

# LAW OFFICE OF ROBERT UKEILEY

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VIA CERTIFIED MAIL

December 14, 2023

Michael Regan  
Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460  
[regan.michael@epa.gov](mailto:regan.michael@epa.gov)

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), promulgate Federal Implementation Plan under 42 U.S.C. §7410(c), and determine whether areas have attained under 42 U.S.C. § 7509(c).

Dear Administrator Regan:

On behalf of the Center for Biological Diversity and the Sierra Club, I am writing to inform you that they intend 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). As detailed below, EPA has failed to undertake mandatory duties with regard to sulfur dioxide (SO<sub>2</sub>) pollution in numerous areas.

EPA should remedy its violation of these mandatory duties to better protect the public from the harmful effects of sulfur dioxide. Exposure to SO<sub>2</sub> in even very short time periods—such as [five minutes](#)—has significant health impacts, including decrements in lung function, aggravation of asthma, and respiratory and cardiovascular morbidity. EPA has also determined that exposure to SO<sub>2</sub> pollution [can aggravate existing heart disease](#), leading to increased hospitalizations and premature deaths.

SO<sub>2</sub> also contributes to the formation of [acid rain](#), which damages trees, crops, historic buildings, and monuments and alters the acidity of both soils and water bodies. Acute and chronic exposures to SO<sub>2</sub> lead to [foliar injury, decreased photosynthesis, and decreased growth of vegetation](#). EPA’s draft Integrated Review Plan acknowledged that oxides of sulfur (SO<sub>x</sub>) and oxides of nitrogen (NO<sub>x</sub>) have a potential to [negatively](#)

[affect endangered species](#). EPA's Integrated Science Assessment even identifies [four federally listed endangered species](#) — three “endangered species in the genus Isoetes” and the endangered green pitcher-plant (*Sarracenia oreophila*)—that are adversely affected by SO<sub>x</sub> pollution. The U.S. Fish and Wildlife Service (FWS) has already identified many other federally protected species that are [negatively affected by atmospheric pollution from SO<sub>x</sub>](#).

In addition, because SO<sub>2</sub> emissions may be transmitted long distances, they contribute to [visibility impairment problems](#) in many national parks and wilderness areas.

EPA has previously found “that current levels of oxides of nitrogen and sulfur are [sufficient to cause acidification](#) of both aquatic and terrestrial ecosystems, nutrient enrichment of terrestrial ecosystems and contribute to nutrient enrichment effects in estuaries that could be considered adverse[.]” 77 Fed. Reg. 20,218, 20,241-42 (April 3, 2012).

[SO<sub>x</sub> also facilitates mercury methylation](#). This creates the [form of mercury](#) which is especially dangerous to humans and wildlife.

On June 2, 2010, EPA revised the primary SO<sub>2</sub> National Ambient Air Quality Standard (NAAQS) by establishing a new one-hour standard at a level of 75 parts per billion (ppb) which is met when the 3-year average of the annual 99th percentile of the daily maximum one-hour average concentrations is less than or equal to 75 ppb. The primary SO<sub>2</sub> NAAQS was set at this level in order to protect public health from the serious threats posed by short-term exposure to SO<sub>2</sub>.

Due to both the more stringent numerical limit and shorter averaging time as compared to the previous SO<sub>2</sub> NAAQS, the 2010 SO<sub>2</sub> NAAQS is far more protective of human health than the prior SO<sub>2</sub> NAAQS and promises huge health benefits. EPA estimated that 2,300 to 5,900 premature deaths and 54,000 asthma attacks a year will be prevented by the new standard.

Timely implementation of the new NAAQS is critical. Considering the scientific evidence, each year implementation of the one-hour SO<sub>2</sub> NAAQS is delayed, 5,900 more people will die prematurely and 54,000 asthma attacks will occur unnecessarily. Further, EPA estimates that the net benefit of implementing the 75 ppb SO<sub>2</sub> NAAQS is up to \$36 billion dollars. Those individuals who suffer from health impacts caused by exposure to SO<sub>2</sub> levels above the NAAQS will have greater medical costs with each year implementation is delayed and, as a result, the monetized benefits of implementing the one-hour SO<sub>2</sub> NAAQS will go unrealized. Further, the ability of those individuals to enjoy everyday activities such as exercise, school, and work will continue to be negatively impacted.

## I. FAILURE TO MAKE FINDINGS OF FAILURE TO SUBMIT

EPA is required to determine whether a state implementation plan (SIP) 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 SIP submittal, 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 SIP submittal. *Id.* This determination is referred to as a “finding of failure to submit.”

