

ATTORNEYS GENERAL OF NEW YORK, CONNECTICUT,
MASSACHUSETTS, AND NEW JERSEY, AND THE
CORPORATION COUNSEL OF THE CITY OF NEW YORK

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

February 14, 2022

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

Re: Notice of Intent to Sue for Failure to Perform Nondiscretionary Duties under the Clean Air Act to Promulgate Federal Implementation Plans Addressing Good Neighbor Provision Requirements for the 2015 Ozone National Ambient Air Quality Standards

Dear Administrator Regan:

New York, Connecticut, Massachusetts, New Jersey, and the City of New York (Noticing States) request that the Environmental Protection Agency and Administrator Michael Regan (together, EPA) take immediate steps to remedy EPA's violation of a nondiscretionary duty under the Clean Air Act (Act). Specifically, EPA must promulgate federal implementation plans (FIPs) to fully address the interstate transport of pollution from sources in Pennsylvania and Virginia (Upwind States), that contribute significantly to nonattainment, or interfere with maintenance of the 2015 ozone National Ambient Air Quality Standards (NAAQS), in violation of the Good Neighbor Provision of the Act. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

The Upwind States significantly contribute to unhealthy ozone levels in the Noticing States and longstanding problems attaining and maintaining the 2015 ozone NAAQS. More than two years ago, EPA made findings that the Upwind States failed to submit state implementation plans (SIPs) addressing excessive interstate pollution transport from their in-state sources, as required under section 110(a)(1) of the Act. 84 Fed. Reg. 66,612, 66,614 (Dec. 5, 2019) (effective Jan. 6, 2020). EPA's "findings of failure to submit" triggered an obligation to promulgate FIPs within two years for the Upwind States addressing their Good Neighbor Provision obligations—by January 6, 2022. 42 U.S.C. § 7410(c)(1). However, EPA has not promulgated the required FIPs within the two-year statutory period required by the Act and has thus failed "to perform an[] act or duty . . . which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). This letter provides notice required by the Act that the Noticing

States intend to commence a citizen suit to obtain EPA's compliance with its mandatory duties.

Accordingly, at the expiration of the required 60-day notice period, the Noticing States intend to file suit against you in your official capacity as the Administrator of the EPA and against EPA for failure to promulgate FIPs and thus to perform a nondiscretionary duty under the Act. *See* 42 U.S.C. § 7604(a) and (b). If the Noticing States must file suit to obtain EPA's compliance with these nondiscretionary duties, we intend to seek all available relief and costs including, without limitation, reasonable attorneys' fees under section 304(d) of the Act. 42 U.S.C. § 7604(d).

Background

Under the cooperative federalism framework of the Act, EPA and the states are required to work together to achieve healthy air quality throughout the country. To promote this goal, the Act requires EPA to establish and periodically revise NAAQS, which establish maximum allowable ambient air concentrations for certain pollutants. 42 U.S.C. §§ 7408-7409.

Ground-level ozone is not emitted directly into the air, but is a secondary air pollutant that forms when other atmospheric pollutants, known as ozone "precursors," such as nitrogen oxides (NO_x) and volatile organic compounds (VOCs), react in the presence of sunlight. 80 Fed. Reg. 65,292, 65,299 (Oct. 26, 2015). EPA has found significant negative health effects in individuals exposed to elevated levels of ozone, including coughing, throat irritation, lung tissue damage, and aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema. *Id.* at 65,302-11. Exposure to ozone has also been linked to premature mortality. *Id.* Some subpopulations face elevated risks from exposure to ozone pollution, including children, the elderly, and those with existing lung diseases, such as asthma. *Id.* In 2015, based on updated scientific information about the health risks of ozone at lower concentrations, EPA revised the ozone NAAQS, setting the primary and secondary standards at 70 parts per billion, 80 Fed. Reg. at 65,292, where they currently remain.¹

The formation and transport of ozone occurs on a regional scale over hundreds of miles throughout much of the eastern United States. EPA has known for decades of the regional nature of the ground-level ozone air quality problem, and that pollution from sources located in multiple upwind states contributes to downwind states' problems attaining and maintaining the ozone NAAQS, with those sources in

¹ EPA kept the same ozone NAAQS in a 2020 rule, *see* 85 Fed. Reg. 87,256 (Dec. 31, 2020), which the Noticing States and others have challenged in the U.S. Court of Appeals for the D.C. Circuit, *New York v. EPA*, D.C. Cir. No. 21-1028. The obligations at issue in this letter relate to the 2015 rule, *see* 80 Fed. Reg. at 65,292.

upwind states routinely contributing to multiple downwind air quality problems in varying amounts. EPA has long recognized that downwind states cannot on our own comply with the ozone NAAQS, and that reducing ozone concentrations in downwind states requires a reduction in what EPA calls the “interstate transport” of ozone precursors from upwind states. *See* 86 Fed. Reg. 23,054, 23,056 (Apr. 30, 2021).

