

Law Office of Robert Ukeiley

507 Center Street • Berea, Kentucky 40403 • tel. 859-986-5402

Robert Ukeiley
rukeiley@igc.org

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

October 15, 2013

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 perform a mandatory duty to make a finding of failure to submit for PM2.5 Increments

Dear Administrator McCarthy,

On behalf of the Sierra Club, I am writing to inform you that Sierra Club intends 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 make a finding of failure to submit, and publish notice of that finding in the Federal Register, for state implementation plan amendments to add particulate matter less than 2.5 microns in diameter (PM2.5) increments for various states listed below. As explained below, EPA has failed to perform this mandatory duty.

EPA should remedy its violation of this mandatory duty to better protect the public from the harmful effects of PM2.5. PM2.5 is “produced chiefly by combustion processes and by atmospheric reactions of various gaseous pollutants,” thus “[s]ources of fine particles include... motor vehicles, power generation, combustion sources at industrial facilities, and residential fuel burning.” 71 Fed. Reg. 61,144, 61,146 (Oct. 17, 2006). The effects of PM2.5 on human health are profound. For example, long-term exposure has been associated “with an array of health effects, notably premature mortality, increased respiratory symptoms and illnesses (e.g. bronchitis and cough in children), and reduced lung function.” 62 Fed. Reg. 38,653, 38,668 (July 18, 1997). Moreover, PM2.5 adversely affects our natural surroundings. For example, regional haze is caused in part by particulates in the air scattering sunlight. EPA, “Haze: How Air Pollution Affects the View” (April 1999) (available at

http://www.epa.gov/ttn/oarpg/t1/fr_notices/haze.pdf). It is vital that EPA perform its mandatory duty in order to strengthen protection of public health and welfare against PM2.5.

Failure to issue a finding of failure to submit

On October 20, 2010, EPA published the final rule on the ‘‘Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM2.5)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)’’ 75 Fed. Reg. 64,864(Oct. 20, 2010)(2010 NSR Rule). This rule established several components for making PSD permitting determinations for PM2.5, including a system of ‘‘increments’’ which is the mechanism used to estimate significant deterioration of ambient air quality for a pollutant. These increments are codified in 40 CFR 51.166(c) and 40 CFR 52.21(c), and are included in the table below.

TABLE 1—PM2.5 INCREMENTS ESTABLISHED BY THE 2010 NSR RULE IN MICROGRAMS PER CUBIC METER

	Annual <u>arithmetic</u>	<u>24-hour max</u>
Class I	1	2
Class II	4	9
Class III	8	18

EPA required that states submit a SIP amendment including these PM2.5 increments by July 20, 2012. 75 Fed. Reg. at 64,898. *See also* 40 C.F.R. § 51.166(a)(6)(i).

EPA is required to determine whether a state implementation plan 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 state implementation plan, 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.’’ Therefore, EPA has a mandatory duty to make a finding of failure to submit PM2.5 increments by no later than January 20, 2013. The following states have failed to submit PM2.5 increment SIP amendments as of the date of this letter yet EPA has not made a finding of failure to submit for these states in violation of its mandatory duty to do so:

Administrator Gina McCarthy

October 15, 2013

Page 3

Alaska	Arizona	Arkansas	California ¹	Connecticut	Hawaii
Idaho	Illinois	Indiana	Iowa	Kentucky	Louisiana
Maine	Maryland	Michigan	Minnesota	Montana	Nebraska
Nevada	New Hampshire		New Jersey	New York	
North Carolina		Ohio	Oklahoma	Oregon	Puerto Rico
Rhode Island	South Dakota	Texas	Utah	Vermont	Virginia
Washington	West Virginia	Wisconsin	Wyoming		

If you disagree with the inclusion of any states in our list of which states were required but failed to submit PM2.5 increment SIP amendments, please let us know as soon as possible.

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

Sierra Club
85 Second St. 2nd Floor
San Francisco, CA 94105
Phone: (415) 977-5500

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

Sierra Club 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 a complaint.

Sincerely,



Robert Ukeiley
Counsel for Sierra Club

¹ For California, we mean the local Air Resource Boards in California which have SIP approved PSD programs. For other states with local air agencies with their own SIP approved PSD programs, we mean the state and all its local air agencies with SIP approved PSD programs.