On January 28, 2022, EPA found that Detroit sulfur dioxide nonattainment area failed to attain the 2010 primary 1-hour SO<sub>2</sub> NAAQS by its attainment date of October 4, 2018. 87 Fed. Reg. 4501 (Jan. 28, 2022). This triggered an obligation for Michigan to submit a SIP revision by January 30, 2023 pursuant to Clean Air Act Section 179(d). 87 Fed. Reg. at 4502.

It has been more than six months since January 30, 2023. However, according to EPA’s SPeCS Public Dashboard,<sup>1</sup> Michigan has not submitted this SIP revision. Nor has EPA made a finding of failure to submit. Therefore, EPA is in violation of its mandatory duty to make a finding of failure to submit a “post-failure to attain” SIP revision including the emission inventory, attainment demonstration, contingency measures, nonattainment New Source Review (NSR), reasonably available control measures/ reasonably available control technology (RACM/RACT), and reasonable further progress (RFP) elements.

On April 5, 2022, EPA found that the Sullivan County, TN sulfur dioxide nonattainment area failed to attain the 2010 primary 1-hour SO<sub>2</sub> NAAQS by its attainment date of October 4, 2018. 87 Fed. Reg. 19,645 (Apr. 5, 2022). This triggered an obligation for Tennessee to submit a SIP revision by April 5, 2023 pursuant to Clean Air Act Section 179(d). *Id.*

It has been more than six months since April 5, 2023. However, according to EPA’s SPeCS Public Dashboard, Tennessee has not submitted this SIP revision. Nor has EPA made a finding of failure to submit. Therefore, EPA is in violation of its mandatory duty to make a finding of failure to submit a post-failure to attain SIP revision including the emission inventory, attainment demonstration, contingency measures, nonattainment New Source Review (NSR), reasonably available control measures/ reasonably available control technology (RACM/RACT), and reasonable further progress (RFP) elements.

On January 31, 2022, EPA found that the Hayden and Miami, AZ sulfur dioxide nonattainment areas failed to attain the 2010 primary 1-hour SO<sub>2</sub> NAAQS by their attainment date of October 4, 2018. 87 Fed. Reg. 4,805 (Jan. 31, 2022). This triggered an obligation for Arizona to submit a SIP revision by January 31, 2023 pursuant to Clean Air Act Section 179(d). *Id.*

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<sup>1</sup> <https://edap.epa.gov/public/extensions/specs-element-dashboard/index.html>

It has been more than six months since January 31, 2023. However, according to EPA's SPeCS Public Dashboard, Arizona has not submitted these SIP revisions. Nor has EPA made a finding of failure to submit. Therefore, EPA is in violation of its mandatory duty to make a finding of failure to submit "post-failure to attain" SIP revisions including the emission inventory, attainment demonstration, contingency measures, nonattainment New Source Review (NSR), reasonably available control measures/ reasonably available control technology (RACM/RACT), and reasonable further progress (RFP) elements.

On March 26, 2021, effective April 30, 2021, EPA promulgated its "Round 4" of nonattainment designations. 86 Fed. Reg. 16,055 (Mar. 26, 2021). This required States with nonattainment areas to submit nonattainment areas SIPs within 18 months of the effective date of the nonattainment designation, that is by no later than October 31, 2022. 86 Fed. Reg. at 16,057. In Round 4, EPA designated Henderson-Webster Counties, KY, St. Lawrence County (part), NY, and Giles County (part), VA as nonattainment areas.

It has been more than six months since October 31, 2022. However, according to EPA's SPeCS Public Dashboard, Kentucky and New York, have not submitted any of the SIP elements and Virginia has not submitted any of the SIP elements except the attainment demonstration. Nor has EPA made a finding of failure to submit. Therefore, EPA is in violation of its mandatory duties to make a finding of failure to submit SIP elements for Kentucky and New York including the emission inventory, attainment demonstration, contingency measures, nonattainment New Source Review (NSR), reasonably available control measures/ reasonably available control technology (RACM/RACT), and reasonable further progress (RFP) elements and for Virginia including the emission inventory, contingency measures, nonattainment New Source Review (NSR), reasonably available control measures/ reasonably available control technology (RACM/RACT), and reasonable further progress (RFP) elements.

