WILDEARTH GUARDIANS
A FORCE FOR NATURE

RECEIVED
JAN 14 2013
Office Of The Executive

January 11, 2013

Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Bldg.
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Notice of Intent to File Suit Over Failure to Make a Finding that Utah and Idaho Failed to Submit State Implementation Plans to Attain the $PM_{2.5}$ National Ambient Air Quality Standards as Required by Part D, Subpart 4 of the Clean Air Act

Dear Administrator Jackson:

Pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(b)(2), 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). Specifically, the EPA has failed to make a finding pursuant to Section 110(k)(1) of the Clean Air Act that the States of Utah and Idaho have failed to submit an implementation plan or plans to meet the requirements of Section 189(a) of the Clean Air Act within 18 months in order to ensure attainment of the National Ambient Air Quality Standards ("NAAQS") for particulate matter less than 2.5 microns in diameter ("$PM_{2.5}$") in areas designated as nonattainment. According to a recent ruling from the U.S. Court of Appeals for the D.C. Circuit, the requirements of Part D, Subpart 4 of the Clean Air Act, which includes Section 189(a), are applicable to $PM_{2.5}$ nonattainment areas. *See NRDC et al. v. EPA*, Order, Slip op., No. 08-1250 (D.C. Cir. Jan. 4, 2013). This ruling obligates EPA to perform its nondiscretionary duties to ensure that $PM_{2.5}$ nonattainment areas are appropriately cleaned up in accordance with Subpart 4.

