

## Law Office of Robert Ukeiley

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Robert Ukeiley  
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August 27, 2014

Gina McCarthy  
Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

**Re: Notice of Intent to File Suit over Failure to Find that States Have not Submitted State Implementation Plans to Attain and Maintain the 2008 Ozone National Ambient Air Quality Standards**

Dear Administrator McCarthy,

Pursuant to Section 304 of the Clean Air Act, this letter is to inform you that Sierra Club and WildEarth Guardians intends to sue you for "a failure of the Administrator [of the United States Environmental Protection Agency ("EPA")] to perform an[] act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act. 42 U.S.C. § 7604(a)(2). Specifically, EPA has failed to find that Arkansas, California, Connecticut, the District of Columbia, Georgia, Iowa, Illinois, Kansas, Massachusetts, Maine, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Virginia, Vermont, Washington, and West Virginia<sup>1</sup> (collectively "States") have failed to submit State Implementation Plans ("SIPs") to meet various requirements under Section 110(a) of the Clean Air Act with regards to the 2008 revised National Ambient Air Quality Standards ("NAAQS") for ozone. These States were required to submit such SIPs within three years of the promulgation of the 2008 ozone NAAQS, or by no later than March 27, 2011. EPA has failed to make such findings, in violation of a nondiscretionary duty set forth under the Clean Air Act.

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<sup>1</sup> See [http://www.epa.gov/air/urbanair/sipstatus/reports/map\\_i.html](http://www.epa.gov/air/urbanair/sipstatus/reports/map_i.html), last viewed 8/13/14.

Public health and welfare protection from the harmful impacts of ground-level ozone, often referred to as smog, will be closer to the protection envisioned by Congress once EPA remedies this violation of its mandatory duty. Ozone has numerous harmful effects on human respiratory systems which include inducing asthma attacks in asthmatics and aggravating chronic lung diseases like emphysema and bronchitis. EPA, *Smog—Who Does it Hurt?*, 2-3 (available at <http://www.epa.gov/air/ozonepollution/pdfs/smog.pdf> (last viewed Oct. 3, 2011)). Long-term exposure may even result in the permanent scarring of lung tissue. EPA, *Ozone and Your Health*, U.S. Environmental Protection Agency (available at <http://www.epa.gov/air/ozonepollution/pdfs/health.pdf> (last viewed Oct. 3, 2011)). Exposure to ozone can also lead to “chronic, adverse effects on lung development in children from the age of 10 to 18 years....” See Gauderman, W. James, et al., *The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age*, N. Engl. J. Med. 351:11, at 1057 (Sept. 9, 2004). The greatest harm “may occur later in life, since reduced lung function is a strong risk factor for complications and death during adulthood.” *Id.* at 1063.

Moreover, ozone’s detrimental effects are not limited to human health. Ozone also interferes with vegetation’s ability to properly function, damaging commercial crops and natural ecosystems alike. See 62 Fed. Reg. 38855, 38875 (July 18, 1997). Thus, it is imperative that EPA remedy its failure to perform its mandatory duty in order to strengthen protection of the public’s health and welfare against ozone.

We intend to bring a suit 60 days from the date of this letter, or shortly thereafter, under the Clean Air Act, 42 U.S.C. § 7604(a)(2), against the EPA over the failure to perform nondiscretionary duties set forth in 42 U.S.C. § 7410(k)(1)(B). The suit will seek injunctive relief, declaratory relief, the cost of litigation, and other relief as may be necessary.

### **Clean Air Act Requirements**

On March 12, 2008, the EPA promulgated NAAQS for ozone, a harmful air pollutant that in small concentrations can trigger asthma attacks, aggravate emphysema, and permanently damage the lungs of children. See 73 Fed. Reg. 16436-16514 (March 27, 2008). EPA set a new standard limiting ozone concentrations to no more than 0.075 parts per million over an 8-hour period. See 40 C.F.R. § 50.15.

In accordance with Section 110(a)(1) of the Clean Air Act, States are required to submit SIPs to attain and maintain the NAAQS within three years of the promulgation or revision of a NAAQS. See 42 U.S.C. § 7410(a)(1). In assuring that SIPs attain and maintain the NAAQS in accordance with Section 110(a)(1), States must ensure their SIPs include requirements set forth under Section 110(a)(2). See 74 U.S.C. § 7410(a)(2). These requirements, include, but are not limited to:

- Limits on interstate transport (42 U.S.C. § 7410(a)(2)(D)(i));

The requirements in 42 U.S.C. § 7410(a)(2)(D)(i)(I) is generally referred to as the “Good Neighbor” elements.

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). Upon making such a finding, EPA has two years by which it must promulgate a Federal Implementation Plan (“FIP”) or approve the required SIP. *See* 42 U.S.C. § 7410(c)(1)(A).

### **The Administrator’s Failure to Perform Nondiscretionary Duties**

In this case, Arkansas, California, Connecticut, the District of Columbia, Georgia, Iowa, Illinois, Kansas, Massachusetts, Maine, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Virginia, Vermont, Washington, and West Virginia have failed to submit SIPs to meet the infrastructure requirements of Sections 110(a)(1) and 110(a)(2)(D)(i)(I) of the Clean Air Act within three years of the promulgation of the 2008 revised ozone NAAQS. As EPA noted in its final rule adopting the 2008 ozone NAAQS, States were required to submit their infrastructure SIPs by March 12, 2011. *See* 73 Fed. Reg. 16,503.

Thus, in accordance with Section 110(k)(1)(B), the Administrator was required to make a finding by no later than September 27, 2011 that States had failed to submit SIPs to meet the aforementioned requirements of Section 110(a)(1) and Section 110(a)(2) of the Clean Air Act. *See* 42 U.S.C. §7410(k)(1)(B). On January 15, 2013, EPA published a notice in the Federal Register in which EPA refused to make a finding that states had failed to submit their Good Neighbor provisions for the 2008 ozone NAAQS. *See* 78 Fed. Reg. 2,882, 2,884 (Jan. 15, 2013). However, on August 1, 2014, that notice of EPA’s refusal to make a finding of failure to submit was vacated by the U.S. Court of Appeals for the D.C. Circuit. *See Maryland v. EPA*, 13-1070, Order (August 1, 2014). When an agency action is vacated, any mandatory duty that the vacated action fulfilled is reinstated. *See e.g. Environmental Defense v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004). Thus, EPA currently has a mandatory duty to promulgate a finding of failure to submit Good Neighbor elements for the 2008 ozone NAAQS. EPA has not made such a finding, in violation of a nondiscretionary duty under the Clean Air Act.

As required by 40 C.F.R. § 54.3, the persons providing this notice is:

Sierra Club  
85 Second St. 2<sup>nd</sup> Floor  
San Francisco, CA 94105  
Phone: (415) 977-5500

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WildEarth Guardians

516 Alto Street

Santa Fe, NM 87501

Phone: (505) 988-9126

While EPA regulations require this information, please direct all correspondences and communications regarding this matter to the undersigned counsel.

Sierra Club, WildEarth Guardians and their counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting undersigned counsel to resolve this matter. If we do not hear from EPA in 60 days, however, we will have to assume that you are not interested in settling this matter and file or amend a complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Ukeiley". The signature is written in a cursive, flowing style.

Robert Ukeiley  
Counsel for Sierra Club  
& WildEarth Guardians