

Wed Oct 27 10:42:40 EDT 2021  
EPAExecSec <EPAExecSec@epa.gov>  
FW: Notice of Intent to Sue Pursuant to Section 304 of the Clean Air Act  
To: "CMS.OEX" <cms.oex@epa.gov>

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**From:** Alexa Carreno <acarreno@eadefense.org>  
**Sent:** Tuesday, October 26, 2021 3:38 PM  
**To:** Regan, Michael <Regan.Michael@epa.gov>  
**Cc:** Robert Ukeiley <RUkeiley@biologicaldiversity.org>  
**Subject:** Notice of Intent to Sue Pursuant to Section 304 of the Clean Air Act

Dear Administrator Regan,

Please find the attached 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 "Air Plan Approval; Pennsylvania; Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) Under the 2008 Ozone National Ambient Air Quality Standards (NAAQS)." This letter will also be sent to your office via certified mail.

If you have any questions or wish to discuss this matter, please feel free to reply to this email or call our office at 720 722 0336.

Sincerely,

Alexa Carreno, Esq.

Environmental and Animal Defense | Executive Director

W. [www.eadefense.org](http://www.eadefense.org)

P. 1.720.722.0336

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Environmental and Animal Defense

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October 27, 2021

VIA CERTIFIED MAIL and ELECTRONIC MAIL

Administrator Michael S. Regan  
United States Environmental Protection  
Agency 1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
[Regan.Michael@epa.gov](mailto: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 “Air Plan Approval; Pennsylvania; Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) Under the 2008 Ozone National Ambient Air Quality Standards (NAAQS).”**

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 intends to file a citizen suit against you in your official capacity and against the Environmental Protection Agency (EPA). The Center for Biological Diversity intends 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 “Air Plan Approval; Pennsylvania; Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) Under the 2008 Ozone National Ambient Air Quality Standards (NAAQS),” 85 Fed. Reg. 80,616 (Dec. 14, 2020), following a grant of EPA’s motion for voluntary remand in *Center for Biological Diversity v. U.S. Environmental Protection Agency, et al.*, No. 21-1279 (3d. Cir. Sept. 3, 2021). The suit will seek injunctive and declaratory relief, the cost of litigation, and other relief.



501 S. Cherry Street, Suite 1100  
Denver, CO 80246

## I. EPA's Unreasonable Delay

### A. Background

This matter concerns EPA's final action entitled "Air Plan Approval; Pennsylvania; Reasonably Available Control Technology (RACT) for Volatile Organic Compounds (VOC) Under the 2008 Ozone National Ambient Air Quality Standards (NAAQS)." (Final Action). EPA assigned this action Docket Number EPA-R03-OAR-2019-0562. The Final Action approved Pennsylvania's Clean Air Act State Implementation Plan (SIP) for the 2008 ozone National Air Quality Standards (NAAQS). Notice of the Final Action was published in the Federal Register on December 14, 2020. *See* 85 Fed. Reg. 80,616 (Dec. 14, 2020).

When evaluating a 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 Third Circuit on February 12, 2021, challenging EPA's approval of Pennsylvania's SIP as to two of these required elements:

- 1) The State and EPA did not provide a sufficient record to show that the State had done an adequate analysis for RACT for sources covered by CTGs. Therefore, EPA's approval was arbitrary and capricious.
- 2) The State's RACT for natural gas processing plants failed to consider information showing that a more stringent level of control should be imposed. Therefore, EPA's approval for this category of sources was contrary to law and arbitrary and capricious.

EPA moved for voluntary remand without vacatur on Aug. 2, 2021. Mot. for Voluntary Remand, *Center for Biological Diversity v. U.S. Environmental Protection Agency, et al.*, No. 21-1279 (3d. Cir. Aug. 2, 2021). (Mot. for Remand). EPA stated that upon remand it would consider "whether the analysis and investigation Pennsylvania performed and submitted to EPA was sufficient to show state laws and regulations implemented Reasonably Available Control Technology-level controls for sources subject to an EPA Control Techniques Guidelines." Decl. of Cristina Fernandez in Support of Mot. for Voluntary Remand at ¶ 7, *Center for Biological Diversity v. U.S. Environmental Protection Agency, et al.*, No. 21-1279 (3d. Cir. Aug. 2, 2021). (Fernandez Decl.).

