

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

WILDEARTH GUARDIANS,	)	
	)	
Plaintiff,	)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
v.	)	
	)	
MICHAEL S. REGAN, in his official	)	
capacity as Administrator of the United	)	
States Environmental Protection Agency,	)	
	)	
Defendant.	)	
	)	
	)	
Case No. 22-174	)	
	)	

INTRODUCTION

1. Plaintiff, WildEarth Guardians (“Guardians”), brings this Clean Air Act (“CAA”) citizen suit against Defendant, Michael S. Regan, Administrator of the United States Environmental Protection Agency (“EPA”), in his official capacity (hereinafter Mr. Regan is referred to as “EPA”) to compel EPA to perform its non-discretionary duty to promulgate a “good neighbor” Federal Implementation Plan (“FIP”) for the State of New Mexico.

2. Ground level ozone, causes death, disease, and both ecological and economic harm. The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, requires that all states create “good neighbor” plans to keep ozone emitted from sources in one state from impacting “downwind” states. If a state fails to submit a good neighbor plan or have such a plan approved by EPA, the Clean Air Act requires EPA to step in and prepare a FIP for that state within two years after finding that state failed to submit a good neighbor plan.

3. When a state fails to submit a good neighbor plan, timely promulgation of a FIP is essential to ensure that public health is protected from the harmful effects of ozone.

4. EPA was required to promulgate a FIP for New Mexico by January 6, 2022, if not before. *See* 84 Fed Reg. 66,612, 66,614 (Dec. 5, 2019). To date, EPA has not promulgated a FIP for New Mexico.

JURISDICTION, NOTICE, AND VENUE

5. This action arises under the Clean Air Act citizen suit provision, 42 U.S.C. § 7604(a)(2), which authorizes civil actions for EPA's failure to perform non-discretionary duties.

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1331, because the action raises a federal question. The Court has authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-02.

7. On January 7, 2022, Guardians notified EPA, by certified mail, of its intent to sue the agency for its failure to promulgate a FIP. Guardians' notice letter informed EPA that the agency was required to promulgate a FIP within two years of a finding that the State of New Mexico had failed to submit a State Implementation Plan ("SIP") addressing interstate transport of ozone air pollution, as required under Section 110(a)(2)(D)(i) of the Clean Air Act. Although 60 days have elapsed since Guardians gave notice, EPA remains in violation of the law.

8. EPA has failed to redress the Clean Air Act violation set forth in Guardians' notice letter. As a result, there exists now between the parties an actual, justiciable controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201.

9. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(1). A substantial part of the events and omissions alleged in this complaint occurred in this district. Additionally, Guardians' main office is located in Santa Fe, New Mexico.

PARTIES

10. Plaintiff, WILDEARTH GUARDIANS, is a non-profit environmental organization with offices in New Mexico, Arizona, Colorado, Idaho, Montana, Oregon, and Washington. Guardians' mission is to protect and restore wildlife, wild rivers, wild places, and the health of the American West. To achieve this, Guardians and its members work to reduce harmful air pollution to safeguard public health, welfare, and the environment.

11. Guardians has more than 200,000 members and supporters, many of whom live, work, and recreate in New Mexico and surrounding states, including in areas that are adversely affected by ground-level ozone that forms as a result of emissions from pollution sources in New Mexico. For example, Guardians has members and supporters who live, work, and recreate in La Plata County, Colorado, as well as throughout the Denver Metro-North Front Range Nonattainment Area. Ozone levels in La Plata County and the Denver Metro-North Front Range Nonattainment Area are often heavily impacted by air pollution from New Mexico. This air pollution, which should be regulated under the FIP that EPA has failed to promulgate by its mandatory deadline to do so, adversely impacts Guardians' and its members' interests.

