

**ATTORNEYS GENERAL OF THE STATES OF NEW JERSEY, CONNECTICUT,
DELAWARE, AND NEW YORK, AND OF THE COMMONWEALTH OF
MASSACHUSETTS; AND CORPORATION COUNSEL OF THE CITY OF NEW YORK**

December 20, 2019

By Certified Mail, RRR
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Hon. Andrew R. Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

**RE: Clean Air Act Notice of Intent to Sue for Failure to Perform
Nondiscretionary Duty to Promulgate Federal Implementation Plans for the
Good Neighbor Provision Requirements for the 2008 Ozone NAAQS.**

Dear Administrator Wheeler:

The States of New Jersey, Connecticut, Delaware, and New York, the Commonwealth of Massachusetts, and the City of New York (collectively, the Noticing States) request that the Environmental Protection Agency (EPA) take immediate steps to remedy its failure to carry out its nondiscretionary duty under the Clean Air Act (the Act). Specifically, EPA must promulgate federal implementation plans (FIPs) to fully address the interstate transport of pollution from sources in upwind states, including Illinois, Indiana, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia (Upwind States), that contribute significantly to nonattainment in, or interfere with maintenance by, the Noticing States of the 2008 ozone National Ambient Air Quality Standards (NAAQS).

On October 1, 2019, the United States Court of Appeals for the D.C. Circuit vacated EPA's Cross-State Air Pollution Rule (CSAPR) Close-Out Rule because the Close-Out Rule did not fully remedy interstate transport in time for downwind states' 2021 deadline to attain the 2008 ozone NAAQS. *New York v. EPA*, 781 F. App'x 4 (D.C. Cir. 2019). The D.C. Circuit issued its mandate on November 5, 2019, yet EPA has not committed to any plan to promulgate replacement FIPs in time for the upcoming 2020 ozone season, the last season that counts towards the 2021 deadline. Time is of the essence: the 2020 ozone season begins in May, less than six months from now. EPA's failure to take immediate action will cause substantial and continuing harm to the Noticing States and the health of our residents.

The Noticing States request that EPA promptly disclose its plans to promulgate a complete FIP to replace the vacated CSAPR Close-Out Rule. New York and Connecticut already provided notice to EPA in October and November 2017 of their intent to sue over EPA's violation of its duty to promulgate FIPs that fully address interstate transport for the 2008 ozone

NAAQS. The D.C. Circuit also put EPA on notice that the Agency must quickly promulgate FIPs to comply with the court's decision and mandate in *New York*. To the extent that any further notice is required, unless EPA promptly remedies this failure, at the expiration of the required notice period the Noticing States intend to file suit against you in your official capacity as the Administrator of the EPA and against EPA for failure to perform a nondiscretionary duty under the Act. See 42 U.S.C. § 7604(a)(2) and (b). 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 under section 304(d) of the Act. 42 U.S.C. § 7604(d).

Background

Under the Act's cooperative federalism framework, to protect public health and welfare EPA and the states are required to work together to achieve healthy air quality throughout the country. 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, 42 U.S.C. § 7407(a), and for prohibiting in-state emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in any other state. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

Ground-level ozone is not emitted directly into the air; it is a secondary air pollutant formed by the atmospheric reaction of "precursor" pollutants such as nitrogen oxides and volatile organic compounds 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 ozone levels, 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. Chronic exposure to high ozone levels is linked to premature mortality. *Id.* Some subpopulations are particularly at risk from ozone exposure, notably children, the elderly, and those with existing respiratory diseases like asthma. *Id.* Based on updated scientific information about the health risks of ozone at lower concentrations, in 2008 EPA lowered the primary and secondary ozone NAAQS to 75 parts per billion (ppb). 73 Fed. Reg. 16,436 (Mar. 27, 2008).

For decades, EPA has known that formation and transport of ozone occurs on a regional scale (i.e., hundreds of miles) over much of the eastern United States. Pollution from sources located in multiple upwind states contributes to high ozone levels in downwind states. EPA has therefore determined that downwind states cannot attain the NAAQS without reducing "interstate transport" of ozone precursor pollution from upwind sources. See, e.g., 81 Fed. Reg. 74,504, 74,514 (Oct. 26, 2016).

Each state must submit a state implementation plan (SIP) within three years of EPA's promulgation or revision of a NAAQS. SIPs must provide for the "implementation, maintenance, and enforcement" of the standard, 42 U.S.C. § 7410(a)(1), by satisfying the requirements of 42 U.S.C. § 7410(a)(2). This includes the "Good Neighbor Provision" at 42 U.S.C. § 7410(a)(2)(D)(i)(I), which requires states to prohibit emissions that significantly contribute to nonattainment, or interfere with maintenance, of a NAAQS in any downwind state. The Act also requires EPA to promulgate a FIP within two years of EPA's disapproval of any state's Good Neighbor SIP, or of EPA's finding that a state failed to submit a Good Neighbor

SIP. 42 U.S.C. § 7410(c)(1); *see EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-09 (2014).