The Third Circuit granted EPA's motion on Sept. 3, 2021. Order, *Center for Biological Diversity v. EPA, et al.*, No. 21-1279 (3d Cir. Sept. 3, 2021). To the knowledge of the Center for Biological Diversity, EPA has taken no action toward reconsideration of the Final Action since the grant of voluntary remand. EPA has

failed to issue a new final rule since the entry of this order, which 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.**

The Clean Air Act provides jurisdiction to the district courts to hear citizen suits to enforce unreasonable delay claims. 42 U.S.C. § 7604(a). To determine if a delay is unreasonable, courts usually consider the six factors articulated in *Telecommunications Research and Action Center v. FCC* (“TRAC”), 750 F.2d 70 (D.C. Cir. 1984): (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. *Id.* at 80.

EPA's delay to date in reconsidering the Final Action violates the “rule of reason” and is threatening human health and welfare 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 Pennsylvania and states “downwind” of Pennsylvania, including states in the Ozone Transport Region. Agencies cannot “justify indefinite delay and recalcitrance in the face of an admittedly grave risk to public health.” *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 145 (3d Cir. 2002). 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). While the Third Circuit did not implement such a deadline to act upon the Final Rule at issue, the SIP for the 2008 NAAQS is beyond ten years overdue and subject to one deadline suit already. *See Center for Biological Diversity v. McCarthy*, 4:16cv04092-PJH (N.D. Cal.) Dk.#32, Revised Consent Decree. By EPA's own admission it could take up to three years (or longer) to act on remand, including “the possibility that EPA would reach the same decision on remand.” *See Mot. for Remand.*

Ozone pollution can cause premature mortality, respiratory problems, aggravate

lung diseases, and increase the frequency of asthma attacks. Those most at risk include children, the elderly, people with lung diseases including asthma, and people who work or exercise outside. 73 Fed. Reg. 16,436, 16,440 (Mar. 27, 2008). 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).<sup>1</sup>

In addition to its impacts on human health, ozone pollution is also harmful to plants and results in negative impacts on ecosystems.<sup>2</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 Pennsylvania’s SIP harms the public health of residents in Pennsylvania and downwind areas, including members of the Center for Biological Diversity who are adversely affected by ozone pollution. Pennsylvania residents and downwind area residents have suffered and will continue to suffer from Pennsylvania’s contribution to ozone pollution if EPA does not act. EPA’s delay in reconsidering its approval of Pennsylvania’s SIP risks aggravating harms to the public health and the environment.

## II. Notice of Intent to Sue

After 180 days have passed from the date of this letter, the Center for Biological Diversity intends 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. If you do not do so, however, we will have to file suit.

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<sup>1</sup> It is worth noting that the EPA is also illegally delaying implementing SIP elements for the oil and gas industry for the 2015 NAAQS in Pennsylvania. *See* Center for Biological Diversity v. Regan, Case No. 4:21-cv-02498-JST (N.D. Cal).

<sup>2</sup> EPA, Ecosystem Effects of Ozone Pollution, available at <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>.

### **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

### **IV. Legal Representation**

The Center for Biological Diversity is represented in this matter by undersigned counsel. Please direct all communications regarding this matter to me at [acarreno@edefense.org](mailto:acarreno@edefense.org) or 720-722-0336. I look forward to hearing from you.

Sincerely,

Alexa Carreno  
Environmental and Animal Defense  
501 S. Cherry St. Suite 1100  
Denver, CO 80246  
[acarreno@edefense.org](mailto:acarreno@edefense.org)  
720-722-0336

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