The Clean Air Act requires each state to submit a SIP for every new and revised NAAQS within three years of that standard’s promulgation or revision, and those SIPs must provide for the “implementation, maintenance, and enforcement” of the new standard. 42 U.S.C. § 7410(a)(1). These plans, known as “Infrastructure” SIPs, must meet the requirements listed under 42 U.S.C. § 7410(a)(2), including the “Good Neighbor Provision” at 42 U.S.C. § 7410(a)(2)(D)(i)(I), which requires states to prohibit emissions that significantly contribute to nonattainment, or interfere with maintenance, of a NAAQS in any downwind state.

EPA must determine whether each state has submitted an administratively complete SIP, including an Infrastructure SIP, “no later than 6 months after the date, if any, by which a state is required to submit the plan or revision.” 42 U.S.C. § 7410(k)(1)(B). If a state fails to submit any required element of a SIP, including elements addressing the Good Neighbor Provision, that state’s plan is deemed incomplete and EPA has a non-discretionary duty to make a determination that the state failed to submit the required SIP. *Id.* In December 2019, EPA published a notice of final action in the Federal Register, effective January 6, 2020, that seven states, including Pennsylvania and Virginia, had failed to submit SIPs adequately addressing these states’ obligations under the Good Neighbor Provision for the 2015 ozone NAAQS. 84 Fed. Reg. at 66,614.

The Act requires EPA to promulgate a FIP within two years of EPA’s disapproval of all or a portion of a SIP, or of EPA’s finding that a state failed to submit a SIP adequately addressing the Good Neighbor Provision. 42 U.S.C. § 7410(c)(1). Thus, EPA’s findings of failure to submit established a two-year deadline for EPA to promulgate a FIP for each such state, unless that state submitted a complete and approvable SIP in the meantime. *Id.*; *see EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-09 (2014). EPA was required to promulgate FIPs by January 6, 2022 for the states for which it made findings of failure to submit on January 6, 2020, but EPA failed to do so. 42 U.S.C. § 7410(c)(1). Neither Pennsylvania or Virginia has submitted a complete, approvable SIP in the meantime.² Therefore, EPA has failed

² *See* EPA, Required State Implementation Plan Elements Dashboard, https://edap.epa.gov/public/extensions/S4S_Public_Dashboard_2/S4S_Public_Dashboard_2.html (showing no Infrastructure SIP submittals for the 2015 ozone NAAQS by Pennsylvania or Virginia for Section 110(a)(2)(D)(i)-I Prong 1: Interstate transport – significant contribution or Section 110(a)(2)(D)(i)-I Prong 2: Interstate transport – interfere with maintenance) (last visited Feb. 14, 2022).

to fulfill its mandatory statutory duty within the timeframe set by statute, and is in breach of its statutory obligation.

Ozone Pollution in the Noticing States

Following EPA's promulgation of the 2015 ozone NAAQS, EPA designated the New York-Northern New Jersey-Long Island, NY-NJ-CT metropolitan area (New York Metropolitan Area) as a nonattainment area with a moderate classification.³ This area consists of nine counties in New York (including all of New York City), twelve counties in New Jersey and three in Connecticut. New Jersey's remaining nine southern counties are part of another regional nonattainment area, the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE metropolitan area (Philadelphia Metropolitan Area) classified as marginal nonattainment. Connecticut's remaining five counties are part of the Greater Connecticut nonattainment area, classified in June 2018 as marginal nonattainment. All three of these designated areas have remained in nonattainment status based on the most recent available design values for 2018-2020.⁴ And even outside of these formally designated nonattainment areas, ozone monitors in other locations within the Noticing States continue to measure unhealthy ozone levels that exceed the standard.⁵

Air quality modeling demonstrates that the high concentrations of ozone measured in these densely-populated downwind regions are, in significant measure, the result of emissions from major stationary sources of NO_x located outside and upwind of each state, which are transported downwind to the Noticing States. Once within the borders of the Noticing States, that transported NO_x combines with ozone formed locally and other ozone precursors to cause such a high level of ambient ozone pollution as to result in exceedances of the NAAQS. In violation of the Good Neighbor Provision, the Upwind States significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in one or more of the Noticing States and are projected to continue doing so in future years.⁶

³ 83 Fed. Reg. 25,776, 25,821 (Jun. 4, 2018).

