



August 30, 2021

BY CERTIFIED MAIL

Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Re: Notice of Intent to File Suit Under the Clean Air Act, Unreasonable Delay in Responding to Petition to Designate Permian Basin of New Mexico an Ozone Nonattainment Area, Find that New Mexico State Implementation Plan is Inadequate

Dear Administrator Regan:

WildEarth Guardians hereby notifies you of its intent to file suit under the Clean Air Act against you and the Environmental Protection Agency (“EPA”) for your failure to meaningfully respond to our March 3, 2021 Clean Air Act petition requesting that you designate the Permian Basin of southeast New Mexico an ozone nonattainment area and find that the New Mexico State Implementation Plan (“SIP”) is substantially inadequate. This petition was submitted pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 551, *et seq.* and the Clean Air Act, 42 U.S.C. § 7401, *et seq.* We intend to bring a suit 180 days from the date of this letter, or shortly thereafter, under section 304 of the federal Clean Air Act, as Amended, 42 U.S.C. § 7604(a), against you for your unreasonable delay in acting upon our Petition.

On March 2, 2021, Guardians submitted via certified U.S. mail and via e-mail a straightforward rulemaking petition requesting that the EPA designate the Permian Basin of southeast New Mexico an ozone nonattainment area and find that the New Mexico SIP is substantially inadequate under the Clean Air Act. The petition was submitted to former Acting EPA Administrator, Jane Nishida, with copies sent to EPA Region 6 and the New Mexico Environment Department. On March 17, 2021, EPA confirmed in a letter sent to Guardians that it received our March 2, 2021 petition and had begun reviewing it.

The petition was filed in light of ongoing violations of national ambient air quality standards (“NAAQS”) for ozone in southeast New Mexico. These ongoing violations of the ozone NAAQS in southeast New Mexico pose serious and urgent health risks to people living and working in the region, and pose significant environmental justice concerns.

EPA’s failure to act on WildEarth Guardians’ Petition is, in effect, condoning unhealthy and arguably illegal air quality in the Permian Basin of New Mexico. Under the Clean Air Act, New Mexico is required to provide for the “implementation, enforcement, and maintenance” of the NAAQS. 42 U.S.C. § 7410(a)(1). Because of ongoing violations of the ozone NAAQS, New Mexico is clearly failing to meet this bedrock requirement of federal clean air law, putting people and communities at risk in the Permian Basin.

The unreasonableness of EPA’s delay is underscored by the dangerously mounting nature of the ozone problem in the Permian Basin of New Mexico. While the region is already violating the ozone NAAQS due to recorded exceedances between 2018 and 2020, ozone monitoring so far in 2021 indicates the frequency and severity of exceedances are increasing. So far in 2021, the ozone NAAQS have been exceeded on 21 days at the three monitoring sites in the region recording a total of 34 exceedances. This high ozone was recorded in the towns of Carlsbad and Hobbs, as well as at Carlsbad Caverns National Park. Ozone levels far exceeded the NAAQS at all three locations, peaking as high as 0.092 parts per million in Carlsbad, more than 30% above the NAAQS of 0.070 parts per million.

Number of Ozone NAAQS Exceedances at Permian Basin, New Mexico Monitoring Sites¹

Monitoring Site Location	County Location	Monitor ID	Number of Daily Exceedances Recorded so far in 2021	Maximum Exceedance (in parts per million)
Carlsbad	Eddy	350151005	19	0.092
Carlsbad Caverns National Park	Eddy	350150010	12	0.085
Hobbs	Lea	350250008	3	0.086

Under the EPA’s own regulations, a violation of the ozone NAAQS occurs when the three-year average of the annual fourth highest daily maximum values exceeds 0.070 parts per million. 40 C.F.R. § 50.19(b). This three year average is referred to as a “design value.” Based on 2021 monitoring data to date, the design value at both monitors in Eddy County are above the NAAQS and the monitor in Lea County is edging closer to the NAAQS.

Ozone Design Values at Permian Basin, New Mexico Monitors

Monitoring Site Location	County Location	Monitor ID	2019 4th Max.	2020 4th Max.	2021 4th Max.	2019-2021 Design Value
Carlsbad	Eddy	350151005	0.080	0.073	0.080	0.077
Carlsbad Caverns National Park	Eddy	350150010	0.074	0.072	0.077	0.074
Hobbs	Lea	350250008	0.070	0.060	0.068	0.066

¹ Monitoring data queried from EPA’s AirData website, <https://www.epa.gov/outdoor-air-quality-data/download-daily-data>.

If EPA were to take action on WildEarth Guardians' Petition, the agency would be compelled to designate the Permian Basin an ozone nonattainment area under the Clean Air Act. This designation would impose deadlines for the State of New Mexico to clean up the air, protect public health, and attain the NAAQS. If EPA were to take action on WildEarth Guardians' Petition, people and communities in the Permian Basin would finally receive the safeguards they are owed under the Clean Air Act and finally rein in unchecked air pollution in the region.

The APA requires EPA to conclude matters raised in petitions within a reasonable time (*see* 5 U.S.C. § 555(b), "within a reasonable time, each agency shall proceed to conclude a matter presented to it") and the Clean Air Act explicitly contemplates that the Administrator will act within a reasonable time (*see* 42 U.S.C. § 7604(a), providing for judicial review of action unreasonably delayed).

In our Petition, we requested that the EPA Administrator:

1. Notify the Governor of New Mexico, within one month of receipt of this petition, that available information indicates the designation of Chaves, Eddy, Lea, and Roosevelt Counties must be revised from attainment to nonattainment; and
2. Notify the State of New Mexico, within one month of receipt of this petition, that its SIP is substantially inadequate and must be revised within three months of notification.

In its March 17, 2021 letter, EPA acknowledged receipt of WildEarth Guardians' Petition by email on March 2, 2021. According to a certified receipt, the Administrator also received a hard copy of WildEarth Guardians' Petition on March 10, 2021. It has now been over five months since the Petition was received and WildEarth Guardians still has not received a substantive response to what is a straightforward request that EPA act upon empirical data and fulfill its foundational legal duties under the Clean Air Act. This failure to act constitutes unreasonable delay under the APA and the Clean Air Act.

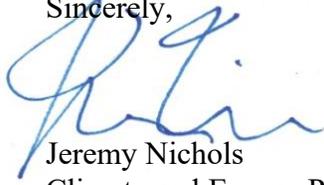
The Clean Air Act provides that any citizen may file suit to compel action unreasonably delayed by the Administrator after providing 180 days' notice. *See* 42 U.S.C. § 7604(a). Pursuant to the Clean Air Act, if the EPA has not taken the actions requested in our Petition, we will file suit to compel action after 180 days.

The full name and address of the organization giving notice is WildEarth Guardians, 301 N. Guadalupe, Suite 201, Santa Fe, NM 87501. Pursuant to Section 304(a) of the Clean Air Act, notice is also being provided to the State of New Mexico. If you wish to discuss this matter further, please contact us at the information indicated below:

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Sincerely,



Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians

Cc: Michelle Lujan Grisham, Governor of the State of New Mexico
David Gray, Acting Regional Administrator, EPA Region 6
James Kenney, Secretary, New Mexico Environment Department