



September 27, 2021

Michael Regan  
Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460  
regan.michael@epa.gov

*Sent via email to regan.michael@epa.gov and via Certified Mail*

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

Dear Administrator Regan:

On behalf of the Center for Biological Diversity and the Center for Environmental Health (collectively, “Environmental Groups”), we hereby give notice of intent to file suit against you for “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.”<sup>1</sup> Specifically, EPA failed to carry out its mandatory duty to issue a finding of failure to submit “Serious” nonattainment area state implementation plan (“SIP”) elements and publish notice of that action in the Federal Register for the 2008 ozone national ambient air quality standards (“NAAQS”).<sup>2</sup> EPA has failed to perform this mandatory duty required for the nonattainment and ozone transport region (OTR) areas and elements listed in Table 1.

### **I. Ground-Level Ozone Pollution is Harmful to Public Health and the Environment**

EPA must remedy its violation of this mandatory duty to better protect public health and native ecosystems from ozone’s harmful effects. According to EPA’s exhaustive scientific review, ground-level ozone pollution—commonly referred to as smog<sup>3</sup>—causes “adverse health effects that range from decreased lung function and increased respiratory symptoms to serious indicators of respiratory morbidity,” such as emergency department visits and hospital admissions.<sup>4</sup> A recent peer-reviewed medical study found that even short-term exposure to high levels of

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<sup>1</sup> 42 U.S.C. § 7604(a)(2); 40 C.F.R. § 54.

<sup>2</sup> 42 U.S.C. § 7410(k)(1)(B).

<sup>3</sup> See, e.g., EPA, “Ground-level ozone basics,” <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics> (“Ozone at ground level is a harmful air pollutant, because of its effects on people and the environment, and it is the main ingredient in “smog.”).

<sup>4</sup> 73 Fed. Reg. 16,436 (March 27, 2008); see also EPA, “Health Effects of Ozone Pollution,” <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>.

ground-level ozone increases the risk of death.<sup>5</sup> Those most at risk from ozone pollution are children and older adults; people who are regularly active outside, such as laborers; and individuals with pre-existing lung and heart diseases such as asthma.<sup>6</sup>

Ozone is also harmful to vegetation and ecosystems.<sup>7</sup> Ozone can be especially harmful to sensitive vegetation—including trees such as the black cherry, quaking aspen, white pine, and ponderosa pine—during the growing season.<sup>8</sup> Ozone pollution can also indirectly harm soils, water, and wildlife, and their associated ecosystems, leading to diminished clean air and water.<sup>9</sup> And ozone pollution also contributes to the climate crisis, as ozone is a greenhouse gas and ozone pollution also hinders plant growth throughout a plant’s lifecycle, thereby shrinking the carbon sequestration potential of plants.<sup>10</sup>

## **II. EPA Failed to Make Findings of Failure to Submit for SIP Elements Required for Areas Designated As “Serious” Nonattainment Under the 2008 Ozone Standards**

EPA is required to determine whether a SIP submittal is administratively complete.<sup>11</sup> 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.<sup>12</sup> This is referred to as a “finding of failure to submit.”

On August 23, 2019, EPA classified the areas listed in Table 1 as “Serious” nonattainment for the 2008 ozone NAAQS.<sup>13</sup> All elements of the nonattainment SIP were due by no later than August 3, 2020, with the exception for RACT measures not tied to attainment, which were due March 23, 2021.<sup>14</sup>

As of the date of this letter, the states in Table 1 have failed to submit “Serious” nonattainment and OTR SIPs for the areas and elements listed. As required under 42 U.S.C. § 7410(k)(1)(B),

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<sup>5</sup> “Increased exposure to ozone may increase the risk of death, Medical News Today (Feb. 2020), <https://www.medicalnewstoday.com/articles/increased-exposure-to-ozone-may-increase-the-risk-of-death#Ozone-pollution>, citing Ana M. Vicedo-Cabrera, et al., “Short term association between ozone and mortality: global two stage time series study in 406 locations in 20 countries,” *BMJ* 368 (Feb. 2020), <https://www.bmj.com/content/368/bmj.m108>.

<sup>6</sup> 73 Fed. Reg. 16,436, 16,440.

<sup>7</sup> EPA, “Ecosystem Effects of Ozone Pollution,” <https://www.epa.gov/ground-level-ozone-pollution/ecosystem-effects-ozone-pollution>.

<sup>8</sup> *Id.*

<sup>9</sup> 73 Fed. Reg. 16,436, 16,485-86.

<sup>10</sup> *Id.* 16,486; *see generally* “Biological Carbon Sequestration,” UC Davis, <https://climatechange.ucdavis.edu/science/carbon-sequestration/biological/>.

<sup>11</sup> 42 U.S.C. § 7410(k)(1)(B).

<sup>12</sup> *Id.* § 7401(k)(1)(B).

<sup>13</sup> 84 Fed. Reg. 44,238 (Aug. 23, 2019).

<sup>14</sup> *Id.* at 44,245 (“The EPA is finalizing August 3, 2020, as the due date for Serious area SIP revisions, including RACT measures tied to attainment.”); *id.* at 44,246 (“EPA is finalizing a due date for SIP revisions for RACT measures not tied to attainment of 18 months from the effective date of this final action, as explained further below.”).

EPA had six months after the states’ deadlines to issue findings of failure to submit. Here, EPA’s mandatory duty passed on February 3, 2021 for all elements except RACT measures not tied to attainment, and September 23, 2021 for RACT measures not tied to attainment. EPA has thus violated its mandatory duty under the Clean Air Act to issue a finding of failure to submit.<sup>15</sup>

Without a submittal addressing the nonattainment SIP elements, the minimum criteria cannot be met for the states in Table 1 to submit a SIP addressing the Serious nonattainment requirement. EPA must therefore issue a finding of failure to submit for the nonattainment areas listed below.