⁴ See EPA, Air Quality Design Values, 2020 Design Value Reports, Ozone Design Values, 2020 (XLSX), Table 1a, *available at* <https://www.epa.gov/air-trends/air-quality-design-values#report> (last visited Feb. 14, 2022).

⁵ See, e.g., https://www3.epa.gov/region1/airquality/ma_over.html (registering exceedances in 2021 of the ozone standards at eight different monitors across Massachusetts).

⁶ See EPA, Revised CSAPR Update, Technical Support Documents, Data File with Ozone Design Values and Ozone Contributions (xlsx), "2023 DVs & Contributions" tab, Cells AS143, BA145, BA146, 151 BA145, BA146, BA151 *available at* <https://www.epa.gov/csapr/revised-cross-state-air-pollution-rule-update> (air quality modeling showing ozone contribution above 1% of the 2015 ozone NAAQS from

The Noticing States have long been involved in efforts to reduce emissions from in-state sources of NO_x and to mitigate the regional transport of NO_x. The Noticing States have cut ozone precursor emissions year after year to meet and exceed “reasonable further progress” targets mandated by 42 U.S.C. § 7511a, including by requiring in-state sources to meet a variety of stringent emissions standards and comply with NO_x Reasonably Available Control Technology (RACT). The Noticing States have also implemented stringent emissions control measures related to mobile sources, and participated in the Ozone Transport Commission, which developed the first NO_x Budget Program that dramatically reduced ozone transport within the Ozone Transport Region. The Noticing States have participated in multiple iterations of federal NO_x Budget trading programs, including the 2005 Clean Air Interstate Rule (CAIR),⁷ 2011 Cross-State Air Pollution Rule (CSAPR),⁸ 2016 CSAPR Update,⁹ and 2021 Revised CSAPR Update.¹⁰ However, these efforts have been insufficient to bring all downwind areas into attainment of the 2015 ozone NAAQS.

EPA’s Failure to Perform Non-discretionary Duties Harms the Noticing States

EPA promulgated the 2015 ozone NAAQS on October 1, 2015. *See, e.g.*, 83 Fed. Reg. 62,998 (Dec. 6, 2018) (EPA implementation rule stating that the 2015 ozone NAAQS “were promulgated on October 1, 2015”), and therefore Infrastructure SIPs were due within three years. However, according to EPA, the Upwind States have still not submitted Infrastructure SIPs addressing their Good Neighbor obligations as required under section 110(a)(2)(D) of the Act.¹¹ Although more than two years

Pennsylvania and Virginia at monitoring locations in the New York Metropolitan Area projected to have 2023 average design values above the 2015 ozone NAAQS); *see id.* at Cell AS354, BA354 (showing ozone contribution above 1% of the 2015 ozone NAAQS from Pennsylvania and Virginia at monitoring locations in the Philadelphia Metropolitan Area projected to have a 2023 maximum design value above the 2015 ozone NAAQS); *see also* 86 Fed. Reg. at 23,086 tables V.D-2 & V.D-3; *id.* at 23,087 table VI.A (Revised CSAPR Update rule projecting significant contribution to nonattainment or interference with maintenance of the less-stringent 2008 ozone NAAQS at Connecticut locations in the New York Metropolitan Area through 2024 ozone season).

⁷ 70 Fed. Reg. 25,162 (May 12, 2005).

⁸ 76 Fed. Reg. 48,208 (Aug. 8, 2011).

⁹ 81 Fed. Reg. 74,504 (Oct. 26, 2016).

¹⁰ 82 Fed. Reg. at 23,054.

¹¹ *See* EPA, Required State Implementation Plan Elements Dashboard, *supra* note 2; *see also* 84 Fed. Reg. at 66,614 (noting that Pennsylvania and Virginia, among

have passed since EPA found the Upwind States failed to submit SIPs addressing their Good Neighbor Provision obligations under the 2015 ozone NAAQS, EPA has not issued FIPs addressing the Good Neighbor Provision obligations of these states, which it was required to do under the Act. *See* 42 U.S.C. §§ 7410(c)(1).

Yet while EPA has failed to take action required by statute, the agency's own modeling projects that the New York Metropolitan Area and Philadelphia Metropolitan Area are likely to experience problems attaining or maintaining the 2015 ozone NAAQS in future years.¹² Further, EPA itself has determined that each of the Upwind States individually will contribute ozone precursors in amounts that exceed an EPA-selected screening level for significant contribution to ambient ozone levels in part or all of the Noticing States' nonattainment areas through at least 2023,¹³ directly impacting downwind areas' ability to attain the standards by their next attainment deadline.

