



August 20, 2019

Via Federal Express

Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., N. W.
Mail Code 1101A
Washington, D.C. 20460

Re: Notice of Intent to File Suit Under Section 304(b) of the Clean Air Act, 42 U.S.C. § 7604(b)(2), for Failure to Issue a Finding of Failure to Submit a Nonattainment State Implementation Plan Under the 2015 National Ambient Air Quality Standard for Sulfur Dioxide, 42 U.S.C. § 7410(k)(1)(B).

Dear Administrator Wheeler,

Pursuant to Section 304(b)(2) of the Clean Air Act, 42 U.S.C. § 7604(b)(2), and 40 C.F.R. part 54, I am writing to provide notice of Sierra Club's intent to file suit against the Administrator of the U.S. Environmental Protection Agency ("EPA") for the "failure of the Administrator to perform an[] act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

Specifically, the Administrator has violated 42 U.S.C. § 7410(k)(1)(B) by failing to issue a finding that Texas failed to submit a nonattainment state implementation plan ("SIP") within 18 months of the effective date of EPA's final rule, Air Quality Designations for the 2010 Sulfur Dioxide ("SO₂") Primary National Ambient Air Quality Standard ("NAAQS")—Supplement to Round 2 for Four Areas in Texas: Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County, 81 Fed. Reg. 89,870 (Dec. 13, 2016). That final rule, which designated, under 42 U.S.C. § 7407(d), the areas around the Martin Lake, Big Brown, and Monticello coal-burning power plants as being in nonattainment with the 2010 SO₂ NAAQS, became effective January 12, 2017, and is still

effective.¹ Thus, under 42 U.S.C. § 7514(a), Texas was required to submit by July 12, 2018, a final nonattainment SIP that meets the requirements of 42 U.S.C. §§ 7502, 7514-7514a, and that provides for attainment of the NAAQS as expeditiously as practicable, but no later than five years from the effective date of the rule. Texas failed to submit any plan.

Under 42 U.S.C. § 7410(k)(1)(B), EPA is required to determine whether a SIP submittal is administratively complete. Where, as here, a state has failed to timely submit any required SIP, EPA must make a determination to that effect no later than six months after a submittal was due—here, by January 12, 2019. *Id.* EPA failed to satisfy that mandatory statutory duty. EPA must remedy its violation of the Clean Air Act by issuing a finding that Texas failed to submit the requisite nonattainment plan under the 2015 SO₂ NAAQS.

A. THE SULFUR DIOXIDE NAAQS AND HUMAN HEALTH

Exposure to SO₂, for even short time periods, such as five minutes, can have significant human health impacts, including the aggravation of asthma attacks and cardiovascular and respiratory failure, leading to increased hospitalizations and premature death.² Children, the elderly, and adults with asthma are particularly at risk.

In 2010, EPA finalized its statutorily-required periodic, independent scientific review of the prior SO₂ NAAQS and concluded that the standards did not adequately protect the public against adverse respiratory effects associated with short-term SO₂ exposure. *Id.* To address these significant health threats, EPA issued a new one-hour SO₂ NAAQS standard that is more protective of human health than the old standard and promises significant health benefits.³ EPA has estimated that between 2,300 and 5,900 premature deaths and 54,000 asthma attacks a year will be prevented by the new standard.⁴ EPA estimated that the net benefit of implementing the revised one-hour SO₂ NAAQS was up to \$36 billion dollars in avoided public health costs and lost productivity.⁵

Sulfur dioxide pollution is not only harmful to human health by itself, but it also contributes to the atmospheric formation of fine particulate matter, which can penetrate deep into the lungs and cause a host of health problems, including aggravated asthma,

¹ As discussed below, Luminant retired the Big Brown and Monticello power plants as of 2018. Although those sources are no longer operating, Texas (or EPA, if the state fails) must still issue a fully-approved maintenance state implementation plan to ensure attainment of the NAAQS in those areas. 42 U.S.C. § 7505a.

² See Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520, 35,525 (June 22, 2010).

³ The new 2010 SO₂ NAAQS standard is a 1-hour standard set at 75 parts per billion, or approximately 196 micrograms per cubic meter. 40 C.F.R. § 50.17(a). The new standard was established in the form of the 99th percentile of the annual distribution of the daily maximum 1-hour average concentrations. *Id.* at § 50.17(b).

