

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

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

September 17, 2020

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 Approve or
Disapprove State Implementation Plans Addressing Interstate
Transport of Ozone and Ozone Precursor Air Pollution
Pursuant to the 2015 Ozone National Ambient Air Quality
Standards**

Dear Administrator Wheeler:

The States of New York, Connecticut, Delaware, and New Jersey, the Commonwealth of Massachusetts, and the City of New York (Noticing States) request that the Environmental Protection Agency and Administrator Andrew Wheeler (together, EPA) take immediate steps to remedy EPA's violation of a nondiscretionary duty under the Clean Air Act (Act). The Noticing States have struggled for decades to attain and maintain healthy air within our borders, due in significant part to the large amounts of ozone pollution caused by emissions from sources in certain upwind states. Yet EPA has failed within the timeframe set by statute to approve or disapprove numerous state implementation plans (SIPs) submitted pursuant to the "Good Neighbor" Provision of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I), that are supposed to eliminate the excessive upwind ozone pollution that prevents downwind areas from attaining and maintaining the 2015 ozone national ambient air quality standards (NAAQS). Accordingly, the Noticing States hereby provide notice of our intent to sue EPA for this violation if it is not expeditiously remedied within 60 days.

As of the date of this letter, the states of Indiana, Kentucky, Michigan, Ohio, Texas, and West Virginia (Upwind States) are home to emission sources that significantly contribute to nonattainment or interference with maintenance of the

2015 ozone NAAQS in the Noticing States. Upwind States have submitted SIPs that purport to address excessive interstate pollution transport from their in-state sources, as required under section 110(a)(1) of the Act. However, EPA has not made the required determinations approving or disapproving these SIPs within 12 months of their being determined or deemed complete, as the agency was statutorily required to do. 42 U.S.C. § 7410(k)(2) & (3).

Specifically, with respect to their Good Neighbor obligations (i.e., Section 110(a)(2)(D)(i) - I Prong 1: Interstate transport - significant contribution, and Section 110(a)(2)(D)(i) - I Prong 2: Interstate transport - interfere with maintenance), Texas's SIP was determined completed on March 12, 2019, West Virginia's on March 14, 2019, Ohio's on March 28, 2019, Indiana's on May 2, 2019, Kentucky's on July 9, 2019, and Michigan's on September 8, 2019.¹ Thus, EPA had a statutory deadline of March 12, 2020 to approve or disapprove these portions of Texas's SIP, a March 14, 2020 deadline for West Virginia's SIP, a March 28, 2020 deadline for Ohio's SIP, a May 2, 2020 deadline for Indiana's SIP, a July 9, 2020 deadline for Kentucky's SIP, and a September 8, 2020 deadline for Michigan's SIP. As of the date of this letter, EPA has not yet completed its mandatory duty to approve or disapprove SIPs submitted by the Upwind States related to significant contribution or interference with maintenance for the 2015 ozone NAAQS.² Therefore the agency is in violation of the Clean Air Act for its failure to perform those nondiscretionary duties with respect to the SIPs submitted by the Upwind States.

Unless EPA promptly makes the required determinations, the 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

¹ See EPA, National Status of a 110(a)(2) Ozone (2015) SIP Infrastructure Requirement, Section 110(a)(2)(D)(i) - I Prong 1: Interstate transport - significant contribution, https://www3.epa.gov/airquality/urbanair/sipstatus/reports/x110_a_2_ozone_2015_section_110_a_2_d_i_-_i_prong_1_interstate_transport_-_significant_contribution_inystate.html (last visited Sept. 17, 2020); and EPA, National Status of a 110(a)(2) Ozone (2015) SIP Infrastructure Requirement, Section 110(a)(2)(D)(i) - I Prong 2: Interstate transport - interfere with maintenance, https://www3.epa.gov/airquality/urbanair/sipstatus/reports/x110_a_2_ozone_2015_section_110_a_2_d_i_-_i_prong_2_interstate_transport_-_interfere_with_maintenance_inystate.html (last visited Sept. 17, 2020).

² EPA also has approaching, unmet deadlines to approve or disapprove SIPs addressing the Good Neighbor Provision for the 2015 ozone NAAQS for Maryland's SIP by October 24, 2020, and Illinois's SIP by November 21, 2020.