EPA's failure to fully address requirements under the Good Neighbor Provision for the Upwind States is a clear breach of EPA's statutory duty and harms the public health and welfare of millions of residents in the Noticing States. Our states have a sovereign duty and responsibility to protect the health and welfare of our residents and the quality of our environment. Yet in large part because of ozone generated and transported from Upwind States—areas where the Noticing States lack any direct authority to reduce emissions—our residents continue to breathe unhealthy air.

EPA's failure to comply with its non-discretionary duties also places unfair economic and administrative burdens on the Noticing States, which are required, subject to punitive consequences, to timely meet our attainment obligations under the Act. The New York Metropolitan Area, designated by EPA as a moderate nonattainment area, has an attainment deadline of August 3, 2024.¹⁴ Attainment must be demonstrated based on three years of air quality readings—from the 2021 through 2023 ozone seasons. Preliminary ozone readings for the 2021 ozone season

other states, “failed to make any SIP submittal addressing interstate transport for the 2015 ozone NAAQS”).

¹² *See* EPA, Revised CSAPR Update, Technical Support Documents, Data File with Ozone Design Values and Ozone Contributions (xlsx), “2023 DVs & Contributions” tab, Cells F143, F145, F146, F151, F354 *supra* note 6; *see also* 86 Fed. Reg. at 23,059 (Revised CSAPR Update rule projecting continuing nonattainment of the less-stringent 2008 ozone NAAQS in New York Metropolitan Area through 2024 ozone season).

¹³ *Id.*

¹⁴ *See* EPA, Fact Sheet – Final Area Designations for the National Ambient Air Quality Standards for Ozone Established in 2015 at 7, *available at*: https://www.epa.gov/sites/production/files/2018-04/documents/placeholder_0.pdf.

show that the New York Metropolitan Area needs significant relief from ozone pollution transported from the Upwind States as expeditiously as practicable. Without significant reductions in upwind, out-of-state pollution in the 2022 and 2023 ozone seasons, the New York Metropolitan Area may be reclassified (i.e. downgraded) to serious nonattainment status. *See* 42 U.S.C. § 7511(b)(2).

The Philadelphia Metropolitan Area and Greater Connecticut attainment deadlines passed in 2021¹⁵ without those areas attaining the standards.¹⁶ Certified ozone data from 2018 through 2020 show that, despite New Jersey and Connecticut's successes in cutting in-state emissions, those areas still did not attain by 2021 and may be reclassified (i.e. downgraded air quality rating) to moderate nonattainment status. *See* 42 U.S.C. § 7511(b)(2).

Requiring downwind areas to plan for attainment and maintenance before requiring upwind reductions is contrary to the Act's statutory structure and places an inequitable burden on downwind areas. *See Wisconsin v. EPA*, 938 F.3d 303, 315 (D.C. Cir. 2019); *New York v. EPA*, 781 F. App'x 4, 6-7 (D.C. Cir. 2019); *North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008). Therefore, EPA's prompt action is necessary to ensure the Upwind States comply with the Good Neighbor Provision expeditiously and eliminate the excessive quantities of ozone that they send downwind into the Noticing States.

EPA's failure to fulfill its mandatory duties as set forth above violates the Clean Air Act and harms the Noticing States, our millions of affected residents, our economies, and our ecosystems. Consequently, this letter provides notice as required under section 304 of the Act, 42 U.S.C. § 7604, and 40 C.F.R. part 54, that New York, Connecticut, Massachusetts, and New Jersey intend to file suit against you and EPA for failing to timely act. Unless EPA takes the required actions before the end of the applicable 60-day notice period, we intend to bring a suit in United States District Court under section 304(a)(2) of the Act for EPA's failure to perform the non-discretionary duties mandated by 42 U.S.C. § 7410(c)(1) and (a)(2)(D)(i)(I). The suit will seek injunctive and declaratory relief, the costs of litigation (including without limitation, reasonable attorneys' fees), and may seek other appropriate relief.

¹⁵ *Id.*

¹⁶ *See* EPA, *See* EPA, Air Quality Design Values, 2020 Design Value Reports, Ozone Design Values, 2020 (XLSX), *supra* note 4, Table 1a (showing 2018-2020 design values for Greater Connecticut and Philadelphia nonattainment areas above the 2015 ozone NAAQS).

Very truly yours,

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