



September 13, 2011

**BY ELECTRONIC MAIL AND
CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
Jackson.lisap@epa.gov

Re: Notice of Intent to File Suit over Failure to Find that States Have not Submitted State Implementations Plans to Attain and Maintain the 2008 Ozone National Ambient Air Quality Standards, a Nondiscretionary Duty Under the Clean Air Act

Dear Administrator Jackson:

Pursuant to Section 304 of the Clean Air Act, this letter is to inform you that WildEarth Guardians intends to sue you and the Environmental Protection Agency (“EPA”) over the failure to find that all 50 States, as well as the District of Columbia, Puerto Rico, Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands (collectively “States”) have failed to submit State Implementation Plans (“SIPs”) to meet various requirements under Section 110(a) of the Clean Air Act with regards to the 2008 revised National Ambient Air Quality Standards (“NAAQS”) for ozone. These States were required to submit such SIPs within three years of the promulgation of the 2008 ozone NAAQS, or by March 12, 2011. In accordance with Section 110(k)(1)(B) of the Clean Air Act, the EPA was required to make findings that States had failed to submit the required SIPs no later than six months after the statutory deadline for submitting such SIPs, or by September 12, 2011. The EPA has so far failed to make such findings, in violation of a nondiscretionary duty set forth under the Clean Air Act.

We intend to bring a suit 60 days from the date of this letter, or shortly thereafter, under the Clean Air Act, 42 U.S.C. § 7604(a)(2), against the EPA over the failure to perform nondiscretionary duties set forth in 42 U.S.C. § 7410(k)(1)(B). The suit will seek injunctive relief, declaratory relief, the cost of litigation, and other relief as may be necessary.

WildEarth Guardians is a New Mexico-based nonprofit organization with offices in Denver and Phoenix. WildEarth Guardians is dedicated to protecting and restoring the American

West and has members who are harmed by the failure of the Administrator and the EPA to follow through with duties under the Clean Air Act to ensure that clean air SIPs are timely submitted and acted upon to ensure adequate protection of air quality and public health and welfare nationwide.

Clean Air Act Requirements

On March 12, 2008, the EPA promulgated revised NAAQS for ozone, a harmful air pollutant that in small concentrations can trigger asthma attacks, aggravate emphysema, and permanently damage the lungs of children. *See* 73 Fed. Reg. 16436-16514 (March 27, 2008). The EPA set a new standard limiting ozone concentrations to no more than 0.075 parts per million over an 8-hour period. *See* 40 C.F.R. § 50.15.

In accordance with Section 110(a)(1) of the Clean Air Act, States are required to submit SIPs to attain and maintain the NAAQS within three years of the promulgation or revision of a NAAQS. *See* 42 U.S.C. § 7410(a)(1).¹ In assuring that SIPs attain and maintain the NAAQS in accordance with Section 110(a)(1), States must ensure their SIPs include requirements set forth under Section 110(a)(2). *See* 74 U.S.C. § 7410(a)(2). These requirements, include, but are not limited to:

- Enforceable emission limits (42 U.S.C. § 7410(a)(2)(A));
- Establishment and operation of monitoring systems (42 U.S.C. § 7410(a)(2)(B));
- Enforcement programs (42 U.S.C. § 7410(a)(2)(C));
- Limits on interstate transport (42 U.S.C. § 7410(a)(2)(D));
- Assurances of adequate authority (42 U.S.C. § 7410(a)(2)(E));
- Monitoring of emissions from stationary sources (42 U.S.C. § 7410(a)(2)(F));
- Authority to exercise emergency powers (42 U.S.C. § 7410(a)(2)(G));
- Provisions that provide for the revision of SIPs (42 U.S.C. § 7410(a)(2)(H));
- Meet nonattainment SIP requirements within nonattainment areas (42 U.S.C. § 7410(a)(2)(I));
- Meet consultation, public notification, and Prevention of Significant Deterioration (“PSD”) requirements (42 U.S.C. § 7410(a)(2)(J));
- Provide for the modeling of air quality (42 U.S.C. § 7410(a)(2)(K));
- Establish permitting fees (42 U.S.C. § 7410(a)(2)(L));
- Ensure consultation and participation by local entities (42 U.S.C. § 7410(a)(2)(M)).

These requirements are collectively referred to as the “general infrastructure elements.”² *See* U.S. EPA, State Implementation Plan Overview, <http://www.epa.gov/air/urbanair/sipstatus/overview.html> (last viewed Sept. 12, 2011).

¹ The definition of States under the Clean Air Act includes the District of Columbia, Puerto Rico, Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. *See* 42 U.S.C. § 7602(d).

² Although the requirements of Section 110(a)(2)(D) are often referred to as “good neighbor elements” due to the fact that they require that SIPs limit the transport of air pollution to downwind states.

Under the Clean Air Act, the Administrator is required to make a finding as to whether a State has submitted the required SIP no later than six months after the date by which the State was required to submit such a SIP. *See* 42 U.S.C. § 7410(k)(1)(B). Upon making such a finding, the EPA has two years by which it must promulgate a Federal Implementation Plan (“FIP”) or approve the required SIP. *See* 42 U.S.C. § 7410(c)(1)(A).

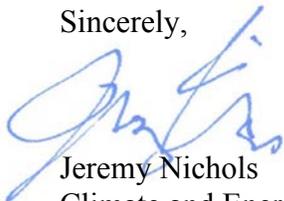
The Administrator’s Failure to Perform a Nondiscretionary Duty

In this case, all States have failed to submit SIPs to meet the infrastructure requirements of Sections 110(a)(1) and 110(a)(2) of the Clean Air Act within three years of the promulgation of the 2008 revised ozone NAAQS. As the EPA noted in its final rule adopting the 2008 ozone NAAQS, States were required to submit their infrastructure SIPs by March 12, 2011. *See* 73 Fed. Reg. 16503. Unfortunately, all States have not done so.

Thus, in accordance with Section 110(k)(1)(B), the Administrator was required to make a finding by September 12, 2011 that States had failed to submit SIPs to meet the aforementioned requirements of Section 110(a)(1) and Section 110(a)(2) of the Clean Air Act. *See* 42 U.S.C. § 7410(k)(1)(B). Such a finding has not been made, in violation of a nondiscretionary duty under the Clean Air Act.

In keeping with the requirements of federal regulations, you are hereby notified that the full name and address of the person giving the notice is WildEarth Guardians, 312 Montezuma Ave, Santa Fe, NM 87501. WildEarth Guardians would prefer to resolve this matter without the need for litigation. For purposes of discussing this matter, please contact me at the information below. Thank you.

Sincerely,



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cc: Gina McCarthy, EPA Assistant Administrator for Air and Radiation
Steve Page, EPA Director of Office of Air Quality and Planning and Standards