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ENVIRONMENTAL PROTECTION BUREAU

October 19, 2017

BY CM/ECF

Hon. Mark Langer
Clerk of Court
U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse &
William B. Bryant Annex
333 Constitution Ave., N.W.
Washington, D.C. 20001

**Re: State of New York, et al. v. United States Environmental
Protection Agency, et al. (D.C. Cir. Case No. 17-1185,
consolidated with Case Nos. 17-1172 and 17-1187)**

Dear Mr. Langer,

Pursuant to Federal Rule of Appellate Procedure 28(j), the undersigned State Petitioners submit this letter to apprise the Court of recent developments demonstrating the continued importance of the Court reaching the merits of this case.

State Petitioners commenced this proceeding against the United States Environmental Protection Agency and its Administrator (collectively, EPA) to seek review of EPA's illegal one-year extension of the statutory deadline to issue designations for 2015 ozone national ambient air quality standards (NAAQS) by October 1, 2017. *See* 82 Fed. Reg. 29,246 (June 28, 2017). Days later, EPA formally withdrew the illegal extension, 82 Fed. Reg. 37,318 (Aug. 10, 2017), which it claimed

made this case moot. However, the designations deadline has passed, and EPA has not made the required ozone NAAQS designations.

EPA's continued delay in issuing designations evidences its departure from the withdrawal notice and support for the prior policy of illegal delay. EPA's lack of action silently perpetuates the approach the agency appeared to officially reverse in its withdrawal notice, *cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("An agency may not ... depart from a prior policy *sub silentio*"), and belies EPA's statement to this Court that "[t]here is no basis whatsoever for the suggestion that EPA would, or even could, now simply withdraw the withdrawal without any further analysis or explanation." EPA Reply 5 (ECF No. 1690522).

Although many State Petitioners have notified EPA of their intent to sue to compel the agency to fulfill its nondiscretionary duty to issue designations, *see* Attachment A, such a lawsuit cannot be commenced for 60 days from the date of the letter, 42 U.S.C. § 7604(b), and the timeframe for its resolution is uncertain. Without a decision in this case, EPA could attempt to shield its ongoing failure to act from judicial review by again imposing an illegal extension of the expired deadline. *But cf.* EPA Reply 5 ("EPA has neither an intention to undo the withdrawal nor any reason to do so.").

Respectfully submitted,

FOR THE STATE OF NEW YORK

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cc: All Counsel
(via ECF)

/s/ Brian Lusignan¹

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ATTACHMENT A

**ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, CONNECTICUT,
ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MINNESOTA, BY AND THROUGH
ITS MINNESOTA POLLUTION CONTROL AGENCY, OREGON, PENNSYLVANIA,
RHODE ISLAND, VERMONT, WASHINGTON, AND DISTRICT OF COLUMBIA**

October 5, 2017

Via Certified Mail

E. Scott Pruitt, Administrator
Office of the Administrator (1101A)
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Notice of Intent to Sue for Failure to Issue Designations for 2015 Ozone National Ambient Air Quality Standards

Dear Administrator Pruitt:

The States of New York, California, Connecticut, Illinois, Iowa, Maine, Minnesota, by and through its Minnesota Pollution Control Agency, Oregon, Rhode Island, Vermont and Washington, the Commonwealths of Massachusetts and Pennsylvania, and the District of Columbia (collectively, “States”) hereby provide notice pursuant to Section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2), of our intent to commence litigation regarding EPA’s failure to timely issue nonattainment designations on the national ambient air quality standards (NAAQS) for ozone promulgated on October 1, 2015. See 65 Fed. Reg. 65,292 (Oct. 26, 2015).

As you are aware, EPA’s promulgation of NAAQS sets in motion a process under the statute that several years later results in air quality benefits. See 42 U.S.C. § 7407(d)(1)(A), (B) (setting forth deadlines for state and EPA designation of nonattainment areas based on date the NAAQS was promulgated) and § 7410(a)(1) (deadline for states to submit implementation plan revisions tied to NAAQS promulgation date). Once EPA promulgates a NAAQS, states must propose designations of nonattainment areas within their borders within a year. 42 U.S.C. § 7407(d)(1)(A). EPA must then promulgate the designations (after making any necessary changes) “as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised [NAAQS].” Id., § 7407(d)(1)(B). The agency may extend this deadline by up to one year in the event that it has “insufficient information” to promulgate the designations. Id. A delay in any of these steps in the process in turn delays when the public receives the air quality benefits of a stronger standard.

Here, EPA has failed to issue the designations for nonattainment areas for the 2015 ozone standards as required under 42 U.S.C. § 7407(d)(1)(B). Under that statutory provision, the promulgation of the ozone NAAQS on October 1, 2015 started the clock ticking for EPA to issue the designations by October 1, 2017. On June 28, 2017, EPA promulgated a rule giving itself an extension of one year to issue the designations, stating that it had “insufficient information” to complete the designations. 82 Fed. Reg. 29,246 (June 28, 2017) (the “designations delay”).

After a collection of states* and environmental organizations challenged EPA's designations delay in court, EPA abruptly reversed course and withdrew the designations delay. 82 Fed. Reg. 37,318 (Aug. 10, 2017). However, EPA was still equivocal on whether the 2015 ozone NAAQS designations would be made by the statutory deadline, noting that although there "may be areas of the United States for which designations could be promulgated" by the deadline, "[t]he Administrator may still determine that an extension of time to complete designations is necessary." 82 Fed. Reg. at 37,319.


As of today, EPA has failed to promulgate nationwide designations for the 2015 ozone NAAQS. The agency's failure to issue the designations constitutes a violation of a nondiscretionary duty under 42 U.S.C. § 7407(d)(1)(B) to promulgate timely nonattainment designations for the 2015 ozone NAAQS, subjecting the agency to suit under Section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2). Accordingly, the States intend to file a lawsuit in federal district court to compel EPA to comply with its obligations under the statute.

If you would like to discuss this matter prior to expiration of the 60-day notice period, you may have your counsel contact us through New York Assistant Attorney General Brian Lusignan at the address below.

Very truly yours,

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By:


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*The governmental units challenging the designations delay consisted of the States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Minnesota, by and through its Minnesota Pollution Control Agency, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Pennsylvania, and the District of Columbia.

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