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August 18, 2021

VIA CERTIFIED MAIL

Administrator Michael S. Regan  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Regan.Michael@epa.gov

**Re: Notice of Intent to Sue Pursuant to Section 304 of the Clean Air Act, 42 U.S.C. § 7604, Regarding EPA's Unreasonable Delay In Responding to the Remand of Final Action Entitled "Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards; Colorado and North Dakota."**

Dear Administrator Regan,

This letter constitutes notice, pursuant to Section 304 of the Clean Air Act, 42 U.S.C. § 7604, that the Center for Biological Diversity and the Center for Environmental Health intend to file a citizen suit against you in your official capacity and against the Environmental Protection Agency (EPA). The Center for Biological Diversity and the Center for Environmental Health intend to bring suit one hundred and eighty days from the date of this letter, or shortly thereafter, for EPA's unreasonable delay in reconsidering its final action entitled "Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards; Colorado and North Dakota," following a grant of EPA's motion for voluntary remand in *Center for Biological Diversity v. U.S. Environmental Protection Agency, et al.*, No. 20-9560 (10th Cir. 2021). The suit will seek injunctive and declaratory relief, the cost of litigation, and other relief.

## I. EPA's Unreasonable Delay

### A. Background

This matter concerns EPA's final action entitled "Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards; Colorado and North Dakota" ("Final Action"). EPA assigned this action Docket Number EPA-R08-OAR-2019-0140. The Final Action approved in full Colorado's Clean Air Act State Implementation Plan (SIP) for the 2015 ozone National Ambient Air Quality Standards (NAAQS). Notice of the Final Action was published in the Federal Register on April 10, 2020.

When evaluating an infrastructure SIP submission, the EPA Administrator must determine whether the submission complies with the requirements of the Clean Air Act established in 42 U.S.C. § 7410(a). 42 U.S.C. § 7410(k)(2)-(4). The Center for Biological Diversity filed a petition for review of the Final Action before the Tenth Circuit on June 9, 2020, challenging EPA's approval of Colorado's SIP as to two of these required elements: 42 U.S.C. § 7410(a)(2)(D), known as the Good Neighbor Provision, which requires evaluation of an upwind state's contribution to downwind nonattainment and maintenance areas, and 42 U.S.C. § 7410(a)(2)(E), which requires that the state have adequate resources and authority under state law to carry out its implementation plan.

With respect to the Good Neighbor Provision, the petition alleged that EPA used the incorrect attainment deadline in its modeling to determine Colorado's contributions to downwind areas, meaning that EPA failed to address Colorado's contribution to several areas and likely underestimated Colorado's impact on interstate pollution. *See* Opening Brief at 24-25, *Center for Biological Diversity v. EPA, et al.*, No. 20-9560 (10th Cir. Oct. 30, 2020) ("Opening Brief"). As for 42 U.S.C. § 7410(a)(2)(E), the petition alleged that Colorado lacks authority to regulate many agricultural sources of air pollution under state law, and therefore cannot effectively implement the SIP. Opening Brief at 39.

EPA moved for voluntary remand on Dec. 31, 2020. Mot. for Voluntary Remand, *Center for Biological Diversity v. EPA, et al.*, No. 20-9560 (10th Cir. Dec. 31, 2020) ("Mot. for Remand"). EPA stated that upon remand it would "consider a relevant judicial decision issued after the Final Rule, supplement the administrative record with additional information and analysis, take and consider additional comment, and provide additional explanation of its assessment of the challenged aspects of the Final Rule." Decl. of Carl Daly in Support of Mot. for Voluntary Remand at ¶ 6, *Center for Biological Diversity v. EPA, et al.*, No. 20-9560 (10th Cir. Dec. 31, 2020) ("Daly Decl.").<sup>1</sup>

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<sup>1</sup> EPA acknowledged that an intervening D.C. Circuit decision held that EPA must measure air quality in the year that corresponds with the next downwind attainment deadline in relation to the Good Neighbor Provision. *Maryland v. EPA*, 958 F.3d 1185, 1203-04 (D.C. Cir.

The Tenth Circuit granted EPA's motion on Jan. 5, 2021, ordering remand to EPA for "proceedings consistent with the Motion for Voluntary Remand." Order, *Center for Biological Diversity v. EPA, et al.*, No. 20-9560 (10th Cir. Jan. 5, 2021). To the knowledge of the Center for Biological Diversity and the Center for Environmental Health, EPA has taken no action toward reconsideration of the Final Action since the grant of voluntary remand. EPA's inaction to date constitutes unreasonable delay.