⁴ EPA, Final Regulatory Impact Analysis (RIA) for the SO₂ National Ambient Air Quality Standards (NAAQS), at tbl. 5.14 (June 2010), https://www3.epa.gov/ttn/ecas/docs/ria/naqs-so2_ria_final_2010-06.pdf.

⁵ 75 Fed. Reg. at 35,588.

chronic bronchitis, and premature death.⁶ Particulate matter and SO₂ pollution can also be transported long distances and can contribute to poor air quality hundreds of miles away.⁷ Indeed, SO₂ emissions from a handful of Texas power plants have been shown to contribute to premature death, asthma events, tens of thousands of lost work and school days, and billions in public health impacts *each year* across the region.⁸

B. IMPLEMENTATION OF THE SO₂ NAAQS

EPA's promulgation of the revised one-hour SO₂ NAAQS triggered mandatory statutory timetables for EPA to "designate" all areas of the country that fail to comply with the standard. Within one year of EPA's issuance of the standard, each state was required to submit to EPA a list of recommended designations for all areas (or portions thereof) in the state as nonattainment,⁹ attainment,¹⁰ or unclassifiable.¹¹ 42 U.S.C. § 7407(d)(1)(A).

EPA's final air quality designations govern the stringency of the Clean Air Act state implementation plans ("SIPs") that will be required from each state to ensure achievement and maintenance of the NAAQS in every state. *See* 42 U.S.C. § 7407(a). If an area is designated as being in "attainment," the state is required to develop a SIP that ensures maintenance and enforcement of the NAAQS. *Id.* § 7410(a)(1)-(2). If an area is designated "nonattainment," however, the state must submit a SIP with additional requirements, including stricter "new source" review permitting rules and provisions that require existing sources to adopt, as expeditiously as practicable, all reasonably available pollution control measures and technologies to ensure attainment of the NAAQS. *Id.* §§ 7502, 7503, 7514-7514a(b)(1).

In either case, the respective state is then required to submit to EPA a state implementation plans ("SIP") within 18 months of the effective date of the designation. Those "nonattainment SIPs" must meet the specific pollution reduction requirements of 42 U.S.C. §§ 7502, 7514-7514a, and provide for attainment of the NAAQS as expeditiously as practicable, but not later than 5 years from the effective date of the nonattainment designation. In sum, text and structure of the Clean Air Act mandates that all areas of the country implement any necessary pollution reductions and come into compliance with the 2010 SO₂ NAAQS no later than June 2018. Yet, more than a year after that statutory deadline, many states, including Texas, have failed to issue state implementation plans for

⁶ 78 Fed. Reg. 3086, 3103, 3105-06 (Jan. 15, 2013).

⁷ EPA, Sulfur Dioxide: Health, <https://www.epa.gov/so2-pollution/sulfur-dioxide-basics>.

⁸ *See* Report of Dr. George Thurston, at 16-18, (Apr. 18, 2015), *available at* www.regulations.gov (Docket ID No. EPA-R06-OAR-2014-0754-0071).

⁹ The Clean Air Act defines a nonattainment area as "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the [NAAQS] for the pollutant." 42 U.S.C. § 7407(d)(1)(A)(i).

¹⁰ An attainment area is "any area . . . that meets the [NAAQS] for the pollutant." *Id.* § 7407(d)(1)(A)(ii).

¹¹ An unclassifiable area is "any area that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS] for the pollutant." *Id.* § 7407(d)(1)(A)(iii).

nonattainment areas, let alone implement the pollution reductions that will ultimately be necessary for nonattainment areas to come into compliance with the 2010 SO₂ NAAQS.

C. EPA'S TEXAS NONATTAINMENT DESIGNATIONS FOR SO₂

Nearly all SO₂ pollution in the United States comes from a handful of very large coal-fired power plants.¹² Three of Texas's largest coal-fired power plants—Big Brown, Martin Lake, and Monticello—have routinely ranked among the top ten largest annual SO₂ polluters in the country.¹³ Based on 2015 data from EPA's Air Markets Program Database, these three plants alone emitted, on average, more than 175,000 tons of SO₂ annually—more than all of the other Texas sources combined.¹⁴ That is not because these three power plants are the largest, but because they lack modern, cost-effective pollution controls commonly used throughout the industry and in Texas.¹⁵

