



September 8, 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](mailto:Jackson.lisap@epa.gov)

**Re: Notice of Intent to File Suit over Failure to Promulgate Regulations to Prevent Significant Deterioration of Air Quality Resulting from Ozone, 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 promulgate regulations to prevent the significant deterioration (“PSD”) of air quality resulting from ozone pollution within two years after the promulgation of the 2008 revised National Ambient Air Quality Standards (“NAAQS”) for ozone (hereafter “2008 ozone NAAQS”) in accordance with Section 166(a) of the Clean Air Act. *See* 42 U.S.C. § 7476(a). 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. § 7476(a). 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 beyond, 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 prevent significant deterioration of air quality resulting from ozone.

**Clean Air Act Requirements**

In accordance with Section 166(a) of the Clean Air Act, the EPA is required to

“promulgate regulations to prevent the significant deterioration of air quality.” 42 U.S.C. § 7476(a). Otherwise known as PSD rules, the Clean Air Act requires that such regulations address several pollutants, including photochemical oxidants, otherwise known as ozone.<sup>1</sup> *Id.* The EPA “shall” promulgate PSD rules “not more than 2 years after the date of promulgation” of a NAAQS.<sup>2</sup> *Id.*

The EPA has made clear that Section 166(a) “provides that EPA establish pollutant-specific PSD regulations, such as increments, after the establishment of NAAQS for the applicable [pollutant]” and “provides that the EPA will promulgate new PSD regulations under section 166, including new increments if appropriate, within 2 years from the promulgation of any NAAQS[.]” 75 Fed. Reg. 64864, 64480 (Oct. 20, 2010). Thus, anytime the EPA promulgates a NAAQS, whether new or revised, the Agency is obligated to promulgate PSD rules within two years.

The goal of PSD is to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). Specifically, regulations promulgated in accordance with Section 166(a) shall “provide specific numerical measures against which permit applications [for stationary sources of air pollution] may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 101 and section 160.” 42 U.S.C. § 7476(c).

Once PSD rules are promulgated, they become effective in one year. States must submit plans to implement the rules within 21 months after the date of promulgation of the PSD rules and the EPA must approve the plans within four months afterward, or 25 months after the date of promulgation of such rules. *See* 42 U.S.C. § 7476(b).

### **The Administrator’s Failure to Perform a Nondiscretionary Duty**

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.

According to the Clean Air Act and the EPA’s interpretation of Section 166(a) of the Clean Air act, the EPA was required to promulgate PSD rules for the 2008 ozone NAAQS within two years of the promulgation of the NAAQS. Thus, EPA was obligated to promulgate PSD rules for the 2008 ozone NAAQS by March 12, 2010.

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<sup>1</sup> The statute actually refers to “photochemical oxidants.” However, as the EPA has noted, “[o]zone is the oxidant found in the largest quantities in the atmosphere.” 70 Fed. Reg. 59582, 59590 (Oct. 12, 2005). To this end, although the EPA originally promulgated national ambient air quality standards for photochemical oxidants in 1971, the Agency later changed the chemical designation from “photochemical oxidants” to “ozone.” *See* 44 Fed. Reg. 8202 (Feb. 8, 1979). Thus, according to the EPA, the reference to photochemical oxidants at Section 166(a) is considered to be a reference to ozone.

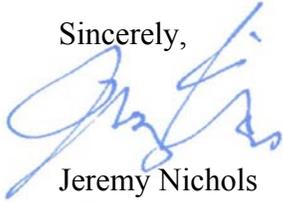
<sup>2</sup> This requirement applies to any NAAQS promulgated after 1977.

Unfortunately, one and a half years later, the EPA still has yet to promulgate PSD rules for the 2008 ozone NAAQS. Thus, as of the date of this notice letter, EPA is in violation of a nondiscretionary duty under the Clean Air Act. The failure of the EPA to act means that PSD rules are not being adopted by states or approved by EPA for implementation. Notably, the failure of the EPA to perform its nondiscretionary duty means that states and the EPA are not ensuring that sources of air pollution are protecting and enhancing air quality with regards to the 2008 ozone NAAQS.

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. If you wish to discuss this matter, please contact me at the information provided 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