**B. EPA's delay is unreasonable given the urgency of the threat posed by ozone pollution to human health and the environment.**

Courts must compel agency action that is delayed unreasonably. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). This analysis is governed by a "rule of reason," with consideration of applicable statutory timetables, whether human health and welfare are at stake, effects on agency activities of a higher or competing priority, and the nature and extent of the interests prejudiced by the delay. Courts need not find impropriety to find that agency action is unreasonably delayed. *Id.* at 1191 n.18 (quoting *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)).

EPA's delay to date in reconsidering the Final Action violates the "rule of reason" given the urgency of the need to reduce air pollution for the benefit of human health and the environment. The ozone pollution at issue represents a significant threat to the public health. Further delay only exacerbates the risk of harm to the environment as well as the health and welfare of residents of Colorado and downwind states. "Where delay adversely affects the health of persons, courts have required expeditious action by agencies." *Environmental Defense Fund v. U.S. Nuclear Regul. Comm'n*, 902 F.2d 785, 789 (10th Cir. 1990). For example, in a decision granting voluntary remand of EPA's approval of a regional haze SIP, the Third Circuit ordered EPA to complete remand proceedings within 180 days. See Order, *Nat'l Parks Conservation Ass'n, et al. v. U.S. E.P.A.*, No. 12-3534 (3d Cir. Oct. 22, 2013).

Ozone pollution can cause premature mortality, respiratory problems, aggravate lung diseases, and increase the frequency of asthma attacks.<sup>2</sup> Those most at risk include

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2020). EPA sought to reevaluate the Final Action in light of *Maryland* as well as new information relevant to its analysis, including new air quality modeling and analysis and emissions trends data. Daly Decl. at ¶¶ 8-11. As for the state authority element, EPA expressed its intent to review its analysis of Colorado state law prohibiting regulation of agricultural emissions from sources other than major stationary sources. Mot. for Remand at 10.

<sup>2</sup> EPA, Health Effects of Ozone Pollution, available at <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>; 80 Fed. Reg. 65,292, 65,294 (Oct. 26, 2015).

children, the elderly, people with lung diseases including asthma, and people who work or exercise outside.<sup>3</sup> EPA revised the ozone NAAQS in 2015 to “provide increased public health protection against health effects associated with long- and short-term exposures,” recognizing that the prior standards were “not requisite to protect public health with an adequate margin of safety.” National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,291, 65,294 (Oct. 26, 2015).

In addition to its impacts on human health, ozone pollution is also harmful to plants and results in negative impacts on ecosystems.<sup>4</sup> Congress also recognized the urgency of reducing air pollution in its requirement that areas designated as nonattainment under a NAAQS reach attainment “as expeditiously as practicable,” but no later than the deadlines provided within the Clean Air Act. 42 U.S.C. § 7511(a)(1).

EPA’s unreasonable delay in reconsidering Colorado’s SIP harms the public health of residents in Colorado and downwind states, including members of the Center for Biological Diversity who are adversely affected by ozone pollution. Herm Hoops, a member of the Center for Biological Diversity, lives in the Uinta Basin, Utah, an ozone nonattainment area downwind from Colorado. Declaration of Herm Hoops at ¶¶ 3, 12, *Center for Biological Diversity v. EPA, et al.*, No. 20-9560 (10th Cir. Oct. 30, 2020). Mr. Hoops suffers from chronic obstructive pulmonary disease (COPD), which heightens his risk of injury caused by ozone pollution, and he suffers health problems related to his exposure to high ozone levels in his area. *Id.* at ¶¶ 13-15. *See also* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015).

Ozone pollution also adversely affects individuals within Colorado. Scott Silber, a member of the Center for Biological Diversity, lives in Boulder, Colorado, and enjoys outdoor activities. Declaration of Scott Silber at ¶¶ 3-4, *Center for Biological Diversity v. EPA, et al.*, No. 20-9560 (10th Cir. Oct. 30, 2020). Mr. Silber suffers from asthma, which is exacerbated by poor air quality. *Id.* at ¶ 4, 11. Mr. Silber is often unable to exercise outdoors due to poor air quality, and limits the outdoors locations he visits based on concerns about air quality, all of which causes him distress. *Id.* at ¶¶ 5, 12-13. Dr. Richard Reading, also a member of the Center for Biological Diversity, lives in Denver, Colorado and enjoys outdoor activities. Declaration of Richard Reading at ¶¶ 3-4, *Center for Biological Diversity v. EPA, et al.*, No. 20-9560 (10th Cir. Oct. 30, 2020). Dr. Reading has suffered respiratory distress and asthma attacks caused by poor air quality, requiring him to seek medical care and take medication, and he can no longer exercise outdoors on bad air quality days. *Id.* at ¶ 5.

Residents of Colorado and downwind states have suffered and will continue to suffer from Colorado’s contribution to ozone pollution if EPA does not act. Indeed, data released by

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<sup>3</sup> *Id.*

<sup>4</sup> EPA, Ecosystem Effects of Ozone Pollution, available at <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>.