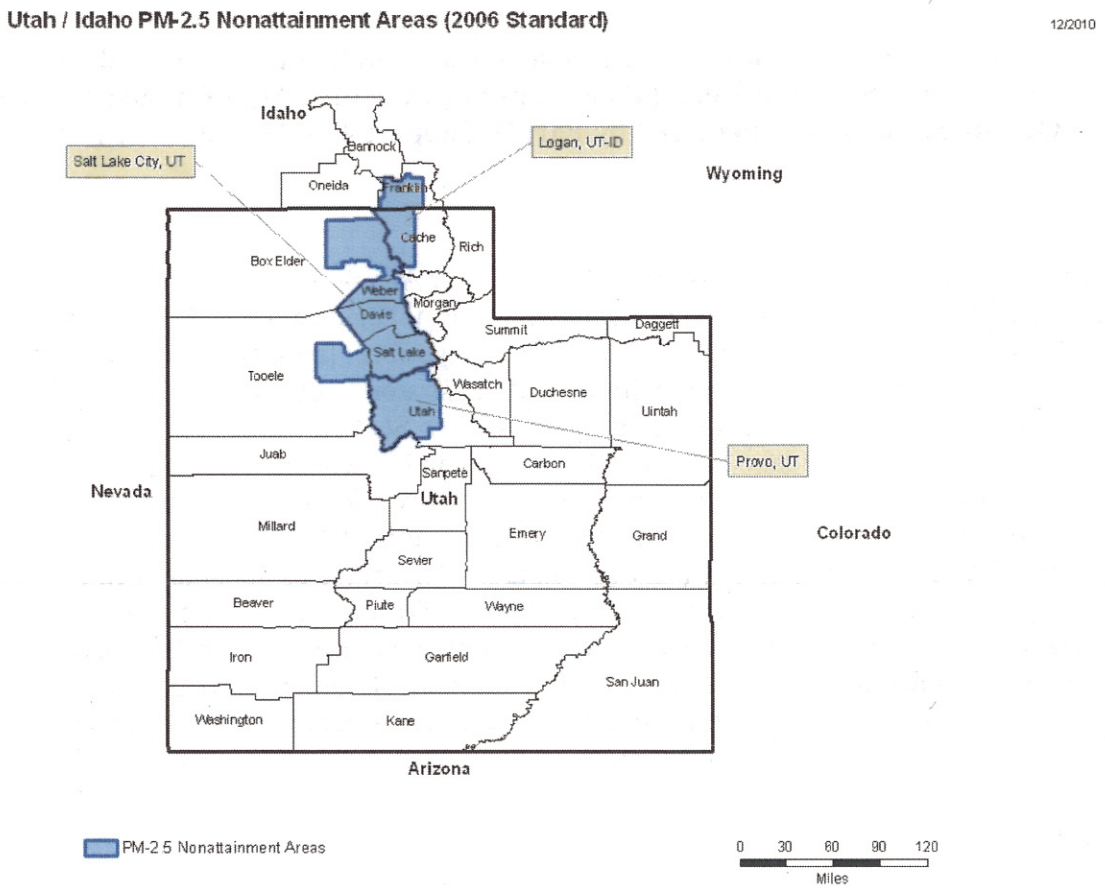
Background

The Administrator signed final revisions to the $PM_{2.5}$ NAAQS on September 21, 2006, adopting a new standard limiting concentrations to no more than 35 micrograms per cubic meter over a 24-hour period. *See* 71 Fed. Reg. 61144-61233 (October 16, 2006). $PM_{2.5}$ includes all particles less than 2.5 microns in diameter, or 1/28th the width of a human hair. Although $PM_{2.5}$ can be directly emitted, it can also form in secondary reactions in the atmosphere. *See* http://www.epa.gov/pmdesignations/basicinfo.htm (last viewed Jan. 10, 2013). According to EPA, the health effects of $PM_{2.5}$ include: increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty breathing; decreased lung function; aggravated asthma;

1536 Wynkoop Street, Ste. 301 Denver, CO 80202 303·573·4898 www.wildearthguardians.org
SANTA FE DENVER PHOENIX

development of chronic bronchitis; irregular heartbeat; nonfatal heart attacks; and premature death. *See* U.S. EPA, Health and Environmental Effects of $PM_{2.5}$, available at http://www.epa.gov/particles/health.html (last viewed Jan. 10, 2013).

Pursuant to Section 107(d) of the Clean Air Act, the EPA established air quality designations for the United States, identifying which areas of the country were or were not attaining the revised 24-hour $PM_{2.5}$ NAAQS. *See* 74 Fed. Reg. 58688-58781 (Nov. 13, 2009).[1] Among the areas identified as not attaining the NAAQS were several portions of the State of Utah, primarily located directly west of the Wasatch Mountains, and a portion of southern Idaho. *See* 40 C.F.R. §§ 81.313 and 81.345. These nonattainment areas were identified as the Logan, Utah area, the Provo Utah area, and the Salt Lake City, Utah area (hereafter the "Utah/Idaho $PM_{2.5}$ Nonattainment Areas"), and encompassed portions of Utah, Salt Lake, Davis, Tooele, Weber, Box Elder, and Cache Counties, Utah, and Franklin County, Idaho. *See* Map Below.



Map Showing Utah and Idaho PM2.5 Nonattainment Areas. Map Available at http://www.epa.gov/oaqps001/greenbk/utid25b.html (last viewed Jan. 10, 2013).

Part D of the Clean Air Act sets forth requirements for cleaning up air pollution in nonattainment areas so that the NAAQS are attained. For the 24-hour $PM_{2.5}$ NAAQS, the D.C.

[1] The designations were signed on October 8, 2009 and published in the Federal Register on November 13, 2009. The effective date of the designations was December 14, 2009.

Circuit Court of Appeals has held that the requirements of Part D, Subpart 4 of the Clean Air Act govern how $PM_{2.5}$ nonattainment areas are to be brought into attainment.[2]

Subpart 4 generally has a twofold approach to addressing $PM_{2.5}$ pollution. First, it requires that nonattainment areas be classified as "moderate" or "serious," depending on the severity of the air pollution problem. *See* 42 U.S.C. § 7513. Under Subpart 4, areas designated as nonattainment for the 24-hour $PM_{2.5}$ NAAQS pursuant to Section 107(d) of the Clean Air Act are classified at the time of designation by operation of law as moderate nonattainment areas. *See* 42 U.S.C. § 7513(a). Secondly, Subpart 4 sets forth requirements for States to develop and submit to the EPA implementation plans (also known as state implementation plans, or SIPs) to ensure that $PM_{2.5}$ nonattainment areas are brought into attainment by dates certain. For nonattainment areas classified as moderate, States must submit a SIP within 18 months of the date of designation. *See* 42 U.S.C. § 7513a(a)(2)(B). Among other things, the SIP must demonstrate that the 24-hour $PM_{2.5}$ NAAQS will be attained within six years of the nonattainment designation, include provisions assuring that reasonably available control measures are implemented within four years of the nonattainment designation, and contain quantitative milestones that are to be achieved every three years until the area is redesignated as attainment. *See* 42 U.S.C. §§ 7513(d)(1), 7513a(a)(1)(B), 7513a(a)(1)(C), and 7513a(c).

