



November 27, 2019

Mr. Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of the Administrator: mail code 1101A
1200 Pennsylvania Ave, NW
Washington, DC 20460
wheeler.andrew@epa.gov

By Certified Mail, Return Receipt Requested, and Email

Re: 60-Day Notice of Intent to File Clean Air Act Citizen Suit

Administrator Wheeler:

This letter is submitted on behalf of Downwinders at Risk, Appalachian Mountain Club, Sierra Club, Texas Environmental Justice Advocacy Services, Air Alliance Houston, and Clean Wisconsin to notify you pursuant to section 304(b) of the Clean Air Act (“CAA” or “Act”) that these organizations intend to sue the U.S. Environmental Protection Agency (“EPA”) for its failure to perform a nondiscretionary duty under the Act. As further specified below, you have failed to carry out your nondiscretionary duty under sections 7410(c)(1) and 7410(a)(2)(D)(i)(I) to issue, within the two-year deadline of section 7410(c)(1), a federal implementation plan that eliminates eastern upwind states’ significant contributions to downwind states’ nonattainment and nonmaintenance of the 2008 ozone standard as expeditiously as practicable and not later than the attainment deadlines faced by downwind states.

The Act requires EPA to set national ambient air quality standards for certain pollutants that endanger public health or welfare, including ozone. 42 U.S.C. §§ 7408, 7409. These clean air standards must be established at a level that protects public health with “an adequate margin of safety.” 42 U.S.C. § 7409(b). States and EPA identify areas of the country where air quality fails to meet the standard and designate those areas as “nonattainment.” 42 U.S.C. § 7404(d).

Nonattainment areas must attain ozone standards “as expeditiously as practicable’ *but not later than*” a date certain, by severity of nonattainment: three years for marginal nonattainment; six years for moderate nonattainment; nine years for serious nonattainment; fifteen years for severe nonattainment; and twenty for extreme nonattainment. *Nat. Res. Def. Council v. EPA*, 777 F.3d 456, 460 (D.C. Cir. 2014) (citing 42 U.S.C. § 7511(a)(1) & Table 1) (emphasis added).

To ensure timely attainment, states must adopt and submit to EPA plans for implementation, maintenance, and enforcement of the standards. 42 U.S.C. § 7410(a). If a state fails to submit a plan, or EPA finds the state plan inadequate, EPA must issue a federal implementation plan within two years. *Id.* § 7410(c)(1).

State and federal implementation plans must satisfy the requirements of the Act's Good Neighbor Provision. 42 U.S.C. § 7410(a)(2)(D)(i)(I). The Good Neighbor Provision requires that plans “prohibit[] . . . any source . . . from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State.” 42 U.S.C. § 7410(a)(2)(D)(i)(I). Upwind state or federal plans must implement the Good Neighbor Provision “consistent with the provisions of [Title I of the Act],” *id.*—that is, as expeditiously as practicable and not later than downwind states' attainment deadlines. *Id.* § 7511(a)(1).

On March 27, 2008, EPA promulgated the 2008 ozone standard of 75 parts per billion. 73 Fed. Reg. 16,436. On July 20, 2012, EPA issued its nonattainment designations. 80 Fed. Reg. 12,264, 12,268. On July 13, 2015, effective August 12, 2015, EPA determined that 24 states,¹ had missed the deadline to adopt and submit state plans implementing their Good Neighbor obligations. 80 Fed. Reg. 12,264. EPA's determination triggered EPA's obligation to issue a federal plan that implemented the Good Neighbor provision within two years, by August 12, 2017. 42 U.S.C. § 7410(c)(1); 81 Fed. Reg. 74,504, 74,512.

In 2016, EPA issued the Cross State Air Pollution Rule update (CSAPR Update), an initial attempt to implement the Good Neighbor provision and address 22 eastern upwind states' contribution to downwind states' ongoing violations of the 2008 ozone standard.² 81 Fed. Reg. 74,504. However, the CSAPR Update was only a “partial remedy” and did not eliminate eastern upwind states' significant contributions to downwind states' nonattainment and nonmaintenance. 81 Fed. Reg. 74,504; *see also State of Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019).

On December 21, 2018, EPA attempted to “close out” its legal obligation—and that of 20 eastern upwind states—to eliminate significant contributions to

¹ Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and West Virginia. 80 Fed. Reg. 12,264.

² As noted, the CSAPR Update covered 22 eastern states: 13 of the 24 states that EPA had determined in 2015 had failed to adopt or submit a state implementation plan (Alabama, Arkansas, Illinois, Iowa, Kansas, Michigan, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Virginia, and West Virginia); 2 states that withdrew their submissions (Maryland and New Jersey); and 7 additional states whose state plans EPA disapproved or partially disapproved (Indiana, Kentucky, Louisiana, New York, Ohio, Texas, and Wisconsin). 81 Fed. Reg. 74,504, 74,512.

downwind nonattainment and maintenance problems.³ But in *State of New York v. EPA*, 781 Fed.Appx. 4 (Mem) (D.C. Cir. 2019), the D.C. Circuit held that the 2018 rule unlawfully failed to prohibit eastern upwind states' significant contributions to downwind nonattainment and nonmaintenance by downwind states' attainment deadlines and vacated the "close-out" rule.

EPA is therefore in violation of its obligation to issue, within two years, a federal implementation plan (or plans) that discharges its legal obligation under the Good Neighbor provision. EPA must issue a federal implementation plan (or plans) for 20 eastern upwind states—Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, Virginia, West Virginia, and Wisconsin—that eliminates their significant contributions to downwind states' nonattainment and nonmaintenance of the 2008 ozone standard as expeditiously as practicable and not later than downwind states' attainment deadlines. The necessary reductions must be implemented by the 2020 ozone season to allow downwind states to demonstrate attainment by the July 20, 2021 attainment date for serious nonattainment areas.

This notice is submitted on behalf of the following organizations:

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Houston, TX 77003

Sierra Club
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Clean Wisconsin
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If EPA does not promptly promulgate a federal implementation plan (or plans) that eliminates these 20 eastern upwind states' significant contributions to downwind states' nonattainment and nonmaintenance as expeditiously as

³ As noted, the "close-out" rule covered 20 eastern states: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, Virginia, West Virginia, and Wisconsin. 81 Fed. Reg. 74,504. Tennessee was not included because EPA determined the CSAPR Update would fully eliminate Tennessee's significant contributions to downwind nonattainment and nonmaintenance of the 2008 ozone standard. 81 Fed. Reg. 74,504; 83. Fed. Reg. 65,882. Kentucky was not included because EPA separately finalized approval of a state plan for Kentucky that claimed to fully address the state's good neighbor obligations. See 83 Fed. Reg. 65,878, 65,879.

practicable and not later than the attainment deadlines, these organizations intend to file suit 60 days from the postmark of this letter. Please contact undersigned counsel at the address and telephone number provided below to further discuss the basis for this claim or to explore possible options for resolution short of litigation.

Sincerely,



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