In March 2016, EPA proposed nonattainment designations for the areas of the country containing the largest sources of SO₂ pollution, including the areas surrounding the Big Brown, Martin Lake, and Monticello power plants. 81 Fed. Reg. 10,563 (Mar. 1, 2016). Consistent with its final SO₂ NAAQS rule, technical guidance, and past practice, EPA based its proposed designations on extensive air dispersion modeling evaluating the short-term impacts of numerous large SO₂ sources across the country. *See* 75 Fed. Reg. at 35,551 (modeling is “the most technically appropriate, efficient, and readily available method for assessing short-term ambient SO₂ concentrations in areas with large point sources”); *see also Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1181-82 (9th Cir.) (approving EPA's use of modeling to predict compliance with NAAQS), *cert. denied* 133 S. Ct. 409 (2012).

On December 13, 2016, EPA issued final nonattainment designations for the Texas areas at issue. 81 Fed. Reg. 89,870 (Dec. 13, 2016). EPA determined that the areas surrounding three coal-fired power plants—Big Brown in the Freestone and Anderson Counties Area, Martin Lake in the Rusk and Panola Counties Area, and Monticello in the

¹² In fact, 91% of all U.S. SO₂ emissions come from coal-fired electric power plants. Sierra Club Comments at 2, *available at* www.regulations.gov (Docket ID No. EPA-HQ-OAR-2014-0464-0420 (Mar. 31, 2016) [hereinafter “Sierra Club Comments”] (citing U.S. EPA, 2011 National Emissions Inventory (NEI) Data, <https://www.epa.gov/air-emissions-inventories/2011-national-emissions-inventory-nei-data>)). At the time EPA promulgated its area designations, 2011 was the most recent year for which complete National Emission Inventory data was available.

¹³ In 2018, Luminant retired the Big Brown and Monticello coal-burning power plants.

¹⁴ These three plants also emit more SO₂ than all of the sources in Oklahoma and Louisiana combined. *See* EPA, Air Markets Program Data, <https://ampd.epa.gov/ampd/>.

¹⁵ *See* EPA, Technical Support Document for the Cost of Controls Calculations for the Texas Regional Haze Federal Implementation Plan (Cost TSD), *available at* www.regulations.gov (Docket ID No. EPA-R06-OAR-2014-0754-0008, at 1 (Nov. 2014) (noting 13 units at 6 large facilities in Texas do not have scrubbers to control SO₂ pollution)).

Titus County Area—failed to meet the health-based 2010 SO₂ NAAQS. *Id.* at 89,873.¹⁶ The effective date of the final rule for those areas of Texas was January 12, 2017.

In February 2017, Texas and the operator of the Big Brown, Martin Lake, and Monticello power plants filed petitions for judicial review of EPA’s SO₂ nonattainment designations. Those petitions for review have been stayed pending EPA’s representations that it intends to reconsider the designations.¹⁷ The final rule, however, remains in effect pending the agency’s administrative reconsideration.

D. TEXAS HAS FAILED TO ISSUE A NONATTAINMENT SIP.

Under Section 191 of the Clean Air Act, Texas was required to submit to EPA state implementation plans (“SIPs”) for the areas designated as nonattainment for the SO₂ NAAQS within 18 months of the effective date of the designation, *i.e.*, by no later than July 12, 2018. 42 U.S.C. § 7514; *see also* 81 Fed. Reg. at 89,871. As noted, for any area designated as nonattainment, the nonattainment SIPs must include, among other provisions, stricter “new source” review permitting rules and provisions that require existing sources to adopt, as expeditiously as practicable, all reasonably available pollution control measures and technologies to ensure attainment of the NAAQS. 42 U.S.C. §§ 7502(c), 7514-7514a. The Clean Air Act mandates that each nonattainment area implement enforceable emission reductions *and* come into compliance with the NAAQS as expeditiously as practicable, but not later than 5 years from the effective date of the nonattainment designation.

Texas was required to issue a nonattainment SIP by July 2018, that included enforceable emissions limitations—specifically, reasonably available control technology—requiring Big Brown, Martin Lake, and Monticello to reduce their SO₂ emissions significantly to ensure compliance with the NAAQS. Texas failed to meet that statutory deadline.