EPA's 2016 CSAPR Update Rule was the Agency's partial FIP for upwind states that had failed to satisfy their Good Neighbor obligations for the 2008 ozone NAAQS. 81 Fed. Reg. at 74,504. In the Update Rule, EPA allocated a budget of tradeable emission allowances reflecting the reductions that EPA determined sources in covered upwind states would be able to achieve through proper use of emissions controls for nitrogen oxides at power plants. For each ton of pollution emitted by an upwind plant covered by the Update, that source must have an allowance.

EPA admitted that the CSAPR Update was not a "full solution," but only a "first, partial step" and a "partial remedy" for upwind states' incomplete or missing Good Neighbor SIPs. *Id.* at 74,520, 74,522, 74,508. EPA expected that "a full resolution of upwind transport obligations" would require, *inter alia*, "further [power plant] reductions that are achievable after 2017," *id.* at 74,522, and that even after all of the Update's emission reductions were implemented, attainment and maintenance problems in downwind areas might remain. *Id.* at 74,520, 74,521-22. Because it only provided a partial remedy in the Update, EPA remained obligated to promulgate FIPs fully resolving the Good Neighbor obligations of upwind states by August 2017.¹ 80 Fed. Reg. 39,961, 39,961 (Jul. 13, 2015) (effective Aug. 12, 2015).

Noticing States' Legal Actions to Enforce EPA's Unmet Obligations

After EPA did not promulgate a complete FIP by August 2017, in January 2018, New York and Connecticut filed suit and a district court ordered EPA to promulgate a final rule by December 6, 2018. *New York v. Pruitt*, No. 18-cv-406, 2018 WL 2976018 at *3 (S.D.N.Y. June 12, 2018). After earlier conceding that the Update was an incomplete remedy, in the CSAPR Close-Out Rule adopted in December 2018, EPA reversed itself and concluded that the Update had *fully* remedied the Upwind States' Good Neighbor obligations and that nothing more remained to be done. 83 Fed. Reg. 65,878 (Dec. 21, 2018). EPA based this finding on its flawed prediction that downwind States would satisfy that standard by 2023—two years *after* the relevant statutory 2021 attainment deadline.

The Noticing States petitioned for review of the wholly deficient CSAPR Close-Out Rule, and the D.C. Circuit took the extraordinary step of granting the States' motion to expedite the appeal in order to provide meaningful relief in time for the 2020 ozone season. In back-to-back rulings, the D.C. Circuit first partially invalidated the CSAPR Update Rule insofar as it "allows upwind States to continue their significant contributions to downwind air quality problems beyond the statutory deadlines by which downwind States must demonstrate their attainment of air quality standards." *Wisconsin v. EPA*, 938 F.3d 303, 309 (D.C. Cir. 2019). The D.C. Circuit remanded the Update to EPA to modify the rule in a manner consistent with its opinion. *Id.* at 336-37. Then, on October 1, 2019, the court vacated the CSAPR Close-Out Rule

¹ EPA was obligated to promulgate a FIP fully resolving Indiana and Ohio's Good Neighbor obligations by July 15, 2018, two years after disapproving relevant portions of those states' Good Neighbor SIPs. 81 Fed. Reg. 38,957 (Jun. 15, 2016) (effective Jul. 15, 2016); *see also* 83 Fed. Reg. 65,878, 65,883 tbl. II.C-1 (Dec. 21, 2018).

because it “rests on an interpretation of the Good Neighbor Provision now rejected by this Court.” *New York v. EPA*, 781 F. App’x at 7.

EPA has announced no plans to comply with the remand in *Wisconsin*, or to remedy the vacatur in *New York*, in time for the looming 2021 attainment deadline. Notably, EPA’s Fall 2019 Unified Regulatory Agenda released after the *Wisconsin* and *New York* decisions does not list any replacement rulemaking to address interstate transport of ozone in the foreseeable future.²

Upwind Emissions Will Prevent Downwind States from Meeting their 2021 Attainment Deadlines

Without immediate action by EPA to reduce upwind emissions by next summer, the New York-Northern New Jersey-Long Island, NY-NJ-CT Nonattainment Area will not attain the 2008 NAAQS by the 2021 deadline. The NY-NJ-CT area covers nine counties in New York (including all of New York City), twelve counties in New Jersey, and three counties in Connecticut. Earlier this year, EPA re-designated this as a “serious” nonattainment area, meaning that New York, New Jersey, and Connecticut must meet a July 21, 2021, attainment deadline. 84 Fed. Reg. 44,238 (Aug. 23, 2019). Whether the states will attain by that date will be determined by 2018, 2019, and 2020 ozone season monitoring data. 83 Fed. Reg. 56,781, 56,784 (Nov. 14, 2018); 42 U.S.C. § 7511(b)(2)(A).