For the Utah/Idaho $PM_{2.5}$ nonattainment areas, the States of Utah and Idaho were therefore obligated to submit SIPs meeting the requirements of Subpart 4 by June 14, 2011, or 18 months after the effective date of their respective nonattainment designations. Among other things, these SIPs were required to ensure attainment with the 24-hour $PM_{2.5}$ NAAQS by December 14, 2015, implement reasonably available control measures by December 14, 2013, and contain quantitative milestones to be achieved every three years until the areas are redesignated as attainment. Unfortunately, neither Utah nor Idaho have submitted such SIPs.

Failure to Perform a Nondiscretionary Duty, Finding of Failure to Submit

Under the Clean Air Act, the Administrator is required to make a finding as to whether a State has submitted the required SIP no later than six months after the date by which the State was required to submit such a SIP. *See* 42 U.S.C. § 7410(k)(1)(B). This is a nondiscretionary duty under the Clean Air Act. Upon making such a finding, the EPA has two years by which it must promulgate a FIP or approve a SIP. *See* 42 U.S.C. § 7410(c)(1)(A).

Here, both Utah and Idaho failed to submit the SIPs required by Part D, Subpart 4 of the Clean Air Act by the mandatory deadline of June 14, 2011. According to EPA's "Status of SIP Requirements for Designated Areas" website, neither Utah nor Idaho have submitted SIPs to fully meet the requirements of Subpart 4. *See* Status of SIP Requirements for Designated Areas for Utah and Idaho, available at
http://www.epa.gov/air/urbanair/sipstatus/reports/ut_areabypoll.html#pm-2.5__2006_ and
http://www.epa.gov/air/urbanair/sipstatus/reports/id_areabypoll.html#pm-2.5__2006_ (last

[2] The D.C. Circuit specifically ordered the EPA to promulgate rules implementing the 24-hour $PM_{2.5}$ NAAQS consistent with Subpart 4. Although the EPA must now promulgate such rules, the holding of the D.C. Circuit does not negate EPA's duty to comply with mandatory deadlines and duties set forth under Subpart 4, or otherwise hold that EPA may ignore nondiscretionary duties while it promulgates any new rules.

viewed Jan. 10, 2013). Notably, neither State has submitted a SIP or SIPs demonstrating that the 24-hour $PM_{2.5}$ NAAQS will be attained by December 14, 2015 in accordance with 42 U.S.C. § 7513a(a)(1)(B), implementing reasonably available control measures by December 14, 2013 in accordance with 42 U.S.C. § 7513a(a)(1)(C), or containing quantitative milestones to be met every three years until the areas are redesignated as attainment.

The EPA was therefore required to make a finding that both Utah and Idaho failed to make the SIP submissions required by Part D, Subpart 4 no later than December 14, 2011. The EPA has not made such a finding. Given that the EPA lacks discretion to extend or otherwise modify the 18-month submission deadline under Subpart 4, the Agency is in violation of a nondiscretionary duty under the Clean Air Act. In accordance with the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a)(2), we therefore intend to file suit after 60 days if the EPA has not followed through with this nondiscretionary duty.

WildEarth Guardians is a New Mexico-based nonprofit organization with offices in Denver and Phoenix. WildEarth Guardians is dedicated to protecting and restoring air quality throughout the American West, including Utah and Idaho, and has members throughout Utah and Idaho who are harmed by the failure of the Administrator and the EPA to follow through duties under the Clean Air Act to ensure that clean air plans are timely promulgated to ensure adequate protection of air quality. In keeping with the requirements of federal regulations, you are hereby notified that the full name and address of the person giving the notice is WildEarth Guardians, 516 Alto St., Santa Fe, NM 87501. For purposes of discussing this matter, please contact us at the information below.

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

Sincerely,

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
1536 Wynkoop, Suite 301
Denver, CO 80202
(303) 437-7663
jnichols@wildearthguardians.org

cc: Gina McCarthy, EPA Assistant Administrator for Air and Radiation
James Martin, EPA Region 8 Administrator
Dennis McLerran, EPA Region 10 Administrator
Curt Fransen, Director, Idaho Department of Environmental Quality
Amanda Smith, Director, Utah Department of Environmental Quality