

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK; STATE OF
CONNECTICUT; STATE OF DELAWARE;
COMMONWEALTH OF
MASSACHUSETTS; STATE OF NEW
JERSEY; and the CITY OF NEW YORK,

Plaintiffs,

v.

ANDREW R. WHEELER, in his official
capacity as Administrator of the United
States Environmental Protection Agency;
and the UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,

Defendants.

Civil No.: 1:21-cv-252

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

**(Clean Air Act, 42 U.S.C. §§ 7401 *et*
seq.)**

Plaintiffs New York, Connecticut, Delaware, Massachusetts, New Jersey, and
the City of New York (collectively, Plaintiff States) allege as follows:

INTRODUCTION

1. Plaintiff States sue for declaratory and injunctive relief through the citizen suit provision of the Clean Air Act (Act) against Andrew R. Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency, and against the United States Environmental Protection Agency (together, EPA). For years, Plaintiff States have struggled to attain and maintain the federal air quality standards for ozone, a pollutant that harms people and ecosystems and is the principal component of “smog.” Plaintiff States’ struggles are due in large part to

the excessive amounts of ozone pollution that are emitted by sources in upwind States and carried by prevailing winds into Plaintiff States. The Act requires upwind States to submit to EPA, for approval or disapproval within a statutorily mandated timeframe, plans that fully eliminate those unlawful quantities of pollution being transported downwind. And if EPA disapproves an upwind States' plan as deficient, that determination triggers EPA's duty to craft a federal plan for that State within a set timeframe. By failing to timely act on a number of plans submitted by upwind States, EPA is disregarding its mandatory duty and harming Plaintiff States that are entitled to relief under the Good Neighbor Provision.

2. Plaintiff States ask the Court to order EPA to carry out the agency's mandatory statutory duty to approve or disapprove state implementation plans (SIPs) submitted by Indiana, Kentucky, Michigan, Ohio, Texas, and West Virginia (Upwind States) under 42 U.S.C. § 7410(a)(2)(D)(i)(I), known as the "Good Neighbor Provision," for the 2015 ozone national ambient air quality standards (NAAQS). This complaint refers to the portions of the Upwind States' SIPs that were submitted to EPA pursuant to the Good Neighbor Provision for the 2015 ozone NAAQS (and are the subject of EPA's overdue action here) as "Good Neighbor SIPs."

3. EPA has not made the required determinations approving or disapproving these Good Neighbor SIPs within 12 months of their being determined or deemed complete, as required by the Act. 42 U.S.C. § 7410(k)(2) & (3).

4. As a result, EPA is subject to suit under the Act and may be enjoined to comply with its mandatory duty.

5. To protect the public from unhealthy ozone levels, in 2015 EPA published revised NAAQS for ozone, setting more stringent benchmarks for allowable ambient ozone pollution, which every State must attain (and thereafter maintain) by deadlines set in the Act. 80 Fed. Reg. 65,292 (Oct. 26, 2015). The New York-Northern New Jersey-Long Island, NY-NJ-CT metropolitan area (New York Metropolitan Area), which encompasses nine counties in New York (including all of New York City), twelve counties in New Jersey and three counties in Connecticut, faces an attainment deadline in August 2024, based on air quality measured in 2021, 2022 and 2023. The Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE metropolitan area (Philadelphia Metropolitan Area), which includes portions of plaintiffs Delaware and New Jersey, and the Greater Connecticut Area, which includes five Connecticut counties not in the New York Metropolitan Area, both face attainment deadlines in 2021, based on air quality measured in 2018, 2019 and 2020.

6. Air pollution from each of the Upwind States significantly contributes to nonattainment of the 2015 ozone NAAQS, or interferes with maintenance of the 2015 ozone NAAQS, in one or more of the Plaintiff States. Therefore, the Plaintiff States need either fully compliant Upwind State Good Neighbor SIPs approved and in place, or if the Upwind States' Good Neighbor SIPs are deficient, disapproval by EPA triggering EPA's obligation to promulgate backstop federal implementation plans (FIPs) within two years to prevent excessive ozone pollution from these Upwind States. *See* 42 U.S.C. § 7410(c)(1).

7. Time is of the essence for the Plaintiff States: EPA's failure to take immediate action to ensure the Upwind States cut air pollution will both prolong harms to the health of our residents from high ozone levels and foreclose the ability of certain Plaintiff States to demonstrate attainment of the 2015 ozone NAAQS by their statutory attainment deadlines. Notably, compliance with the New York Metropolitan Area's upcoming statutory attainment deadline will be determined in part by average ozone measurements for the 2021 ozone season, which will begin in a few short weeks.

8. Plaintiff States ask the Court to find that EPA violated the Act when it failed, within the Act's 12-month timeframe, to approve or disapprove each Upwind State's Good Neighbor SIP—the portions of each Upwind State's SIP purporting to fulfill that State's Good Neighbor Provision obligations—for the 2015 ozone NAAQS.

9. The Court should order EPA to take final action approving or disapproving each of the Upwind States' Good Neighbor SIPs by a date certain.

10. Plaintiff States also seek all available litigation costs, including reasonable attorneys' fees, under section 304(d) of the Act, 42 U.S.C. § 7604(d).

JURISDICTION

11. This Court has subject matter jurisdiction over this action pursuant to section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2), which authorizes any person, after due notice, to sue to compel the performance of a nondiscretionary duty under the Act.

12. The Court also has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1361 (suits to compel officer or agency actions).

NOTICE

13. In satisfaction of section 304(b) of the Act, 42 U.S.C. § 7604(b), and 40 C.F.R. part 54, Plaintiff States sent notice to EPA on September 17, 2020, of their intention to file suit for EPA's failure to perform the nondiscretionary duties described here. A copy of the notice letter is attached as Exhibit 1.

14. The statutory 60-day notice period has now expired without action by EPA.

VENUE

15. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) because this suit names an agency of the United States and an officer of the United States acting in his official capacity, and a substantial part of the events or omissions giving rise to the Plaintiff States' claims occurred in this judicial district.

16. EPA's failure to approve or disapprove the Good Neighbor SIPs prolongs the risk of harm from high ozone levels to millions of residents in each of the Plaintiff States and hinders attainment and maintenance of the 2015 ozone NAAQS in areas including without limitation, in the New York Metropolitan Area, which includes New York counties located in this judicial district.

PARTIES

17. Plaintiff States—sovereign States and the City of New York—bring this action on behalf of their residents and on their own behalf to protect their respective

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