interstate Transport of Ozone and Ozone
Precursor Air Pollution**

Dear Administrator Wheeler:

The States of New York, Connecticut, and New Jersey request that the Environmental Protection Agency (EPA) take immediate steps to remedy its violation of a nondiscretionary duty under the Clean Air Act (Act) to make findings of failure to submit state implementation plans that comply with the “Good Neighbor” provision of the Clean Air Act, section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i), with respect to the 2015 ozone national ambient air quality standards (NAAQS). More than three years have passed since EPA promulgated the 2015 ozone NAAQS on October 1, 2015, yet as of the date of this letter, the states of Maryland, Pennsylvania, and Virginia, states upwind of New York, Connecticut, and/or New Jersey with emission sources that significantly contribute to nonattainment or interference with maintenance in our states of the 2015 ozone NAAQS, have not submitted implementation plans to address interstate pollution transport from their in-state sources, as required under section 110(a)(1) of the Act. Despite those failures to submit, EPA has not made the required determinations of failure to submit, which the agency was required to do within six months of the deadline for submittal of state implementation plans, *i.e.*, by April 1, 2019, *see* 42 U.S.C. § 7410(k)(1)(B); *see also* 42 U.S.C. § 7410(c)(1)(A). Therefore the agency is in violation of the Clean Air Act for its failures to perform these nondiscretionary duties with respect to the failures to submit by these states.

Unless EPA promptly makes the required determinations, New York, Connecticut, and New Jersey (Noticing States) intend to file suit against you in your official capacity as the Administrator of the EPA and against EPA for failures to perform nondiscretionary duties under the Act at the expiration of the required 60-day notice period. See 42 U.S.C. § 7604(a)(2)&(b). Under section 304(d) of the Act, 42 U.S.C. § 7604(d), “[t]he court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.” If the Noticing States must file suit to obtain EPA’s compliance with these nondiscretionary duties, we intend to seek all available costs, including without limitation, reasonable attorneys’ fees.

Background

Under the cooperative federalism framework of the Act, 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 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.* In 2015, based on updated scientific information about the health risks of ozone at lower concentrations, EPA revised the ozone NAAQS, setting the primary and secondary standards at 70 parts per billion. 80 Fed. Reg. at 65,292.

The formation and transport of ozone occurs on a regional scale over hundreds of miles throughout 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 has long recognized that downwind states cannot on their own comply with the ozone NAAQS, and that reducing ozone concentrations in

downwind states requires a reduction in what EPA calls the “interstate transport” of ozone precursors from upwind states. 81 Fed. Reg. 74,504, 74,514 (Oct. 26, 2016).

The Clean Air Act requires each state to submit a state implementation plan (SIP) for every new and revised 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 the Good Neighbor provision. The Good Neighbor provision requires that each 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.

The Act also requires EPA to determine whether each state has submitted an administratively complete SIP, including an Infrastructure SIP, “no later than 6 months after the date, if any, by which a State is required to submit the plan or revision.” 42 U.S.C. § 7410(k)(1)(B). If a state fails to submit any required element of a SIP, that state’s plan is deemed incomplete and EPA has a non-discretionary duty to make a determination that the state failed to submit the required SIP. *Id.* This determination is known commonly as a “finding of failure to submit.” The finding of a failure to submit is critical because it starts a two-year deadline for EPA to promulgate a federal implementation plan (FIP) unless the state submits a complete and approvable plan in the meantime. *Id.* § 7410(c)(1)(A).¹

Ozone Pollution in New York, Connecticut, and New Jersey

Following EPA’s promulgation of the 2015 ozone NAAQS, EPA designated the New York-Northern New Jersey-Long Island, NY-NJ-CT metropolitan area (NY Metro Area) as a nonattainment area with a moderate classification.² This area consists of nine counties in New York, 12 counties in New Jersey and three in Connecticut. New Jersey’s remaining nine southern counties are part of another regional nonattainment area, the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE metro area (Philadelphia Metro Area) classified as marginal nonattainment.³ Connecticut’s remaining five counties are part of the Greater Connecticut nonattainment area, classified in June 2018 as marginal nonattainment.⁴

¹ See also *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014) (recognizing EPA’s nondiscretionary statutory duty to promulgate FIPs within two years).

² 83 Fed. Reg. 25,776, 25,821 (Jun. 4, 2018).

³ *Id.* at 25,819.

⁴ *Id.* at 25,794.

Air quality modeling in these nonattainment areas demonstrates that the high concentrations of ozone measured in these densely-populated regions are, in significant measure, the result of emissions from major stationary sources of NOx located outside and upwind of each state. Many of these sources operate large boilers and other units that require very tall stacks to emit the exhaust from their combustion processes. As a result of the use of these tall stacks and the high temperatures of the exiting gases, large quantities of NOx are sent high into the atmosphere. These high concentrations of NOx and subsequently formed ozone are carried by prevailing winds into the Noticing States, where they combine with ozone formed locally and other ozone precursors to cause ozone NAAQS exceedances as much as hundreds of miles from the pollution's sources.

