



VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

July 26, 2023

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

RE: Notice of Intent to Sue Under the Federal Clean Air Act

Dear Administrator Regan:

This letter provides notice, pursuant to 42 U.S.C. § 7604(b), that Sierra Club intends to file a citizen suit against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA, based on your failure to perform a nondiscretionary duty set forth under the Clean Air Act. *See* 42 U.S.C. § 7604(a)(2). Specifically, Sierra Club intends to file suit over your failure to find, within the express time frame required by 42 U.S.C. § 7410(k)(2), that certain states¹ failed to submit complete revised state implementation plans (“SIPs”) for moderate nonattainment of the 2015 ozone national ambient air quality standards (“NAAQS” or “standards”). *See* 42 U.S.C. §§ 7502, 7511a(b).

On October 7, 2022, EPA issued a final determination that twenty-two areas or portions of areas previously classified as “Marginal” for the 2015 ozone NAAQS failed to attain the standard by the applicable attainment date of August 3, 2021. *See* EPA, Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Areas Classified as Marginal for the 2015 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 60,897, 60901 (Oct. 7, 2022). As a result, these twenty-two areas were reclassified to “Moderate” nonattainment for the 2015 ozone NAAQS, effective November 7, 2022. *Id.* In accordance with the Clean Air Act, any state containing a reclassified Moderate nonattainment area was required to, no later than January 1, 2023, submit a SIP revision to EPA to satisfy certain specific air quality planning requirements. 87 Fed. Reg. at 60,899; *see also* 42 U.S.C. §§ 7502, 7511a. Among other

¹ These states are listed in Table 1 below.

components, for instance, Clean Air Act Sections 172 and 182 require that these SIPs contain adequate provisions for reasonable further progress (“RFP”), Reasonably Available Control Measures (“RACM”), Reasonably Available Control Technology (“RACT”), and motor vehicle inspection and maintenance. 42 U.S.C. §§ 7502, 7511a(b).² Eighteen states identified in Table 1, below, failed to submit plans to address the requirements of Clean Air Act Sections 172 and 182 for areas within their boundaries that were reclassified on November 7, 2022 as Moderate nonattainment under the 2015 ozone NAAQS.³

Table 1: SIP Revision Submittals for 2015 Ozone NAAQS Moderate Nonattainment Reclassification as of 07/25/2023			
State	Deadline	State Submittal Date	EPA Completeness Action
Arizona	01/01/2023		No
California	01/01/2023		No
Colorado	01/01/2023		No
Connecticut	01/01/2023		No
Delaware	01/01/2023		No
Illinois	01/01/2023		No
Indiana	01/01/2023		No
Kentucky	01/01/2023		No
Maryland	01/01/2023		No
Michigan	01/01/2023		No
Missouri	01/01/2023		No
New Jersey	01/01/2023		No
Nevada	01/01/2023		No
Ohio	01/01/2023		No
Pennsylvania	01/01/2023		No
Texas	01/01/2023		No
Utah	01/01/2023		No
Wisconsin	01/01/2023		No

² EPA’s Required State Implementation Plan Elements Dashboard indicates that these states must submit Contingency Measures for VOC and NOX, I/M Basic, Moderate Nonattainment New Source Review, Moderate Ozone Attainment Demonstration, Moderate Reasonable Further Progress (Sections 172(c)(2) and 172(b)(1)), and numerous RACT NOx and VOC RACT SIP elements by January 1, 2023. EPA, *Required State Implementation Plan Elements Dashboard*, available at https://edap.epa.gov/public/extensions/S4S_Public_Dashboard_2/S4S_Public_Dashboard_2.html.

³ These eighteen states contain the twenty-two areas reclassified as Moderate nonattainment under the 2015 ozone NAAQS, except for the Washington, District of Columbia-Maryland-Virginia nonattainment area. 87 Fed. Reg. at 60,901. Virginia and the District of Columbia are omitted because EPA has proposed a clean data determination for the Washington, District of Columbia-Maryland-Virginia nonattainment area. 88 Fed. Reg. 6,688 (Feb. 1, 2023).

