

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF NEW HAMPSHIRE, STATE OF RHODE ISLAND,
and STATE OF VERMONT,

Plaintiffs,

– against –

GINA McCARTHY, in her official capacity
as Administrator of the United States
Environmental Protection Agency; and the
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

COMPLAINT

Index No. 16-7827

Plaintiffs New York, Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont (collectively, the States) bring this action to compel Gina McCarthy, as Administrator of the United States Environmental Protection Agency (EPA), and EPA to comply with the nondiscretionary duty under the Clean Air Act (Act) to approve or disapprove a petition submitted by the States to EPA under section 176A of the Act, 42 U.S.C. § 7506a(a), requesting the addition of nine states to the Ozone Transport Region (OTR) established pursuant to section 184 of the Act, 42 U.S.C. § 7511c. The States seek an order requiring EPA to provide for public notice and comment with regard to the States’ section 176A petition and to approve or disapprove the petition, after considering public comment, by dates certain.

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action pursuant to section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2), which authorizes any person, after duly giving notice, to commence a

citizen suit against EPA where the Administrator has failed to perform a nondiscretionary duty under the Act.

2. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the States' claim occurred in this judicial district. The Administrator's failure to perform her nondiscretionary duty to timely take action on the States' section 176A petition is adversely impacting areas within this judicial district, specifically the New York City metropolitan area, which is in nonattainment with the ozone National Ambient Air Quality Standards (NAAQS) based in part on the significant contribution of air pollution from upwind states named in the petition. Additionally, a substantial number of its citizens and residents on whose behalf plaintiff State of New York brings this action reside in this district, and EPA maintains an office in this district.

PARTIES

3. Plaintiff State of New York is a sovereign entity that brings this action on behalf of its citizens and residents.

4. Plaintiff State of Connecticut is a sovereign entity that brings this action on behalf of its citizens and residents.

5. Plaintiff Commonwealth of Massachusetts is a sovereign entity that brings this action on behalf of its citizens and residents.

6. Plaintiff State of New Hampshire is a sovereign entity that brings this action on behalf of its citizens and residents.

7. Plaintiff State of Rhode Island is a sovereign entity that brings this action on behalf of its citizens and residents.

8. Plaintiff State of Vermont is a sovereign entity that brings this action on behalf of its citizens and residents.

9. Each of the plaintiffs is a “person” as defined in the applicable provision of the Act, 42 U.S.C. § 7602(e).

10. Defendant Gina McCarthy is Administrator of the EPA and is sued in her official capacity. The Administrator is charged with implementation and enforcement of the Act, including the requirements to timely approve or disapprove any section 176A petition and establish appropriate proceedings for public participation regarding such petition, including notice and comment.

11. Defendant EPA is an executive agency of the federal government charged with implementing and enforcing the Act in coordination with the States.

STATUTORY FRAMEWORK

12. Pursuant to sections 108 and 109 of the Act, 42 U.S.C. §§ 7408 & 7409, EPA is required to establish and periodically revise NAAQS for certain pollutants, such as ozone. States are primarily responsible for ensuring attainment and maintenance of a NAAQS once EPA has established it. Under section 110 of the Act, states submit, for EPA’s approval, state implementation plans (SIPs) that provide for the attainment and maintenance of the NAAQS through control programs directed to sources of the relevant pollutants.

13. Pursuant to section 184 of the Act, 42 U.S.C. § 7511c, Congress created the OTR to help states address the pervasive ozone nonattainment problems in the Northeastern United States. By statute, the OTR consists of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont

and the Consolidated Metropolitan Statistical Area that includes the District of Columbia. 42 U.S.C. § 7511c(1).

14. Pursuant to section 176A of the Act, 42 U.S.C. § 7506a, the Governor of any state, including those states within the OTR, may petition the Administrator of the EPA to add any state or portion of a state to any region established pursuant to sections 176A and 184 of the Act. The Administrator may add a state to the OTR whenever the Administrator has reason to believe that the interstate transport of air pollution from such state significantly contributes to a violation of the ozone NAAQS in the transport region.

15. Section 184 of the Act requires any state newly added to the OTR to submit within nine (9) months a SIP that contains the minimum volatile organic compound (VOC) and nitrogen oxide (NO_x) emission control requirements applicable to OTR states.

16. Section 176A requires that the EPA Administrator “shall establish appropriate proceedings for public participation regarding . . . petitions [submitted pursuant to section 176A] . . ., including notice and comment” and “shall approve or disapprove any such petition[] . . . within 18 months of receipt.” 42 U.S.C. § 7506a(a).

FACTUAL BACKGROUND

A. Ozone Pollution and the Significant Contribution of Upwind, Non-OTR States to Non-Attainment with the 2008 Ozone NAAQS in the OTR

17. Ozone is a colorless, odorless gas that forms when other atmospheric pollutants, known as ozone “precursors,” such as NO_x and VOCs, react in the presence of sunlight.