The Noticing States have long been involved in efforts to reduce emissions from in-state sources of NOx and to mitigate the regional transport of NOx, and have cut ozone precursor emissions year after year to meet and exceed “reasonable further progress” targets mandated by 42 U.S.C. § 7511a, including by requiring in-state sources to meet a variety of stringent emissions standards and comply with NOx Reasonably Available Control Technology (RACT). The Noticing States have also implemented stringent emissions control measures related to mobile sources, and participate in the Ozone Transport Commission, which developed the NOx Budget Program. The Noticing States have also participated in multiple iterations of NOx Budget trading programs, including the 2005 Clean Air Interstate Rule (CAIR),⁵ 2011 Cross-State Air Pollution Rule (CSAPR)⁶ and 2016 CSAPR Update.⁷

EPA Has Failed to Perform Non-discretionary Duties to the Detriment of New York, Connecticut, and New Jersey

As noted above, EPA promulgated the 2015 ozone NAAQS on October 1, 2015. *See, e.g.*, 83 Fed. Reg. 62,998 (Dec. 6, 2018) (EPA implementation rule stating that the 2015 ozone NAAQS “were promulgated on October 1, 2015”). As of the date of this letter, according to EPA, Maryland, Pennsylvania, and Virginia have not submitted Infrastructure SIPs that address their Good Neighbor obligations as required under section 110(a)(2)(D) of the Act.⁸ Yet, despite the fact that more than

⁵ 70 Fed. Reg. 25,162 (May 12, 2005).

⁶ 76 Fed. Reg. 48,208 (Aug. 8, 2011).

⁷ 81 Fed. Reg. 74,504 (Oct. 26, 2016).

⁸ *See* EPA, National Status of a 110(a)(2) Ozone (2015) SIP Infrastructure Requirement, Requirement: Section 110(a)(2)(D)(i) – I Prong 1: Interstate Transport – significant contribution, available at: https://www3.epa.gov/airquality/urbanair/sipstatus/reports/x110_a_2_ozone_201

six months have passed since the October 1, 2018 deadline for SIP submittals, EPA has not issued the required findings of failure to submit for these states, which it was required to do under the statute by April 1, 2019. *See* 42 U.S.C. § 7410(k)(1)(A). Moreover, even EPA’s own modeling, which the Noticing States and others are challenging elsewhere as unduly optimistic,⁹ projects that, in 2023, pollution from each of these states will account for at least 1 percent of ambient ozone levels in part or all of the Noticing States’ nonattainment regions. Accordingly, EPA itself has concluded that each of these upwind states individually will significantly contribute to nonattainment and/or interference with maintenance of the 2015 ozone NAAQS for years to come. *See* EPA, 2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions, https://www.epa.gov/sites/production/files/2018-05/updated_2023_modeling_dvs_collective_contributions.xlsx.

EPA’s failure to fully address requirements under the Good Neighbor provision for Maryland, Pennsylvania, and Virginia is a clear breach of EPA’s statutory duty and harms the public health and welfare of millions of New York, Connecticut, and New Jersey residents. Our states have a sovereign duty and responsibility to protect the health and welfare of our residents and the quality of our environment.

EPA’s failure to comply with its non-discretionary duties also places unfair economic and administrative burdens on the Noticing States, which are required, subject to punitive consequences, to timely meet their attainment obligations under the Act. The NY Metro Area, designated by EPA as a moderate nonattainment area, has an attainment deadline of August 3, 2024. *See* EPA, Fact Sheet – Final Area Designations for the National Ambient Air Quality Standards for Ozone Established in 2015 at 7, *available at*: https://www.epa.gov/sites/production/files/2018-04/documents/placeholder_0.pdf. Attainment must be demonstrated based on air quality for three years beginning in 2021, just two years from now. The Philadelphia Metro Area and Greater Connecticut attainment deadlines are even sooner: 2021. *Id.* Certified ozone data from 2018 show numerous exceedances of the ozone standards, and ozone readings in the 2019 and 2020 seasons will likely show that, despite New Jersey and Connecticut’s success in cutting in-state emissions, those areas will still not attain by 2021 and may be reclassified (i.e. downgraded air quality rating) to moderate nonattainment status as a consequence. *See* 42 U.S.C. § 7511(b)(2).

As EPA recognized in the 2016 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 74,516. For example, EPA stated that “[i]f states or the EPA

5_section_110_a_2_d_i_-_i_prong_1_interstate_transport_-_significant_contribution_inbystate.html (last visited July 26, 2019).

⁹ *See, e.g.*, Opening Brief for State Petitioners, *New York, et al. v. EPA, et al.*, Case No. 19-1019, ECF Doc. 1783918, at 41-45 (D.C. Cir. filed Apr. 19, 2019).

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.” *Id.*; 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).

EPA’s failure to fulfill its mandatory duties as set forth above violates the Clean Air Act and harms New York, Connecticut, New Jersey, and their millions of affected residents. 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, Connecticut and New Jersey intend to file suit against you and EPA for failing to timely act. Unless EPA takes the required actions before the end of the applicable 60 day notice period, we intend to bring a suit in United States District Court under section 304(a)(2) of the Act for EPA’s failure to perform the non-discretionary duties mandated by 42 U.S.C. § 7410(k)(1)(B). The suit will seek injunctive and declaratory relief, the costs of litigation (including without limitation, reasonable attorneys’ fees), and may seek other relief.

Very truly yours,

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