

## Law Office of Robert Ukeiley

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October 15, 2013

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

**Re: Notice of intent to sue pursuant to 42 U.S.C. § 7604(b)(2) for failure to promulgate a Federal Implementation Plan under 42 U.S.C. § 7410(c)(1) for Montana to Treat NO<sub>x</sub> as a Precursor for Ozone**

Dear Administrator McCarthy,

Pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Sierra Club notifies you that they intend to file suit against you for "a failure 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 of the Environmental Protection Agency ("EPA") is required to promulgate a Federal Implementation Plan for Montana's SIP-approved Prevention of Significant Deterioration (PSD) program to properly regulate nitrogen oxides as an ozone precursor.

EPA must remedy this violation of its mandatory duties to better provide protection from the harmful impacts of ground-level ozone, often referred to as smog. Ozone has numerous harmful effects on human respiratory systems which include inducing asthma attacks 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>). 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>). 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. Thus, it is imperative that EPA remedy its failure to perform its mandatory duties to strengthen protection of the public's health and welfare against ozone.

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The Clean Air Act requires states to submit State Implementation Plans (SIPs) that provide for the “implementation, maintenance, and enforcement” of a new or revised National Ambient Air Quality Standard within three years of the standard’s promulgation. 42 U.S.C. § 7410(a)(1). These SIPs must include the Prevention of Significant Deterioration (PSD) permit program for new major sources of pollution and major modification of existing major sources of pollution. *See e.g.* 42 U.S.C. § 7410(a)(2)(C). If EPA disapproves a SIP submission in whole or part, EPA has a mandatory duty to promulgate a Federal Implementation Plan (FIP) within 2 years of that disapproval. 42 U.S.C. § 7410(c)(1)(B).

On November 29, 2005, EPA promulgated the phase 2 implementation rule for the 1997 ozone NAAQS, which includes requirements for PSD programs to treat nitrogen oxides as a precursor for ozone (72 Fed. Reg. 71612). On July 22, 2011, EPA disapproved Montana’s section 110(a)(2) infrastructure elements (C) and (J) for the 1997 ozone NAAQS because the Montana SIP approved PSD program does not meet the phase 2 implementation rule requirement to treat nitrogen oxides as a precursor for ozone. 76 Fed. Reg. 43,918, 42,922 (July 22, 2011). The effective date for the rule containing this disapproval was August 22, 2011. 76 Fed. Reg. at 43,918. Thus, EPA has a mandatory duty to promulgate a FIP for Montana’s PSD program to treat nitrogen oxides as a precursor for ozone no later than August 22, 2013. However, as of the date of this letter, EPA has still not promulgated a FIP to treat nitrogen oxides as a precursor for ozone. Thus, EPA is in violation of its mandatory duty. *See* 42 U.S.C. § 7410(c)(1)(B).

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

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

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

Sierra Club 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, as is almost always the case when EPA is illegally failing to implement the Clean Air Act, we will have to assume that you are not interested in settling this matter and file a complaint.

Sincerely,



Robert Ukeiley  
Counsel for Sierra