

## Law Office of Robert Ukeiley

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### **VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

August 28, 2012

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

**Re: Clean Air Act Notice of Intent to Sue pursuant to 42 U.S.C. § 7604(b)(2) for failure to make a finding of failure to submit under 42 U.S.C. § 7410(k)(1)(B) and take final action under 42 U.S.C. § 7410(k)(2) & (3) for 2006 PM2.5 NAAQS nonattainment areas**

Dear Administrator McCarthy,

On behalf of the Center for Biological Diversity, I am writing to inform you that the Center for Biological Diversity intends to file suit against you for “a failure of the Administrator [of the United States Environmental Protection Agency (“EPA”)] to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). Specifically, under 42 U.S.C. § 7410(k)(1)(B), EPA must issue a finding of failure to submit nonattainment area state implementation plan (SIP) submittals, and publish notice of that action in the Federal Register for the 2006 particulate matter less than 2.5 microns in diameter (PM2.5) national ambient air quality standards (NAAQS). This duty is required for the nonattainment areas listed in Table 1. Additionally, under 42 U.S.C. § 7410(k)(2) and (3), EPA must take final action, and publish notice of that action in the Federal Register, on SIP submittals listed in Table 2. As explained in more detail below, EPA has failed to perform these mandatory duties.

EPA should remedy its violation of these mandatory duties to better protect the public and native ecosystems from PM2.5’s harmful effects. PM2.5 is “produced chiefly by combustion processes and by atmospheric reactions of various gaseous pollutants,” thus “[s]ources of fine particles include . . . motor vehicles, power generation, combustion sources at

industrial facilities, and residential fuel burning.” 71 Fed. Reg. 61144, 61146 (Oct. 17, 2006). The effects of PM<sub>2.5</sub> on humans are profound. For example, long-term exposure has been associated “with an array of health effects, notably premature mortality, increased respiratory symptoms and illnesses (e.g. bronchitis and cough in children), and reduced lung function.” 62 Fed. Reg. 38652, 38668 (July 18, 1997).

PM<sub>2.5</sub> also adversely impacts wildlife. EPA has explained “a number of animal toxicologic . . . studies had reported health effects associations with high concentrations of numerous fine particle components[.]” 71 Fed. Reg. 2620, 2643 – 2644 (Jan. 17, 2006). PM<sub>2.5</sub> also causes direct foliar injury to vegetation. *Id.* at 2682. As to broader ecosystem impacts, EPA has explained that the nitrogen and sulfur “containing components of PM have been associated with a broad spectrum of terrestrial and aquatic ecosystem impacts that result from either the nutrient or acidifying characteristics of the deposited compounds. *Id.* These impacts include nitrogen saturation which “causes 1) Decreased productivity, increased mortality, and/or shifts in terrestrial plant community composition, often leading to decreased biodiversity in many natural habitats wherever atmospheric [reactive nitrogen] deposition increases significantly and critical thresholds are exceeded; (2) leaching of excess nitrate and associated base cations from terrestrial soils into streams, lakes and rivers and mobilization of soil aluminum; and (3) alteration of ecosystem processes such as nutrient and energy cycles through changes in the functioning and species composition of beneficial soil organisms (Galloway and Cowling 2002).” *Id.* EPA has described this impacts on terrestrial ecosystems as “profound and adverse[.]” *Id.* EPA has also determined that PM<sub>2.5</sub> adversely impacts aquatic ecosystems via excess nutrient inputs and acid and acidifying deposition. 71 Fed. Reg. at 2682 – 2683. “Data from existing deposition networks in the U.S. demonstrate that N and S compounds are being deposited in amounts known to be sufficient to affect sensitive terrestrial and aquatic ecosystems over time.” 71 Fed. Reg. at 2683.

Moreover, PM<sub>2.5</sub> adversely affects the aesthetics of our natural surroundings. For example, Regional haze is caused in part by particulates in the air scattering sunlight. EPA, Haze- How Air Pollution Affects the View (available at [http://www.epa.gov/ttn/oarpg/t1/fr\\_notices/haze.pdf](http://www.epa.gov/ttn/oarpg/t1/fr_notices/haze.pdf)). It is vital that EPA take the required action in order to strengthen protection of public health and welfare against PM<sub>2.5</sub>.

## **I. FAILURE TO MAKE FINDING OF FAILURE TO SUBMIT**

EPA is required to determine whether a state implementation plan (SIP) submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B). If, six months after a submittal is due, a state has failed to submit any required SIP, there is no submittal that may be deemed administratively complete, and EPA must make a determination stating that the state failed to submit the required state implementation plan. *Id.* This is referred to as a “finding of failure to submit.”

EPA nonattainment designations for the 2006 PM<sub>2.5</sub> NAAQS were effective no later than December 14, 2009. *see* 74 Fed. Reg. 58,688 (Nov. 13, 2009). EPA designated all of the areas listed in Table 1 nonattainment for the 2006 PM<sub>2.5</sub> NAAQS. 74 Fed. Reg. at 58,696. All

elements of the nonattainment SIP were due by no later than December 14, 2012. *See* “Implementation Guidance for the 2006 24-Hour Fine Particulate (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS),” from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Directors, Regions I-X (Mar. 2, 2012) at 1; 40 C.F.R. § 51.1002(a) *remanded NRDC v. EPA*, 706 F.3d 428 (D.C. Cir. 2013). Thus, EPA has a mandatory duty to make a completeness finding under 42 U.S.C. § 7410(k)(1)(B) by no later than June 14, 2013. The States in Table 1 have failed to submit nonattainment SIPs for the areas listed in Table 1 as of the date of this letter. Yet, EPA has failed to issue a finding of failure to submit, as required under 42 U.S.C. § 7410(k)(1)(B), regarding the nonattainment area SIPs for the areas listed in Table 1 for all elements except those elements listed in Table 2 below. In addition, EPA does not have to issue a finding of failure to submit for the Nogales area for the attainment demonstration, contingency measures, Reasonably Available Control Measures/Reasonably Available Control Technology and Reasonable Further Progress elements, the Los Angeles – South Coast area for the emission inventory element, and the Pittsburgh area for nonattainment New Source Review element.

