

## Law Office of Robert Ukeiley

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### **VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

September 14, 2016

Gina McCarthy  
Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

**Re: Clean Air Act Notice of Intent to Sue pursuant to 42 U.S.C. § 7604(b)(2) for failure to take final action under 42 U.S.C. § 7410(k)(2) - (4) and failure to make findings of failure to submit under 42 U.S.C. § 7410(k)(1)(B) for 2008 ozone NAAQS nonattainment areas state implementation plans**

Dear Administrator McCarthy,

On behalf of the Center for Biological Diversity, the Center for Environmental Health, and the Clean Air Council (“Environmental Groups”), I am writing to inform you that the Environmental Groups intend to file suit against you for “a failure of the Administrator [of the United States Environmental Protection Agency (“EPA”)] to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). Specifically, under 42 U.S.C. § 7410(k)(1)(B), EPA must issue a finding of failure to submit nonattainment area state implementation plan (SIP) submittal elements, and publish notice of that action in the Federal Register for the 2008 ozone national ambient air quality standards (NAAQS). This duty is required for the ozone transport region (OTR) area and element listed in Table 1. Additionally, under 42 U.S.C. § 7410(k)(2) - (4), EPA must take final action, and publish notice of that action in the Federal Register, on SIP submittals listed in Table 2. As explained in more detail below, EPA has failed to perform these mandatory duties.

EPA should remedy its violation of these mandatory duties to better protect the public and native ecosystems from ozone’s harmful effects. People commonly refer to ground level ozone as smog. According to EPA, based on exhaustive scientific review, ozone pollution causes decreased lung function, increased respiratory symptoms, emergency department visits,

hospital admissions for respiratory causes, and even death. 73 Fed. Reg. 16,436 (Mar. 27, 2008). Those most at risk from ozone pollution are children; active people, *e.g.*, runners and people who do manual labor outside; people with pre-existing lung and heart diseases such as asthma; and older people. *Id.* at 16,440. Ozone also damages vegetation, both native and commercial crops. *Id.* at 16,485-16,486. Damage to native vegetation results in ecosystem damage, including diminished ecosystem services, that is, the life sustaining services that ecosystems provide to people for free, such as clean air, clean water and carbon sequestration. *Id.*

**I. FAILURE TO MAKE FINDING OF FAILURE TO SUBMIT**

EPA is required to determine whether a state implementation plan (SIP) submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B). If, six months after a submittal is due, a state has failed to submit any required SIP, there is no submittal that may be deemed administratively complete, and EPA must make a determination stating that the state failed to submit the required state implementation plan. *Id.* This is referred to as a “finding of failure to submit.”

EPA nonattainment designations for the 2008 ozone NAAQS were effective for most areas of the United States no later than July 20, 2012. *see* 77 Fed. Reg. 30,088 (May 21, 2012). EPA designated all of the areas listed in Table 1 nonattainment for the 2008 ozone NAAQS or these areas are part of the ozone transport region (OTR). All elements of the nonattainment SIP were due by no later than the dates listed in Table 1. *See* [http://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-8hr\\_2008\\_en.html](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-8hr_2008_en.html). EPA has a mandatory duty to make a completeness finding under 42 U.S.C. § 7410(k)(1)(B) by no later than six months after the due dates for the submittals. The States in Table 1 have failed to submit nonattainment and OTR SIPs for the areas and elements listed in Table 1 as of the date of this letter. Yet, EPA has failed to issue a finding of failure to submit, as required under 42 U.S.C. § 7410(k)(1)(B), regarding the nonattainment or OTR area SIPs for the areas and elements listed in Table 1.

**TABLE 1**

<b>AREA &amp; ELEMENT(S)</b>	<b>SUBMITTAL DEADLINE (No later than)</b>
New York RACT VOC CTG Industrial Cleaning Solvents (2006)	7/20/2015

Without a submittal addressing the nonattainment SIP elements, the minimum criteria cannot be met for the States in Table 1 to submit a state implementation plan addressing the nonattainment requirement, and EPA must issue a finding of failure to submit. EPA is in violation of this mandatory duty.

## II. FAILURE TO APPROVE OR DISAPPROVE IN WHOLE OR PART

The Clean Air Act also requires that if, six months after a state submits a SIP submittal, EPA has not made the completeness finding and has not found the submittal to be incomplete, the submittal is deemed administratively complete by operation of law. 42 U.S.C. § 7410(k)(1)(B). EPA must take final action on an administratively complete submittal by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of the completeness finding. 42 U.S.C. § 7410(k)(2) - (4).

For the 2008 ozone NAAQS nonattainment SIP, states have submitted elements which were deemed complete by the date in the completion date column of Table 2. Thus, the due date for EPA to take final action on these submittals by approving or disapproving them in whole or part passed on the date in the final action due date column. However, EPA has not taken final action on these submittals as of the date of this letter. Thus, EPA is in violation of its mandatory duty in 42 U.S.C. § 7410(k)(2) - (4).

**TABLE 2<sup>1</sup>**

AREA & STATE	ELEMENT(S)	COMPLETION DATE	FINAL ACTION DUE DATE
San Joaquin Valley, CA	RACT NOx for Major Sources	1/18/2015	1/18/2016
Riverside County (Coachella Valley), CA	RACT NOx for Major Sources, RACT Non-CTG VOC for Major Sources	1/18/2015	1/18/2016
Sacramento Metro [Placer]	RACT NOx for Major Sources	10/30/2014	10/30/2015
OTR Delaware	RACT NOx for Major Sources, RACT Non-CTG VOC for Major Sources	7/24/2015	7/24/2016
OTR New York	RACT NOx for Major Sources, RACT Non-CTG VOC for Major Sources	6/22/2015	6/22/2016
Jamestown, New York	Nonattainment NSR Rules – Marginal	10/4/2013	10/4/2014
New York-N. New Jersey-Long Island, New York	Nonattainment NSR Rules – Moderate	10/4/2013	10/4/2014
New York-N. New Jersey-Long Island,	Nonattainment NSR Rules – Moderate	10/28/2014	10/28/2015

<sup>1</sup> Note: Submittals prior to May 21, 2012 must have been submitted for purposes of compliance with the 1997 ozone NAAQS. EPA has a mandatory duty to take final action on a SIP submittal regardless of whether it was submitted to meet requirements for the 1997 or 2008 ozone NAAQS.

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New Jersey			
Imperial County, CA	Nonattainment NSR Rules – Moderate	3/7/2014	3/7/2015

As required by 40 C.F.R. § 54.3, the persons providing this notice are:

The Center for Biological Diversity  
1212 Broadway, Suite 800  
Oakland, CA. 94612  
Attn: Jonathan Evans  
Tel: (510) 844-7100 x318

Center for Environmental Health  
2201 Broadway, Suite 302  
Oakland, CA 94612  
Attn: Caroline Cox  
Tel: (510) 655-3900

Clean Air Council  
135 South 19<sup>th</sup> Street, Suite 300  
Philadelphia, PA 19103  
Tel: (215) 567-4004

While EPA regulations require this information, please direct all correspondences and communications regarding this matter to the undersigned counsel.

The Environmental Groups and their counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA coming into compliance within 60 days. If you do not do so, however, we will have to file or amend a complaint.

Sincerely,



Robert Ukeiley  
Counsel for Center for Biological Diversity,  
Center for Environmental Health, and Clean Air  
Council