EPA since the grant of voluntary remand in this case show that ozone pollution in both Colorado and downwind areas currently exceeds the 2015 ozone NAAQS. *See infra* Section I(B)(i). It is clear that EPA's delay in reconsidering its approval of Colorado's SIP risks aggravating harms to the public health and the environment.

**i. EPA's unreasonable delay in reconsidering Colorado's obligations under the Good Neighbor Provision risks delays in the implementation of measures to address air pollution.**

In its motion for voluntary remand, EPA acknowledged that it used the inappropriate year in its modeling of Colorado's contributions to downwind states under the Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D). When it evaluated Colorado's SIP, EPA assessed Colorado's obligations consistent with the Aug. 3, 2024 deadline for Moderate nonattainment areas to come into compliance with the 2015 ozone NAAQS, rather than the Aug. 3, 2021 deadline for Marginal area attainment. *Daly Decl.* at ¶ 8. EPA therefore failed to address Colorado's contribution to current downwind nonattainment areas, under the assumption that these areas would be in attainment by the Moderate attainment deadline.

EPA now concedes that Aug. 3, 2021 is the appropriate date for modeling, as an intervening judicial decision makes clear that EPA must find a violation of the Good Neighbor Provision if an upwind source will significantly contribute to nonattainment in a downwind area at the *next* downwind attainment deadline. *Daly Decl.* at ¶ 8; *see also Maryland v. EPA*, 958 F.3d 1185, 1204 (D.C. Cir. 2020). *See also* 86 Fed. Reg. 37,942 (July 19, 2021) (Evaluating Good Neighbor provision for FL, GA, NC, and SC using 2021 analytic year in light of *Maryland v. EPA* decision). EPA noted that upon remand, in addition to reconsidering its analysis using the appropriate attainment deadline, it would also consider new modeling and analysis, emissions trends data, and other information that would be relevant to Colorado's contributions to other states. *Daly Decl.* at ¶ 10.

EPA's own data now shows that Colorado failed to attain the 2015 ozone NAAQS by August 3, 2021. The 2018-2020 design value for the Denver Metro/North Front Range area was 0.081 ppm, well above the 2015 NAAQS of 0.070 ppm (and even above the less stringent 2008 NAAQS of 0.075 ppm).<sup>5</sup> The downwind Uinta Basin area in Utah likewise failed to attain the 2015 NAAQS by August 3, 2021, with a 2018-2020 design value of 0.076 ppm.<sup>6</sup> This data indicates the urgency of further review by EPA to accurately evaluate and address Colorado's contribution to downwind states.

Given that EPA itself has recently published data demonstrating that Colorado has not attained the 2015 ozone NAAQS, EPA's delay in reconsidering Colorado's impacts on the

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<sup>5</sup> *See* EPA, Ozone Design Values, 2020, available for download at <https://www.epa.gov/air-trends/air-quality-design-values>; *see also* 80 Fed. Reg. 65,293, 65,294 (Oct. 26, 2015).

<sup>6</sup> *Id.*

environment and the public health in Colorado and downwind states is unreasonable. Further analysis of Colorado's contributions to interstate air pollution, based on the appropriate attainment deadline and using EPA's new data and information, is necessary. EPA's inaction to date risks delaying the implementation of measures that protect the public from harmful ozone pollution. Furthermore, EPA has proposed action on Florida, Georgia, North Carolina, and South Carolina but has not proposed action for Colorado. It is unreasonable for EPA to move forward with addressing the four southeast states' Good Neighbor obligations but not Colorado's.

**ii. EPA's unreasonable delay in addressing Colorado's state law prohibition on regulating certain agricultural emissions harms the environment and public health.**

As the Center for Biological Diversity noted in comments on Colorado's SIP submission and in its Petition for Review, Colorado state law expressly prohibits the state from "regulat[ing] emissions from agricultural, horticultural, or floricultural production such as farming, seasonal crop drying, animal feeding operations that are not housed commercial swine feeding operations as defined in section 25-8-501.1(2)(b), and pesticide application," unless such emissions are from "major stationary sources" as defined by the Clean Air Act. Colo. Rev. Stat. § 25-7-109(8)(a). This provision prohibits Colorado from creating enforceable limitations for ozone precursor emissions and other pollutants from agriculture, thus preventing it from implementing its SIP in violation of 42 U.S.C. § 7410(a)(2)(E).

The Colorado legislature recently reaffirmed exemptions from regulation for agricultural emissions that do not come from stationary sources, making the situation even worse. Colorado House Bill 21-1266, §§ 9, 15. Colorado's inability to regulate many agricultural emissions represents a significant obstacle toward reduction of air pollution: many agricultural emissions are from sources other than major stationary sources, such as fugitive emissions (i.e. soil and pesticides).