**Table 1**

Area	Overdue Elements	EPA Deadline to Make a Finding of Failure to Submit
<b>Chicago-Naperville (IL portion)</b>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Attainment Demonstration- Serious</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for Reasonable Further Progress (“RFP”) Milestones</li> <li>• Emissions Inventory</li> <li>• Inspection and Maintenance (“I/M”) Enhanced</li> <li>• Non-attainment New Source Review (“NSR”) for Serious</li> <li>• RACT Measures Tied to Attainment<sup>16</sup></li> <li>• RFP Serious</li> </ul>	Feb. 3, 2021
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<b>Dallas-Fort Worth, TX</b>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Attainment Demonstration- Serious</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Provisions for RFP Milestones</li> <li>• Emissions Inventory</li> <li>• RACT NOX for Major Sources</li> </ul>	Feb. 3, 2021

<sup>15</sup> 42 U.S.C. § 7410(k)(1)(B).

<sup>16</sup> In this letter, we are using the terms “RACT measures tied to attainment” and “RACT measures not tied to attainment” in the same way that EPA used those terms in Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards. 84 Fed. Reg. 44,238 (Aug. 23, 2019).

Area	Overdue Elements	EPA Deadline to Make a Finding of Failure to Submit
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<p style="text-align: center;"><b>Greater Connecticut, CT</b></p>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Emissions Inventory</li> </ul>	Feb. 3, 2021
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<p style="text-align: center;"><b>Houston-Galveston-Brazoria, TX</b></p>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for RFP Milestones</li> <li>• RACT Measures Tied to Attainment</li> </ul>	Feb. 3, 2021
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<p style="text-align: center;"><b>Chicago-Naperville (IN portion)</b></p>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for RFP Milestones</li> <li>• Emissions Inventory</li> <li>• RACT Measures Tied to Attainment</li> </ul>	Feb. 3, 2021
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<p style="text-align: center;"><b>New York-North New Jersey-Long Island, New York-New Jersey-Connecticut (CT portion)</b></p>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Attainment Demonstration- Serious</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for RFP Milestones</li> <li>• Emissions Inventory</li> <li>• I/M Enhanced</li> <li>• Non-attainment NSR for Serious<sup>17</sup></li> <li>• RACT Measures Tied to Attainment</li> <li>• RFP Serious</li> </ul>	Feb. 3, 2021

<sup>17</sup> EPA’s “Required State Implementation Plan Elements Dashboard” indicates that the state submitted this element on December 29, 2020, but there is no way to verify this information. See EPA, [https://edap.epa.gov/public/extensions/S4S\\_Public\\_Dashboard\\_2/S4S\\_Public\\_Dashboard\\_2.html](https://edap.epa.gov/public/extensions/S4S_Public_Dashboard_2/S4S_Public_Dashboard_2.html).

Area	Overdue Elements	EPA Deadline to Make a Finding of Failure to Submit
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<b>New York-North                      New Jersey-Long                      Island, New York-                      New Jersey-                      Connecticut                      (NJ portion)</b>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Attainment Demonstration- Serious</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for RFP Milestones</li> <li>• Emissions Inventory</li> <li>• I/M Enhanced</li> <li>• Non-attainment NSR for Serious</li> <li>• RACT Measures Tied to Attainment</li> <li>• RFP Serious</li> </ul>	Feb. 3, 2021
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<b>New York-North                      New Jersey-Long                      Island, New York-                      New Jersey-                      Connecticut                      (NY portion)</b>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Attainment Demonstration- Serious</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for RFP Milestones</li> <li>• Emissions Inventory</li> <li>• I/M Enhanced</li> <li>• Non-attainment NSR for Serious</li> <li>• RACT Measures Tied to Attainment</li> <li>• RFP Serious</li> </ul>	Feb. 3, 2021
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<b>San Diego County,                      CA</b>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Attainment Demonstration- Serious</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for RFP Milestones</li> <li>• I/M Enhanced</li> <li>• Non-attainment NSR for Serious<sup>18</sup></li> </ul>	Feb. 3, 2021

<sup>18</sup> EPA’s “Required State Implementation Plan Elements Dashboard” indicates that on October 10, 2020, EPA took final action to find this submittal complete, but the associated Federal Register notice does not correlate with this element. See EPA, [https://edap.epa.gov/public/extensions/S4S\\_Public\\_Dashboard\\_2/S4S\\_Public\\_Dashboard\\_2.html](https://edap.epa.gov/public/extensions/S4S_Public_Dashboard_2/S4S_Public_Dashboard_2.html), citing to 85 Fed. Reg. 57727 (Sept. 16, 2020).

Area	Overdue Elements	EPA Deadline to Make a Finding of Failure to Submit
	<ul style="list-style-type: none"> <li>• RACT Measures Tied to Attainment</li> <li>• RFP Serious</li> </ul>	
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021
<p style="text-align: center;"><b>Chicago-Naperville, (Wisconsin)</b></p>	<ul style="list-style-type: none"> <li>• Enhanced Monitoring</li> <li>• Clean-Fuel Vehicle Programs</li> <li>• Contingency Measures for Attainment</li> <li>• Contingency Measures for RFP Milestones</li> <li>• Emissions Inventory</li> <li>• Non-attainment NSR for Serious</li> <li>• RACT Measures Tied to Attainment</li> </ul>	Feb. 3, 2021
	<ul style="list-style-type: none"> <li>• RACT Measures Not Tied to Attainment</li> </ul>	Sept. 23, 2021

### **III. Conclusion**

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

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Center for Environmental Health  
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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 a complaint.

Thank you,

*Victoria Bogdan Tejeda*

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