12. Elevated ozone levels, to which EPA's failure to promulgate a FIP contributes, force Guardians' members to limit outdoor activities that they would otherwise be able to engage in. And Guardians' members' reasonable concerns about the health harms of their ozone exposure diminish their enjoyment of places and activities they previously enjoyed. Guardians' members' interests in using and enjoying the natural environment in areas that do not meet or struggle to maintain the 2015 standard are further harmed because elevated levels of ozone damage plant life, aquatic life, and natural ecosystems. Ozone damage to vegetation can lead to wildlife avoidance of certain areas, as well as a reduction in biodiversity or other changes to a

local community's ecosystem, making it more difficult for Guardians' members to observe, study, research, photograph, or write about wildlife, plants, or ecosystems. EPA's failure to promulgate the FIP at issue in this case increases the risk and likelihood that Guardians' members and staff and the plants and animals Guardians seeks to protect are being exposed to unhealthy levels of ozone in excess of federal standards.

13. The violations alleged in this Complaint also deprive Guardians and its members of certain procedural rights associated with EPA's required action to promulgate a FIP, including notice and opportunity to comment. The violations alleged in this Complaint also deprive Guardians and its members of certain information associated with EPA's required action to promulgate a FIP.

14. The injuries suffered by Guardians' members and staff are traceable to EPA's failure to promulgate the FIP at issue in this case and would be remedied by promulgation of this plan.

15. Defendant, MICHAEL S. REGAN, is Administrator of the EPA. Mr. Regan is sued in his official capacity. As Administrator, Mr. Regan is responsible for ensuring EPA's compliance with the Clean Air Act. Section 110(c)(1) of the Clean Air Act, 42 U.S.C. § 7410(c)(1), requires EPA to promulgate FIPs within two years of finding that a state has failed to make the required submission of a SIP or revision. If ordered by a Court, the Administrator of the EPA has the authority and the ability to remedy the harm alleged in this complaint by providing the requested relief.

LEGAL BACKGROUND

16. Congress enacted the Clean Air Act to establish a partnership between EPA and the states for the attainment and maintenance of national air quality goals. 42 U.S.C. §§ 7401-

7515. This partnership is intended to “speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.” H.R. Rep. No. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356.

17. The partnership between EPA and the states established in the Clean Air Act employs a model of cooperative federalism in which EPA sets health-based National Ambient Air Quality Standards (“NAAQS”) and individual states develop plans (“State Implementation Plans” or “SIPs”), according to strict deadlines, to ensure air quality meets the NAAQS.

18. States, or regions within a state, must adopt SIPs that contain enforceable emissions limitations necessary to attain the NAAQS and meet all applicable requirements of the Clean Air Act. *See, e.g.*, 42 U.S.C. §§ 7410(a)(1), (a)(2)(A), 7502(c)(6).

19. Among the applicable requirements of the Clean Air Act, section 110(a)(2) lists the elements that SIPs must address, including section 110(a)(2)(D)(i) which applies to interstate transport of air pollution. 42 U.S.C. § 7410(a)(2). Section 110(a)(2)(D)(i) has four separate requirements. The SIP must contain provisions that prohibit any source in any state from emitting pollution in an amount that will:

- (1) contribute significantly to nonattainment in another state;
- (2) interfere with maintenance by another state with any NAAQS;
- (3) interfere with measures in another state to prevent significant deterioration of air quality in that state; or
- (4) interfere with measures to protect visibility in another state.

See 42 U.S.C. § 7410(a)(2)(D)(i). The portion of a state’s SIP that addresses these requirements is commonly referred by many names, including “Good Neighbor SIP,” “Transport SIP,” or “Infrastructure SIP” (hereinafter “Good Neighbor SIP”).

20. When EPA promulgates a new or revised NAAQS, section 110(a)(1) of the Clean Air Act requires states to submit new SIPs that provide for the implementation, maintenance, and enforcement of the new or revised standard within three years after promulgation of the standard, or within a shorter time-period if EPA so prescribes. 42 U.S.C. § 7410(a)(1). Such plans must be submitted to and approved by EPA. 42 U.S.C. § 7410(a)(1), (k).