The urgency of regulating agricultural sources of emissions, both to address climate change and to more generally benefit human health and the environment, is increasingly recognized. For example, agriculture is the largest source of methane emissions in the U.S.<sup>7</sup> and is responsible for 40 percent of human-caused methane emissions globally.<sup>8</sup> Methane contributes to the formation of ground-level ozone, with "detrimental effects on people,

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<sup>7</sup> EPA, Overview of Greenhouse Gases: Methane Emissions, available at <https://www.epa.gov/ghgemissions/overview-greenhouse-gases>.

<sup>8</sup> United Nations Environment Programme and Climate and Clean Air Coalition, Global Methane Assessment: Benefits and Costs of Mitigating Methane Emissions (2021), at 9, available at <https://www.unep.org/resources/report/global-methane-assessment-benefits-and-costs-mitigating-methane-emissions>.

ecosystems and crops.”<sup>9</sup> Methane is also a significant driver of climate change, contributing to “at least a quarter of today’s gross warming.”<sup>10</sup> A recent study finds that fast action to reduce methane emissions is essential to achieve warming targets and limit damage from warming to social and natural systems.<sup>11</sup> Another recent study finds that methane emissions in the U.S. are likely significantly higher than current estimates, including estimates from EPA reporting.<sup>12</sup> Additionally, atmospheric methane amounts have increased rapidly in the past decade.<sup>13</sup>

The risk of ozone pollution from pesticides and soil emissions is likewise concerning. For example, a 2018 study found that agricultural soil produces significant emissions of nitrogen oxide gases (NO<sub>x</sub>) in California.<sup>14</sup> EPA also recognizes that pesticides emit volatile organic compounds (VOCs).<sup>15</sup>

EPA must urgently address the issue of Colorado’s prohibition on regulation of many agricultural sources of air pollution. The danger posed by agricultural sources of air pollution to human health and the environment show that EPA’s delay to date is unreasonable.

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EPA’s Final Action approving Colorado’s SIP risks causing harm to the environment and the public health. EPA itself acknowledges that it must act to correct its analysis, and its reconsideration is also mandatory under the terms of the Tenth Circuit order granting remand to EPA for “proceedings consistent with the Motion for Voluntary Remand.” EPA’s unreasonable delay in reconsidering the Final Action violates the Clean Air Act prohibition against unreasonably delayed agency action, 42 U.S.C. § 7604(a), as well as the Administrative Procedure Act’s requirement that an agency conclude matters presented to it within a reasonable time, 5 U.S.C. § 555(b), and prohibition of unreasonable delay in agency action, 5 U.S.C. § 706(1). *See also Forest Guardians*, 174 F.3d at 1187 (“Through [5

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<sup>9</sup> *Id.* at 18.

<sup>10</sup> Ilissa B. Ocko et al., *Acting rapidly to deploy readily available methane mitigation measures by sector can immediately slow global warming*, 16 Environmental Research Letters (2021), at 2.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> Matthew N. Hayek and Scot M. Miller, *Underestimates of methane from intensively-raised animals could undermine goals of sustainable development*, 16 Environmental Research Letters (2021), at 5.

<sup>13</sup> Global Methane Assessment, *supra*, at 18.

<sup>14</sup> Maya Almaraz et al., *Agriculture is a major source of NO<sub>x</sub> pollution in California*, 4 Science Advances (2018).

<sup>15</sup> EPA, What are volatile organic compounds (VOCs)?, available at <https://www.epa.gov/indoor-air-quality-iaq/what-are-volatile-organic-compounds-vocs>.

U.S.C.] § 706 Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed.”).

## **II. Notice of Intent to Sue**

After 180 days have passed from the date of this letter, the Center for Biological Diversity and the Center for Environmental Health intend to file suit against you and EPA in federal court pursuant to 42 U.S.C. § 7604 for EPA’s unreasonable delay in reconsidering the Final Action, as described above. However, we would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting us within 60 days about coming into compliance with the mandatory duty and the 180 days for the unreasonable delay. If you do not do so, however, we will have to file suit.

## **III. Noticing Party**

As required by 40 C.F.R. § 54.3, the parties giving notice are:

The Center for Biological Diversity  
1536 Wynkoop St., Ste. 421  
Denver, CO 80202

The Center for Environmental Health  
2201 Broadway, Suite 508  
Oakland, CA 94612

## **IV. Legal Representation**

The Center for Biological Diversity and the Center for Environmental Health are represented in this matter by undersigned counsel. Please direct all communications regarding this matter to me at [klynch@law.du.edu](mailto:klynch@law.du.edu) or 308-871-6140. I look forward to hearing from you.

Sincerely,



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