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 goal, 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 face elevated risks 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 known for decades 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. EPA has long recognized that downwind states cannot on our 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 SIP for every new and revised NAAQS within three years of that standard’s promulgation or revision, and those SIPs must provide for the “implementation, maintenance, and enforcement” of the new 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.* When a state submits a SIP, the Administrator must determine that it is complete or incomplete. Where the Administrator does not make any such affirmative determination by six months after the date of submission, the SIP “shall on that date be deemed by operation of law to meet such minimum criteria.” *Id.* § 7410(k)(1)(B).

Once an Infrastructure SIP submission is complete (by either EPA determination or by operation of law), EPA must approve or disapprove the SIP within 12 months. *See* 42 U.S.C. § 7410(k)(2) (“[w]ithin 12 months of a determination by the Administrator (or a determination deemed by operation of law) . . . the Administrator *shall act* on the submission in accordance with paragraph (3)” (emphasis added)). The Administrator’s action must consist of either an approval (in whole or in part) or disapproval (in whole or in part), but “[t]he plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.” *Id.* § 7410(k)(3). If EPA approves the SIP, and assuming it complies with the Good Neighbor provision, the SIP’s requirements take effect, ensuring that the Upwind States control their in-state sources’ emissions as required by the Good Neighbor provision. Conversely, if EPA disapproves a SIP, this determination establishes a two-year deadline for EPA to promulgate a federal implementation plan (FIP) unless the state submits a complete and approvable SIP in the meantime. *Id.* § 7410(c)(1)(B).³

Here, the Upwind States’ Infrastructure SIPs purporting to address significant contribution or interference with maintenance for the 2015 ozone 8-hour NAAQS have all been considered complete for more than 12 months, but EPA has failed to act on the submissions by approving or disapproving them as required by 42 U.S.C. §§ 7410(k)(2) and (3). Therefore, EPA has failed to fulfill its mandatory statutory duty

³ *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).

within the timeframe set by statute, and is presently in breach of its statutory obligation.

Ozone Pollution in the Noticing States

Following EPA's promulgation of the 2015 ozone NAAQS, EPA designated the New York-Northern New Jersey-Long Island, NY-NJ-CT metropolitan area (New York Metropolitan Area) as a nonattainment area with a moderate classification.⁴ This area consists of nine counties in New York (including all of New York City), twelve counties in New Jersey and three in Connecticut. New Jersey's remaining nine southern counties and New Castle County, Delaware are part of another regional nonattainment area, the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE metropolitan area (Philadelphia Metropolitan Area) classified as marginal nonattainment. Connecticut's remaining five counties are part of the Greater Connecticut nonattainment area, classified in June 2018 as marginal nonattainment. And even outside of these formally designated nonattainment areas, ozone monitors in other locations within the Noticing States continue to measure unhealthy ozone levels that exceed the standard.⁵

Air quality modeling demonstrates that the high concentrations of ozone measured in these densely-populated downwind regions are, in significant measure, the result of emissions from major stationary sources of NO_x 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 height of these tall stacks and the temperatures of the exiting gases, large quantities of NO_x are sent high into the atmosphere where they are carried hundreds of miles by prevailing winds, including into the Noticing States. Once within the borders of the Noticing States, that transported NO_x combines with ozone formed locally and other ozone precursors to cause such a high level of ambient ozone pollution as to result in exceedances of the NAAQS.

The Noticing States have long been involved in efforts to reduce emissions from in-state sources of NO_x and to mitigate the regional transport of NO_x. The Noticing States 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 NO_x 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

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

⁵ See, e.g., https://www3.epa.gov/region1/airquality/ma_over.html (registering numerous exceedances in 2019 of the ozone standard at monitors in Lynn and Martha's Vineyard, Massachusetts).

first NOx Budget Program that dramatically reduced ozone transport within the Ozone Transport Region. The Noticing States have participated in multiple iterations of federal NOx Budget trading programs, including the 2005 Clean Air Interstate Rule (CAIR),⁶ 2011 Cross-State Air Pollution Rule (CSAPR)⁷ and 2016 CSAPR Update.⁸

EPA's Failure to Perform Non-discretionary Duties Harms the Noticing States

As discussed 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, the Upwind States have submitted Infrastructure SIPs that purport to address their Good Neighbor obligations as required under section 110(a)(2)(D) of the Act.⁹ Yet, despite the fact that more than 12 months have passed since these submissions were respectively either determined or deemed complete, EPA has not issued the required approval or disapproval for these SIPs, which it was required to do under the Act. *See* 42 U.S.C. §§ 7410(k)(2) & (3).

