



EARTHJUSTICE

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NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

September 29, 2011

CERTIFIED MAIL

Lisa P. Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**Re: Citizens United for Responsible Energy Development's Clean Air Act Section 304
Notice Regarding the EPA Administrator's Unlawful Failure to Promulgate the
Designation of an Ozone Nonattainment Area in Wyoming's Upper Green River
Basin**

Dear Administrator Jackson:

On March 12, 2009, as the oil-and-gas industry extended its reach across the region, Governor Dave Freudenthal recommended that your agency designate Wyoming's Upper Green River Basin as an ozone nonattainment area under the Clean Air Act.¹ The analysis offered in support of this recommendation left no doubt as to the source of Wyoming's ozone pollution. According to the state's Department of Environmental Quality, an extended assessment had "conclusively show[n]" that the region's elevated ozone levels were "primarily due to local emissions from oil and gas ... development activities: drilling, production, storage, transport, and treating."²

¹ 42 U.S.C. § 7407(d)(1)(A); Governor Dave Freudenthal, Wyoming 8-Hour Ozone Designation Recommendation (Mar. 12, 2009); Wyoming Department of Environmental Quality, Technical Support Document I for Recommended 8-Hour Ozone Designation for the Upper Green River Basin (Mar. 26, 2009) ("Wyoming Nonattainment Analysis"), at vi-viii, 23-26, 94-95.

² Wyoming Nonattainment Analysis at viii.

Two-and-a-half years have passed since Wyoming's former governor recommended the Upper Green River Basin for nonattainment. The region's ozone problem has not abated. Last winter alone, the residents of Sublette County suffered thirteen days with ozone concentrations considered "unhealthy" under the Environmental Protection Agency's current air-quality index.³ In light of the research underlying your recent proposal to strengthen air-quality standards for the pollutant, it is evident that the region's residents have been burdened by "unhealthy" ozone levels for a much greater period of time.⁴

This degradation of the Upper Green River Basin's once-pristine air has fundamentally diminished life in the region. During many winter months, when conditions are conducive to ozone formation, residents face repeated warnings regarding elevated ozone levels and the resulting risks of going outside.⁵ On such days, some are left to stay indoors—including the children that take part in Pinedale Elementary School's "alternative recess."⁶ Others venture outside only to suffer burning eyes and difficulty in breathing.⁷ The uncertainty and stress resulting from these conditions have further impacted the region's residents. As the Sublette County Commission emphasized in a March 2011 press release, citizens are "'alarmed and concerned with so many alerts and spikes in ozone levels.'"⁸

³ U.S. Environmental Protection Agency, Daily Ozone AQI Levels in 2011 for Sublette County, Wyoming, available at http://www.epa.gov/cgi-bin/broker?msaorcountyName=countycode&msaorcountyValue=56035&poll=44201&county=56035&msa=1&sy=2011&flag=Y&_debug=2&_service=data&_program=dataprog.trend_tile_dm.sas (attached as Exhibit 1).

⁴ See id. (documenting 56 days between January and June 2011 when ozone levels reached or exceeded 0.060 ppm); 75 Fed. Reg. 2,938 (Jan. 19, 2010) (EPA proposal "that the level of the 8-hour primary standard, which was set at 0.075 ppm in the 2008 final rule, should instead be set at a lower level within the range of 0.060 to 0.070 parts per million (ppm), to provide increased protection for children and other 'at risk' populations against an array of O₃-related adverse health effects").

⁵ See, e.g., 2011 DEQ Ozone Advisories, Pinedale Online! (Mar. 17, 2011) (documenting ten ozone advisories in February and March 2011), available at <http://www.pinedaleonline.com/news/2011/03/OzoneCalendar.htm> (attached as Exhibit 2); Wyoming Department of Environmental Quality, Ozone Advisory for Monday, Feb. 28, Pinedale Online! (Feb. 27, 2011), available at <http://www.pinedaleonline.com/news/2011/02/OzoneAdvisoryforMond.htm> (attached as Exhibit 3).

⁶ See, e.g., Cat Urbigkit, Ozone Levels Spike in Sublette County, Casper Star-Tribune (Mar. 3, 2011), available at http://trib.com/news/state-and-regional/article_2cc97385-25f0-5bb2-a436-607d30498de6.html?print=1 (attached as Exhibit 4).

⁷ See, e.g., Ozone Readings Rise in the Boulder Area, Pinedale Online! (Feb. 15, 2011), available at <http://www.pinedaleonline.com/news/2011/02/Ozonereadingsriseint.htm> (attached as Exhibit 5); Jeff Gearino, Sublette Ozone Concerns Linger, Casper Star-Tribune (Dec. 30, 2009), available at http://trib.com/news/state-and-regional/article_bcaaba66-f50b-11de-867b-001cc4c002e0.html?print=1 (attached as Exhibit 6).

⁸ Sublette County Commission, Media Release: Commission Responds to Winter Ozone Concerns (Mar. 17, 2011) (statement of Commission Chairman Joel Bousman), available at <http://www.pinedaleonline.com/news/2011/03/SubletteCountyCommis1.htm> (attached as Exhibit 7).