21. Pursuant to Clean Air Act section 110(k)(1)(B), the EPA must determine no later than 6 months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established pursuant to Clean Air Act section 110(k)(1)(A). 42 U.S.C. § 7410(k)(1)(A), (B). The determination that a state has not submitted a SIP submission that meets the minimum completeness criteria is referred to as a “finding of failure to submit.”

22. Where a proposed SIP or SIP revision is submitted, the Clean Air Act requires EPA to determine, within 60 days of EPA’s receipt of the proposed SIP or SIP revision, whether the submission is complete, or sufficient to meet the minimum criteria established by EPA for such proposals. 42 U.S.C. § 7410(k)(1)(B). If EPA does not determine if a submission is complete, it is deemed complete by operation of law after 60 days. *Id.* If EPA determines that the proposed SIP or SIP revision does not meet the minimum criteria, the State is considered not to have made the submission. 42 U.S.C. § 7410(k)(1)(C).

23. Within 12 months of finding that a proposed SIP or SIP revision is complete (or deemed complete by operation of law), EPA must act to approve, disapprove, or approve in part and disapprove in part, the submission. 42 U.S.C. § 7410(k)(2).

24. If EPA approves a SIP or SIP revision, polluters must comply with all emission standards and limitations contained in the SIP, and all such standards and limitation become federal law and are enforceable by EPA and citizens in federal courts. 42 U.S.C. § 7413 and 42 U.S.C. § 7604(a).

25. If EPA issues a finding that a state failed to submit a SIP or submitted an incomplete SIP, or a finding that disapproves the SIP in whole or in part because the SIP fails to meet the Clean Air Act's minimum requirements, EPA must develop its own plan ("Federal Implementation Plan" or "FIP") within two years of such a finding. 42 U.S.C. § 7410(c)(1). The Clean Air Act requires EPA to promulgate a FIP within this two-year period "unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such [a FIP]." *Id.*

26. If EPA fails to comply with a non-discretionary duty, such as promulgating a FIP within the statutorily mandated timeframe, the Clean Air Act allows any person to bring suit to compel EPA to perform its duty. 42 U.S.C. § 7604(a)(2).

FACTUAL ALLEGATIONS

27. On October 1, 2015, EPA revised the 8-hour ozone NAAQS. This revision reduced the allowed level of ozone from 75 parts per billion ("ppb") to 70 ppb and obligated states to submit a new SIP to provide for the implementation, maintenance, and enforcement of the revised standard by October 1, 2018.

28. Ground-level ozone is a poisonous gas that forms when emissions from smokestacks, tailpipes, and oil and gas production activities react with sunlight. It is a major health concern. Subsequent to EPA's revision of the NAAQS in 2015, air quality monitors in New Mexico and in neighboring states have routinely recorded ozone levels above the NAAQS. EPA reports and modeling data indicate that emissions from sources of pollution in New Mexico contribute to high ozone levels within the state and within neighboring states, including Colorado and Texas.

29. On November 22, 2019, nearly 15 months after New Mexico was required to submit a new Good Neighbor SIP, EPA issued a "finding of failure to submit," determining that New Mexico had "not submitted [a] complete interstate transport [SIP] to meet the requirements of CAA [Clean Air Act] section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS[.]" 84 Fed. Reg. 66,612, 66,614, 66,616 (Dec. 5, 2019). The finding was published in the Federal Register on December 5, 2019, with an "effective date" of January 6, 2020. *Id* at 66,612.

30. This finding initiated the two-year deadline for EPA to promulgate a FIP for New Mexico by no later than January 6, 2022, unless prior to that time, the state made a submission to meet the requirements of section 110(a)(2)(D)(i)(I) and EPA fully approved such a submission. *See* 42 U.S.C. § 7410(c)(1)(A).