## **II. FAILURE TO PROMULGATE FEDERAL IMPLEMENTATION PLANS**

On March 18, 2016, effective April 18, 2016, EPA published an action finding that Arizona had failed to submit the required SO<sub>2</sub> nonattainment plan for the Hayden nonattainment area by the submittal deadline. See 81 Fed. Reg. 14,736, 14,738 (Mar. 18, 2016). This finding triggered a requirement that EPA promulgate a Federal Implementation Plan (FIP) within two years of the finding unless, before promulgating the FIP (a) the state had made the necessary complete submittal and (b) EPA had approved the submittal as meeting applicable requirements. See 42 U.S.C. § 7410(c)(1). As a result, EPA was required to promulgate a FIP for the Hayden SO<sub>2</sub> nonattainment area by no later than April 18, 2018 for the attainment demonstration, contingency measures, enforceable emissions limitations and controls, RACM/RACT, and RFP elements. See 85 Fed. Reg. 71,547 (Nov. 10, 2020). EPA has failed to perform this mandatory duty for the Hayden SO<sub>2</sub> nonattainment area.

On November 3, 2020, effective December 3, 2020, EPA published an action finding that Indiana, Louisiana, Guam, and Puerto Rico had failed to submit the required SO<sub>2</sub> nonattainment plan for the Huntington, Evangeline Parish, Piti-Cabras, Guayama-Salinas, and San Juan nonattainment areas by the submittal deadline. See 85 Fed. Reg. 69,504, 69,506 (Nov. 3, 2020). This finding triggered a requirement that EPA promulgate Federal Implementation Plans (FIP) within two years of the finding unless, before promulgating the FIP (a) the state had made the necessary complete submittal and (b) EPA had approved the submittal as meeting applicable requirements. See 42 U.S.C. § 7410(c)(1). As a result, EPA was required to promulgate FIPs for the Huntington, Evangeline Parish, Piti-Cabras, Guayama-Salinas, and San Juan SO<sub>2</sub> nonattainment areas by no later than December 3, 2022 for the emissions inventory, attainment demonstration, contingency measures, enforceable emissions limitations and controls, RACM/RACT, nonattainment new source review program, and RFP elements. EPA has failed to perform these mandatory duties for the Huntington, Evangeline Parish, Piti-Cabras, Guayama-Salinas, and San Juan SO<sub>2</sub> nonattainment areas.

### **III. FAILURE TO MAKE DETERMINATIONS OF WHETHER AREAS HAVE ATTAINED BY THEIR ATTAINMENT DATES**

No later than 6 months after the attainment date for a nonattainment area, EPA has a mandatory duty to determine whether an area has attained the NAAQS and publish a notice in the Federal Register of that determination. 42 U.S.C. § 7509(c).

EPA designated all of the areas listed in Table 1 below as nonattainment for the 2010 SO<sub>2</sub> NAAQS effective no later than January 12, 2017. 81 Fed. Reg. 45,039 (July 12, 2016); 81 Fed. Reg. 89,870 (Dec. 13, 2016). Therefore, these areas had an attainment date of no later than January 12, 2022. See 42 U.S.C. § 7514a(a). As a result, EPA had a mandatory duty to determine whether these areas attained by the attainment date and publish notice of such finding by no later than July 12, 2022. See 42 U.S.C. § 7509(c). EPA has failed to perform this mandatory duty for the areas listed in Table 1.

**TABLE 1**  
(Round 2 Nonattainment Areas)

STATE	AREA
IL	Alton Township
MD	Anne Arundel County and Baltimore County
MI	St. Clair
TX	Freestone and Anderson Counties
TX	Rusk and Panola Counties
TX	Titus County

EPA designated all of the areas listed in Table 2 below as nonattainment for the 2010 SO<sub>2</sub> NAAQS effective no later than April 9, 2018. 83 Fed. Reg. 1,098 (Jan. 9, 2018). Therefore, these areas had an attainment date of no later than April 9, 2023. See 42 U.S.C. § 7514a(a). As a result, EPA had a mandatory duty to determine whether these areas attained by the attainment date and publish notice of such finding by no later than October 9, 2023. See 42 U.S.C. § 7509(c). EPA has failed to perform this mandatory duty for the areas listed in Table 2.

**TABLE 2**  
(Round 3 Nonattainment Areas)

"STATE"	AREA
IN	Huntington
LA	Evangeline Parish (Partial)
GUAM	Piti-Cabras
PR	San Juan
PR	Guayama-Salinas

**V. NOTICE REQUIREMENTS**

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

The Center for Biological Diversity  
1536 Wynkoop St., Ste. 421  
Denver, CO 80202

Sierra Club  
2101 Webster St., Ste. 1300  
Oakland, CA 94612

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

The Center for Biological Diversity, the Sierra Club, and their counsel would prefer to resolve this matter without the need for litigation. Therefore, we look forward to EPA contacting us within 60 days about coming into compliance. If you do not do so, however, we will have to file a complaint.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Ukeiley".

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