It is imperative that your agency immediately initiate actions that will restore clean air to the Upper Green River Basin. Accordingly, Citizens United for Responsible Energy Development (“CURED”)—a grassroots organization dedicated to ensuring that oil-and-gas activities in and around Sublette County do not compromise human health or environmental quality—hereby gives notice of its intent to file suit against the Environmental Protection Agency unless you promulgate an ozone nonattainment designation for the Upper Green River Basin within sixty days.⁹

Under Section 107(d) of the Clean Air Act, the governor of each state is directed to provide the Administrator of the Environmental Protection Agency with a list designating all areas within the state as “nonattainment,” “attainment,” or “unclassifiable” for any “new or revised national ambient air quality standard for any pollutant.”¹⁰ Following a state’s submission, the Administrator is required to publish a Federal Register notice promulgating the designations “as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard.”¹¹ While this deadline “may be extended for up to one year,” the Clean Air Act explicitly limits such extensions to circumstances in which “the Administrator has insufficient information to promulgate the designations.”¹²

In failing to promulgate a designation for Wyoming’s Upper Green River Basin, you have violated these requirements—unlawfully delaying implementation of statutory protections to which all in Sublette County are entitled. The Environmental Protection Agency finalized its revised national ambient air quality standard for ozone on March 12, 2008.¹³ Under Section 107(d) of the Clean Air Act, you were accordingly obligated to promulgate an ozone designation for the Upper Green River Basin no later than March 12, 2010—more than one-and-a-half years ago.¹⁴

This extraordinary delay cannot be justified by your invocation of a one-year extension on January 19, 2010.¹⁵ Under the Clean Air Act, an extension of the deadline for promulgating area designations is available only “in the event the Administrator has insufficient information

⁹ See 42 U.S.C. § 7604(b)(2); 40 C.F.R. §§ 54.1-54.3.

¹⁰ 42 U.S.C. § 7407(d)(1)(A).

¹¹ 42 U.S.C. §§ 7407(d)(1)(B)(i), 7407(d)(2)(A).

¹² 42 U.S.C. § 7407(d)(1)(B)(i).

¹³ 73 Fed. Reg. 16,436, 16,503, 16,511 (Mar. 27, 2008).

¹⁴ 42 U.S.C. § 7407(d)(1)(B)(i); see also *id.* § 7407(d)(2)(A) (publication requirement).

¹⁵ See 75 Fed. Reg. 2,936 (Jan. 19, 2010).

to promulgate the designations.”¹⁶ As a result, there was no legal basis for resting a one-year extension on “the significant uncertainty that [your] Ozone NAAQS Reconsideration Proposal create[d] regarding the continued applicability of the 2008 NAAQS.”¹⁷ Moreover, even if the statutory extension had been properly invoked, your deadline for promulgating the Upper Green River Basin designation would have passed on March 12, 2011 – more than six months ago.¹⁸

For the foregoing reasons, you are presently in violation of your nondiscretionary duty to promulgate an Upper Green River Basin designation for the 2008 ozone standard and to publish notice of that designation in the Federal Register, as mandated by Section 107(d) of the Clean Air Act.¹⁹ While your agency recently announced its intention to “finalize initial area designations for the 2008 ozone NAAQS by mid-2012,”²⁰ such further delay is unlawful and intolerable. As the oil-and-gas industry has already proposed thousands of new wells within the Upper Green River Basin,²¹ the health and welfare of Sublette County’s residents depends upon your taking immediate action to ensure that any such development proceeds in a manner that restores and protects the region’s air quality. If you fail to promulgate an Upper Green River Basin designation for the 2008 ozone standard within the next sixty days, we will seek a court order on behalf of CURED compelling you to fulfill your duties under Section 107(d) of the Clean Air Act.

Citizens United for Responsible Energy Development is a nonprofit Wyoming organization located at the following address:

P.O. Box 1123
Pinedale, WY 82941

¹⁶ 42 U.S.C. § 7407(d)(1)(B)(i); see also 73 Fed. Reg. at 16,503 (2008 final ozone rule) (“EPA’s promulgation of [ozone] designations must occur no later than March 12, 2010, although that date may be extended by up to one year under the CAA (no later than March 12, 2011) if EPA has insufficient information to promulgate the designations.” (emphasis added)).

¹⁷ 75 Fed. Reg. at 2,937.

¹⁸ 75 Fed. Reg. at 2,937 (asserting that the extended “deadline for promulgating initial area designations for the March 2008 ozone NAAQS ... is March 12, 2011”).

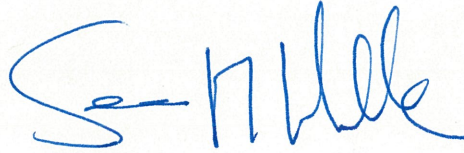
¹⁹ 42 U.S.C. §§ 7407(d)(1)(B)(i), 7407(d)(2)(A).

²⁰ EPA Assistant Administrator Gina McCarthy, Memorandum re Implementation of the Ozone National Ambient Air Quality Standard (Sept. 22, 2011), at 2.

²¹ Dustin Bleizeffer, More Drilling Proposed Near Pinedale Despite Ozone Spikes, Billings Gazette (May 21, 2011), available at http://billingsgazette.com/news/state-and-regional/wyoming/article_505d8229-6b4f-59bb-842a-ed07296280a9.html?print=1 (attached as Exhibit 8).

Undersigned counsel are representing CURED in this matter and would be happy to discuss the issues raised in this letter. If you wish to have such a discussion, please contact Sean Helle at the address indicated below.

Sincerely,



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