Air quality monitoring data for the 2018 and 2019 ozone seasons³ and transport modeling by three regulators show that the NY-NJ-CT Nonattainment Area will not meet its 2021 attainment deadline due in significant part to ozone transported from sources in the Upwind States. Modeling by the New York State Department of Environmental Conservation and the Ozone Transport Commission, submitted in comments on the Close-Out Rule, show that, without further out-of-state reductions, the NY-NJ-CT Nonattainment Area and other downwind nonattainment areas will continue to suffer from summertime exceedances of the 75 ppb ozone NAAQS.⁴ EPA, in modeling for both the CSAPR Update and Close-Out Rules, similarly found that emissions from upwind sources, including in the Upwind States, significantly contribute to

² See Office of Information & Regulatory Affairs, Fall 2019 Unified Agenda of Regulatory & Deregulatory Actions, <https://www.reginfo.gov/public/do/eAgendaMain> (select ‘Environmental Protection Agency’) (last accessed December 12, 2019).

³ See Attachment A to the Declaration of Sharon C. Davis in Support of Petitioners’ Motion to Expedite, *New York v. EPA*, D.C. Cir. No. 19-1231 (filed Nov. 26, 2019, Doc. # 1817645) (table of 4th highest ozone season readings at monitors in the NY-NJ-CT area for the years 2015 through 2019).

⁴ N.Y. St. Dep’t of Env’tl. Conserv., Comments on “Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard,” 83 Fed. Reg. 31915-31939, July 10, 2018, Attachment at 4, 6, EPA-HQ-OAR-2018-0225-0094 (Aug. 31, 2018), available at www.regulations.gov; Ozone Transp. Comm’n, Comments on the EPA’s Proposed Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, at 2-3, 15-17, EPA-HQ-OAR-2018-0225-0316 (undated), available at www.regulations.gov.

nonattainment in this multistate nonattainment area. *See* 81 Fed. Reg. at 74,538-39; 2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions, Row 199, Column M, available at <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs> (showing, for instance, that upwind states would contribute 60.6% to the 2023 design value at a Fairfield County, CT monitor).

Moreover, without EPA action now, other Noticing States such as Delaware and Massachusetts are likely to face challenges with successfully maintaining attainment of the 2008 ozone NAAQS, as well as the forthcoming need to demonstrate attainment and maintenance of the more stringent 70 ppb 2015 ozone NAAQS.

EPA Has Failed to Perform a Non-Discretionary Duty to the Detriment of the Noticing States

EPA's 2015 finding that numerous upwind states failed to satisfy their Good Neighbor obligations for the 2008 ozone NAAQS triggered a two-year deadline for the agency to promulgate FIPs for those states by August 12, 2017.⁵ 80 Fed. Reg. at 39,961; *see* 42 U.S.C. § 7410(c)(1). Yet, to date, EPA has failed to promulgate complete FIPs for the Upwind States. The CSAPR Close-Out Rule—which purported to fully resolve EPA's FIP obligation—is now vacated, and EPA is once again in default of its statutory deadline, in violation of 42 U.S.C. § 7410(c)(1).

EPA's failure to fully address requirements under the Good Neighbor Provision for those Upwind States is a clear breach of EPA's statutory duty and risks the health of tens-of-millions of residents in the Noticing States, who are exposed to elevated ozone levels so long as the Upwind States continue to pollute in violation of the Good Neighbor Provision. As discussed above, both short-term and prolonged exposures to ambient ozone are linked to serious adverse health effects like reduced lung function and asthma attacks.

EPA's failure to comply with its nondiscretionary duty also perpetuates unfair economic and administrative burdens in downwind nonattainment states, which must adopt ever more stringent in-state control measures to compensate for lax emission limits in upwind states. *See, e.g.*, 81 Fed. Reg. at 74,516 (“[T]he 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.”).

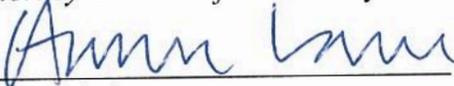
This letter provides notice as required under section 304 of the Act, 42 U.S.C. § 7604, and 40 C.F.R. Part 54, that the Noticing States intend to file suit against you and EPA for failing to timely promulgate FIPs that fully address the Good Neighbor obligations for the 2008 ozone NAAQS for the Upwind States. Unless EPA takes the required actions before the end of the

⁵ For Indiana and Ohio, by July 15, 2018. *See supra*, n.1.

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 and costs of litigation (including reasonable attorney fees), and may seek other appropriate relief.

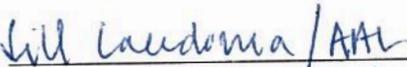
Sincerely,

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Attorney General of New Jersey

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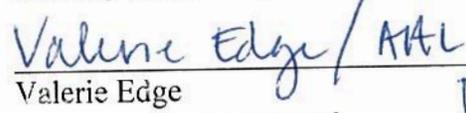
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