**TABLE 1**

<b>AREA</b>	<b>STATE</b>
Fairbanks	Alaska
Nogales	Arizona
Chico	California
Imperial County	California
Los Angeles-South Coast Air Basin	California
San Francisco Bay	California
Detroit-Ann Arbor	Michigan
Canton-Massillon	Ohio
Cleveland-Akron-Lorain	Ohio
Liberty-Clairton	Pennsylvania
Pittsburgh-Beaver Valley <sup>1</sup>	Pennsylvania
Milwaukee-Racine	Wisconsin

Without a submittal addressing the nonattainment SIP requirements, the minimum criteria cannot be met for the States in Table 1 to submit a state implementation plan addressing the nonattainment requirement, and EPA must issue a finding of failure to submit. EPA is in violation of this mandatory duty.

## **II. FAILURE TO APPROVE OR DISAPPROVE IN WHOLE OR PART**

The Clean Air Act also requires that if, six months after a state submits a SIP submittal, EPA has not made the completeness finding and has not found the submittal to be incomplete,

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<sup>1</sup> 78 Fed. Reg. 49,403 (Aug. 14, 2013) is just a proposed rulemaking and thus has no impact on EPA’s mandatory duty.

the submittal is deemed administratively complete by operation of law. 42 U.S.C. § 7410(k)(1)(B). EPA must take final action on an administratively complete submittal by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of the completeness finding. 42 U.S.C. § 7410(k)(2) and (3).

For the 2006 PM<sub>2.5</sub> NAAQS NA SIP, states have submitted elements which were deemed complete by the date in the completion date column of Table 2. Thus, the due date for EPA to take final action on these submittals by approving or disapproving them in whole or part passed on the date in the final action due date column. However, EPA has not taken final action on these submittals as of the date of this letter. Thus, EPA is in violation of its mandatory duty in 42 U.S.C. § 7410(k)(2) and (3).

**TABLE 2**

AREA	ELEMENT	COMPLETION DATE	FINAL ACTION DUE DATE
Fairbanks, Alaska	Non-Attainment New Source Review	5/19/2011 <sup>2</sup>	5/19/2012
Los Angeles – South Coast, California	Non-Attainment New Source Review	3/27/2012 <sup>3</sup>	3/27/2013
Knoxville-Sevierville-La Follette, Tennessee	Non-Attainment New Source Review	1/29/2012 <sup>4</sup>	1/29/2103
Milwaukee-Racine, Wisconsin	Non-Attainment New Source Review	11/12/2011 <sup>5</sup>	11/12/2012
Charleston, South Carolina	Non-Attainment New Source Review	1/1/2011 <sup>6</sup>	1/1/2012
Steubenville-Weirton, Ohio	Non-Attainment New Source Review	1/1/2011 <sup>7</sup>	1/1/2012

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

The Center for Biological Diversity  
351 California Street, Suite 600  
San Francisco, California 94104  
Attn: Jonathan Evans  
Tel: (415) 436-9682 x318

<sup>2</sup> See [http://www.epa.gov/air/urbanair/sipstatus/reports/ak\\_lembypoll.html#pm-2.5\\_2006\\_1198](http://www.epa.gov/air/urbanair/sipstatus/reports/ak_lembypoll.html#pm-2.5_2006_1198)

<sup>3</sup> See [http://www.epa.gov/air/urbanair/sipstatus/reports/ca\\_lembypoll.html#pm-2.5\\_2006\\_1201](http://www.epa.gov/air/urbanair/sipstatus/reports/ca_lembypoll.html#pm-2.5_2006_1201)

<sup>4</sup> See [http://www.epa.gov/air/urbanair/sipstatus/reports/tn\\_lembypoll.html#pm-2.5\\_2006\\_1227](http://www.epa.gov/air/urbanair/sipstatus/reports/tn_lembypoll.html#pm-2.5_2006_1227)

<sup>5</sup> See [http://www.epa.gov/air/urbanair/sipstatus/reports/wi\\_lembypoll.html#pm-2.5\\_2006\\_1232](http://www.epa.gov/air/urbanair/sipstatus/reports/wi_lembypoll.html#pm-2.5_2006_1232)

<sup>6</sup> See [http://www.epa.gov/air/urbanair/sipstatus/reports/wv\\_lembypoll.html#pm-2.5\\_2006\\_1233](http://www.epa.gov/air/urbanair/sipstatus/reports/wv_lembypoll.html#pm-2.5_2006_1233)

<sup>7</sup> See [http://www.epa.gov/air/urbanair/sipstatus/reports/wv\\_lembypoll.html#pm-2.5\\_2006\\_1233](http://www.epa.gov/air/urbanair/sipstatus/reports/wv_lembypoll.html#pm-2.5_2006_1233)

Administrator Gina McCarthy

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

The Center for Biological Diversity and its counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA coming into compliance within 60 days. If you do not do so, however, we will have to file a complaint.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert Ukeiley".

Robert Ukeiley  
Counsel for Center for Biological Diversity