Source: EPA, *Required State Implementation Plan Elements Dashboard*, available at https://edap.epa.gov/public/extensions/S4S_Public_Dashboard_2/S4S_Public_Dashboard_2.html (last accessed July 25, 2023).⁴

For each required SIP submittal, the Clean Air Act imposes on the Administrator a nondiscretionary duty to determine, within a statutorily mandated timeframe, whether the plan is administratively complete and meets established minimum criteria. *See* 42 U.S.C. § 7410(k)(1)(B). The Administrator must make this completeness finding within sixty days of receipt of a plan or plan revision from a state. *Id.* Where a state has failed to submit a required SIP, the minimum criteria will not have been met and the Administrator must make a finding stating so no later than six months after the state’s missed submittal deadline. *Id.* This is commonly referred to as a “finding of failure to submit.” A finding of failure to submit a required plan then triggers EPA’s nondiscretionary duty to promulgate a federal implementation plan (“FIP”) “at any time within 2 years after the Administrator finds that a State has failed to make a required submission.” 42 U.S.C. § 7410(c)(1)(A).

As to the above-identified eighteen states that have failed to submit plans addressing Clean Air Act Sections 172 and 182 requirements, the Administrator has violated his mandatory duty to issue a finding of failure to submit the required Moderate nonattainment SIP revisions. The deadline for states to submit such plans was January 1, 2023. *See* 87 Fed. Reg. at 60,900. Because these eighteen states have failed to submit their plan revisions for moderate nonattainment of the 2015 ozone NAAQS, they clearly fail to meet EPA’s minimum criteria for SIP completeness. By law, the Administrator was therefore required to make findings of failure to submit as to each of the states no later than six months after the January 1, 2023 state submission deadline, or by July 1, 2023. *See* 42 U.S.C. § 7410(k)(1)(B). The Administrator has failed to make the necessary findings of failure to submit, in violation of his nondiscretionary duty under Section 110(k)(1)(B).

Section 304(a)(2) of the Clean Air Act provides that any person may sue the Administrator of the EPA “where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.” 42 U.S.C. § 7604(a)(2). Section 110(k)(1)(B) of the Clean Air Act expressly provides that “[w]ithin 60 days of the Administrator’s receipt of a plan or

⁴ According to the Connecticut, Maryland, and Ohio state environmental department websites, these states’ SIP revisions for the moderate reclassification under the 2015 ozone NAAQS have been submitted. *See* Con. Dep’t of Energy & Env’t, *SIP Revisions and Other State Air Quality Plans*, <https://portal.ct.gov/DEEP/Air/Planning/SIP/Air-SIP-Revisions--Other-State-Plans-for-Control-of-Air-Pollution> (last accessed July 19, 2023) (stating RACT SIP revision was “[s]ubmitted to EPA” on May 23, 2023); Md. Dep’t of the Env’t, *Air Quality Planning Program*, <https://mde.maryland.gov/programs/air/airqualityplanning/pages/index.aspx> (last accessed July 19, 2023) (stating the “Baltimore Moderate Nonattainment Area 0.070 ppm 8-Hour Ozone State Implementation Plan Attainment Demonstration” dated March 7, 2023 is “pending EPA approval”); Ohio EPA, *Air Pollution Control Announcements*, <https://epa.ohio.gov/divisions-and-offices/air-pollution-control/announcements> (last accessed July 19, 2023) (stating “Ohio’s Attainment Demonstration for the Cleveland, OH Moderated 2015 Ozone Nonattainment Area Submitted to U.S. EPA” on December 21, 2022). However, as of July 25, 2023, the EPA’s Required State Implementation Plan Elements Dashboard currently states that no SIP revisions have been received by EPA from those states.

plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met.” 42 U.S.C. § 7410(k)(1)(B) (emphases added). This provision imposes a clear nondiscretionary duty on the Administrator to act within six months of a missed deadline for a plan submission under this section. Thus, where the Administrator has failed to perform this nondiscretionary duty, citizens may bring suit to compel such action.

The Clean Air Act requires citizens to provide the Administrator with sixty days’ notice prior to bringing an action under Section 304(a)(2). 42 U.S.C. § 7604(b)(2); *see also* 40 C.F.R. 54.2(a). Therefore, Sierra Club hereby notifies EPA and the Administrator of its intent to file suit against EPA and the Administrator of the EPA, under Clean Air Act Section 304(a)(2), for failing to perform the nondiscretionary duties described above. If these violations remain unresolved at the end of the 60-day notice period, Sierra Club intends to seek the following relief:

1. A court order compelling EPA and the Administrator to, within 60 days from the date of the order, publish a rule (or rules) finding that the above-referenced states have failed to make complete SIP revision submissions that address the requirements of Clean Air Act Sections 172 and 182 for moderate nonattainment of the 2015 ozone NAAQS, thereby triggering a two-year deadline for EPA to issue FIPs;
2. Attorneys’ fees and other litigation costs; and
3. Other appropriate relief as allowed.

If you would like to discuss the matters identified in this letter or offer a proposal for resolving this issue, please contact the undersigned counsel.

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