Although Luminant Generation Company has reportedly ceased operating the Big Brown and Monticello power plants in early 2018, the operator’s voluntary operational decisions are not enforceable and do not excuse Texas’s failure to issue a state implementation plan. Instead, the state (or EPA, where the state refuses) must implement “permanent and enforceable reductions” of pollution, including reasonably available control technology at major existing sources, to clean up unhealthy air before EPA may redesignate that area. 42 U.S.C. § 7407(d)(3)(E). In any case, the state must still submit a final and enforceable SIP that ensures the achievement *and* maintenance of the NAAQS—something Texas has indisputably failed to do. *See generally* 42 U.S.C. §§ 7407(d)(3), 7505a.

¹⁶ EPA also determined that the fourth area, Milam County surrounding the Sandow Power Station, was “unclassifiable.” 81 Fed. Reg. at 89,871.

¹⁷ EPA has represented that it intends to reconsider or “correct” the Texas nonattainment designations in light of Luminant Generation Company’s decision to deactivate Big Brown and Monticello. As explained below, however, Luminant’s voluntary decision to cease operations is not enforceable and does not excuse Texas’s failure to issue a state implementation plan. Moreover, the agency cannot circumvent the Clean Air Act’s specific redesignation provisions by simply adopting a legal argument—one that the agency itself rejected—that purportedly “corrects” the designation. 42 U.S.C. § 7407(d)(3).

E. EPA IS IN VIOLATION OF ITS MANDATORY STATUTORY DUTY TO ISSUE A FINDING THAT TEXAS FAILED TO SUBMIT A NONATTAINMENT SIP.

Under 42 U.S.C. § 7410(k)(1)(B), EPA is required to determine whether a SIP submittal is administratively complete. If, six months after a submittal is due, a state has failed to submit a 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 SIP submittal. *Id.* This determination is referred to as a “finding of failure to submit.”

As noted, on December 13, 2016, under 42 U.S.C. § 7407(d), EPA designated the areas surrounding three coal-fired power plants—Big Brown in the Freestone and Anderson Counties Area, Martin Lake in the Rusk and Panola Counties Area, and Monticello in the Titus County Area—as being in nonattainment with the health-based 2010 SO₂ NAAQS. 81 Fed. Reg. at 89,873. The effective date of the final rule for those areas of Texas was January 12, 2017, and the designations remain effective. *Id.* As a result of that final and effective designations, Texas was required, by July 12, 2018, to submit a nonattainment SIP that implemented enforceable emission limits necessary to ensure attainment of the standard. 42 U.S.C. § 7514; *see also* 81 Fed. Reg. at 89,871 (concluding that Texas must submit a nonattainment SIP within 18 months). Texas failed to meet that deadline.

Because there is no SIP submittal to review, EPA was required to make a determination that the state failed to submit the required SIP no later than six months after a submittal was due—here, by January 12, 2019. *Id.* Consequently, EPA is in violation of its mandatory statutory duty to issue a finding of failure to submit under the Clean Air Act.

As discussed, the text and structure of the Clean Air Act mandated that all areas of the country implement enforceable pollution reductions and come into compliance with the 2010 SO₂ NAAQS *no later than June 2018*. Now, more than a year after that statutory deadline, several states, including Texas, have failed to issue state implementation plans for SO₂ nonattainment areas, let alone implement the pollution reductions necessary to come into compliance with the Clean Air Act’s minimum safeguards for ambient air quality. Under these circumstances, EPA has a statutory obligation to remedy Texas’s failure to submit a plan to protect public health by issuing a formal finding that Texas failed to submit the requisite nonattainment plan under the 2015 SO₂ NAAQS. Once EPA issues the requisite finding of failure to submit, it has a mandatory duty to either promulgate a FIP or approve a SIP within two years. 42 U.S.C. § 7410(c)(1)(B).

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

Joshua Smith
Senior Staff Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Phone: (415) 977-5560
Email: joshua.smith@sierraclub.org

Sierra Club would prefer to resolve this matter without the need for litigation. Quickly and fairly resolving this matter would be a clear indication that EPA intends to respect the rule of law. Therefore, we look forward to EPA contacting the undersigned counsel to resolve this matter. If we do not hear from EPA in 60 days, we will assume that you are not interested in settling this matter, and we will file a complaint.

Sincerely,



Joshua Smith
Counsel for Sierra Club

Cc:

Ken McQueen
Administrator, Region 6
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Guy Donaldson
Section Chief
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202-2733

Matthew Z. Leopold
General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N. W.
Mail Code: 2310A
Washington, D.C. 20460