18. EPA has found significant negative health effects in individuals exposed to elevated levels of ozone, including coughing, throat irritation, lung tissue damage, and aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema. Exposure to ozone has also been linked to premature mortality. Some subpopulations are

particularly at risk from exposure to ozone pollution, including children, the elderly, and those with existing lung diseases, such as asthma.

19. EPA revised the ozone NAAQS in 2008 and again in 2015.

20. Despite enacting stringent controls, many states within the OTR are in nonattainment with the 2008 ozone NAAQS and are currently measuring well above the 2015 NAAQS.

21. Modeling and analysis performed by EPA and/or the States has shown that interstate transport of air pollution from upwind states outside of the OTR, including Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia, contribute significantly to violations of the 2008 ozone NAAQS within the OTR, including within the plaintiff States. In addition, preliminary modeling demonstrates that emissions in the abovementioned states, as well as North Carolina, are projected to contribute to nonattainment of the 2015 ozone NAAQS in the petitioning states.

22. States outside and upwind of the OTR that contribute significantly to nonattainment areas within the OTR are not required to, and generally do not, impose controls as stringent as those required of OTR-state sources by section 184 of the Act.

B. The States' Section 176A Petition and EPA's Failure to Timely Act on the Petition

23. On or about December 9, 2013, Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont submitted a section 176A petition to EPA. *See Exhibit 1.* The petition requested that EPA expand the OTR to include Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia. The petitioning states also requested that EPA provide an opportunity for public participation, including public notice and comment, with regard to the petition. On or about December 10, 2013, Pennsylvania joined the section 176A petition.

24. The petition, and the technical support document that accompanied it, *see* Exhibit 2, demonstrated that interstate transport of air pollution from Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia significantly contributes to violations of the ozone NAAQS in the OTR.

25. Thereafter, petitioning states and the upwind states listed in the petition attempted to reach a voluntary agreement among themselves in order to resolve the issues of ozone transport before EPA acted on the petition. The parties were not able to reach an agreement and notified EPA.

26. EPA failed to provide for public comment or act on the States' petition despite a legal obligation to do so within 18 months of receipt, or by June 10, 2015, pursuant to section 176A.

27. Expansion of the OTR will reduce precursor emissions that significantly contribute to ozone nonattainment in the States and will result in a fairer distribution of the burden of controlling ozone pollution due to transport.

28. On April 6, 2016, the petitioning states sent a letter to EPA requesting immediate action to grant the December 10, 2013 petition. *See* Exhibit 3. The petitioning states expressed concern about EPA's delay due to ongoing harm to public health and the inability of the petitioning states to meet their attainment requirements. EPA did not respond to the petitioning states' letter or take the requested actions.

C. Notice of Violation

29. On April 18, 2016, the States sent a citizen suit notice letter by certified mail to the Administrator notifying her of the States' intention to commence a lawsuit within 60 days against EPA for: (1) failing to timely provide an opportunity for public participation, including

public notice and comment, with regard to the States' section 176A petition; and (2) failing to timely approve or disapprove the petition. *See Exhibit 4.* According to U.S. Postal Service receipts, the Administrator received the letter on April 22, 2016. *Id.* More than 60 days have passed since EPA received the notice letter. EPA has not taken the required actions.

CLAIM FOR RELIEF
(Failure to Perform a Nondiscretionary Duty
to Timely Take Action on a Section 176A Petition)

30. As set forth above, the Administrator had nondiscretionary legal duties to provide an opportunity for public participation, including public notice and comment, with regard to the States' section 176A petition, and to approve or disapprove the petition by no later than June 10, 2015.

31. The Administrator's failure to timely provide an opportunity for public participation, including public notice and comment, with regard to the States' section 176A petition, and the failure to timely approve or disapprove the petition, are violations of 42 U.S.C. § 7506a(a), which continue to this day.

32. These violations constitute a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" under 42 U.S.C. § 7604(a)(2).

33. The delay caused by the Administrator's failure has harmed and continues to harm the States by delaying action to address the transport of air pollution from upwind states that significantly contributes to ozone nonattainment in the OTR, to the detriment of the health and welfare of the States' citizens.

REQUESTED RELIEF

WHEREFORE, the States respectfully request that this Court enter judgment against Defendants as follows:

A. Declare that Defendants are in violation of section 176A of the Act for failing to timely provide an opportunity for public participation, including public notice and comment, with regard to the States' section 176A petition, and for failing to timely approve or disapprove the petition;

B. Enjoin Defendants, by dates certain, to (1) provide appropriate proceedings for public participation, including notice and comment, on the States' section 176A petition; and (2) approve or disapprove the 176A petition after considering public comments;

C. Award the States the costs of litigation, including reasonable attorneys' fees;

D. Retain jurisdiction over this matter until such time as Defendants have approved or disapproved the States' section 176A petition after having provided an opportunity for public participation, including public notice and comment, with regard to the petition; and

E. Such other relief as the Court deems just and proper.

Dated: October 6, 2016

Respectfully submitted,

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* Application for attorney admission to the Court pending

** Motion for admission *pro hac vice* to be filed shortly after filing of complaint