31. The State of New Mexico submitted its Good Neighbor SIP to EPA on August 3, 2021, nearly three years after the state's deadline to submit. Upon information and belief, New Mexico's SIP submission is fatally flawed and cannot be lawfully approved by EPA.

32. As of the date of filing this Complaint, EPA has not taken any action on New Mexico's SIP submission. The EPA has not proposed to approve or disapprove, or otherwise

taken any action that would indicate the agency has a schedule for reviewing New Mexico's SIP submission.

33. As of the date of filing this Complaint, EPA has not promulgated a FIP for New Mexico.

34. In the meantime, the New Mexico SIP does not contain provisions prohibiting emissions of ozone and ozone forming emissions that would significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in other states.

35. On January 7, 2022, Guardians notified EPA, by certified mail, of its intent to sue the agency for its failure to promulgate a FIP. Guardians' notice letter informed EPA that the agency was required to promulgate a FIP within two years of a finding that the State of New Mexico had failed to submit a SIP, addressing interstate transport of ozone air pollution, as required under Section 110(a)(2)(D)(i) of the Clean Air Act. Although 60 days have elapsed since Guardians gave notice, EPA remains in violation of the law.

CLAIM FOR RELIEF

Failure to Perform a Non-Discretionary Duty to Promulgate a Good Neighbor FIP for New Mexico

36. Plaintiff incorporates by reference all the preceding allegations in this Complaint.

37. The Clean Air Act imposes a mandatory duty on EPA to promulgate a FIP for any state that it finds failed to submit a required SIP within two years of such a finding. 42 U.S.C. § 7410(c)(1)(A).

38. On November 22, 2019, EPA issued a finding, subsequently published in the Federal Register on December 5, 2019 identifying an effective date of January 6, 2022, that New Mexico failed to submit a SIP required to satisfy section 110(a)(2)(D)(i)(I) with regard to the 2015 8-hour ozone NAAQS.

39. More than two years have passed since EPA issued a finding that New Mexico failed to submit a SIP required to satisfy section 110(a)(2)(D)(i)(I) with regard to the 2015 8-hour ozone NAAQS.

40. EPA has not approved a SIP for New Mexico required to satisfy section 110(a)(2)(D)(i)(I) with regard to the 2015 8-hour ozone NAAQS.

41. EPA is in violation of its mandatory duty to promulgate a FIP or approve a SIP for New Mexico required to satisfy section 110(a)(2)(D)(i)(I) with regard to the 2015 8-hour ozone NAAQS.

42. This violation constitutes a “failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator,” within the meaning of the Clean Air Act’s citizen suit provision. 42 U.S.C. § 7604(a)(2). EPA’s violation is ongoing and will continue unless remedied by this Court.

REQUEST FOR RELIEF

Plaintiff, WildEarth Guardians, respectfully requests the Court grant the following relief:

A. A declaratory judgment that EPA has violated and is in violation of its mandatory duty under 42 U.S.C. § 7410(c)(1) to promulgate a Federal Implementation Plan for New Mexico required to satisfy section 110(a)(2)(D)(i)(I) with regard to the 2015 8-hour ozone NAAQS;

B. An injunction directing EPA to promulgate a FIP for New Mexico within 90 days of the court’s order as required to satisfy section 110(a)(2)(D)(i)(I) of the Clean Air Act with regard to the 2015 8-hour ozone NAAQS;

C. An order retaining jurisdiction of this action until such time as EPA has complied with its non-discretionary duty under the Clean Air Act to ensure compliance with the Court's injunction;

D. An order awarding Guardians its costs of litigation, including reasonable attorneys' fees; and

E. Such other and further relief as this Court deems just and proper.

Respectfully submitted on this 8th day of March, 2022,

/s/ Daniel L. Timmons
NM Bar No. 152754
WildEarth Guardians
301 N. Guadalupe Street, Suite 201
Santa Fe, NM
(505) 570-7014
dtimmons@wildearthguardians.org