Yet while EPA has failed to take action required by statute, the agency’s own modeling, which the Noticing States and others have challenged elsewhere as unduly optimistic,¹⁰ projects that, in 2023, the New York Metropolitan Area and Philadelphia Metropolitan Area are likely to remain in nonattainment of the 2015 ozone NAAQS.¹¹ Further, EPA itself has determined that each of the Upwind States individually will contribute ozone precursors in amounts that exceed an EPA-selected screening level

⁶ 70 Fed. Reg. 25,162 (May 12, 2005).

⁷ 76 Fed. Reg. 48,208 (Aug. 8, 2011).

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

⁹ *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, *and* EPA, National Status of a 110(a)(2) Ozone (2015) SIP Infrastructure Requirement, Section 110(a)(2)(D)(i) - I Prong 2: Interstate transport - interfere with maintenance, *supra* note 1.

¹⁰ *See, e.g.*, Final Opening Brief for Petitioners, *New York, et al. v. EPA, et al.*, Case No. 19-1231, ECF Doc. 1835776, at 43-49 (D.C. Cir. filed Mar. 27, 2020).

¹¹ *See* 84 Fed. Reg. 56,058, 56,080-81 (Oct. 18, 2019); *see also State of New York v. EPA*, 964 F.3d 1214, 1220 (D.C. Cir. 2020) (“The EPA agreed with New York . . . that the New York Metropolitan Area would likely be in nonattainment of the 2015 NAAQS in 2023.”).

for significant contribution to ambient ozone levels in part or all of the Noticing States' nonattainment areas in 2023.¹²

EPA's failure to fully address requirements under the Good Neighbor provision for the Upwind States is a clear breach of EPA's statutory duty and harms the public health and welfare of millions of residents in the Noticing States. Our states have a sovereign duty and responsibility to protect the health and welfare of our residents and the quality of our environment. Yet in large part because of ozone generated and transported from Upwind States—areas where the Noticing States lack any direct authority to reduce emissions—our residents continue to breathe unhealthy air.

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 our attainment obligations under the Act. The New York Metropolitan Area, designated by EPA as a moderate nonattainment area, has an attainment deadline of August 3, 2024.¹³ Attainment must be demonstrated based on air quality for three years beginning in March 2021, less than a year from now. Preliminary ozone readings in the 2020 ozone season show that the New York Metropolitan Area needs significant relief from ozone precursor pollution transported from the Upwind States as expeditiously as practicable. Without significant reductions in upwind, out-of-state pollution in the 2021 ozone season and subsequent years used to determine attainment by the 2024 deadline, the New York Metropolitan Area may be reclassified (i.e. downgraded air quality rating) to serious nonattainment status. *See* 42 U.S.C. § 7511(b)(2).

The Philadelphia Metropolitan Area and Greater Connecticut attainment deadlines are even sooner: 2021.¹⁴ Certified ozone data from 2018 and 2019 show numerous exceedances of the ozone standards, and preliminary ozone readings in the 2020 ozone season show that, despite Delaware, New Jersey and Connecticut's successes in cutting in-state emissions, those areas still will likely not attain by 2021 and may be reclassified (i.e. downgraded air quality rating) to moderate nonattainment status. *See* 42 U.S.C. § 7511(b)(2).

¹² *See* EPA, 2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions (rev. May 2018), *available at* <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naqs>.

¹³ *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.

¹⁴ *Id.*

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 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 *Wisconsin v. EPA*, 938 F.3d 303, 315 (D.C. Cir. 2019); *New York v. EPA*, 781 F. App'x 4, 6-7 (D.C. Cir. 2019); *North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008).

EPA's failure to fulfill its mandatory duties as set forth above violates the Clean Air Act and harms the Noticing States, our millions of affected residents, and our ecosystems. 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, Delaware, Massachusetts, New Jersey, and the City of New York 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)(2) and (3). The suit will seek injunctive and declaratory relief, the costs of litigation (including without limitation, reasonable attorneys' fees), and may seek other appropriate relief.

Very truly yours,

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