

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

CHESAPEAKE BAY FOUNDATION, INC.)

6 Herndon Avenue)

Annapolis, MD 21403)

Anne Arundel County)

ADIRONDACK COUNCIL)

103 Hand Ave. #3, P.O. Box D-2)

Elizabethtown, NY 12932)

CHESAPEAKE CLIMATE ACTION NETWORK)

6930 Carroll Avenue, Suite 720)

Takoma Park, MD 20912)

Montgomery County)

ENVIRONMENTAL DEFENSE FUND)

2060 Broadway, Suite 300)

Boulder, CO 80302)

ENVIRONMENTAL INTEGRITY PROJECT)

1000 Vermont Ave. NW, Suite 1100)

Washington, DC 20005)

PHYSICIANS FOR SOCIAL RESPONSIBILITY,)

CHESAPEAKE, INC.)

325 East 25th Street)

Baltimore, MD 21218)

Baltimore City)

SIERRA CLUB)

2101 Webster Street, Suite 1300)

Oakland, CA 94612)

Plaintiffs,)

v.)

SCOTT PRUITT, Administrator,)

United States Environmental Protection Agency,)

and)

UNITED STATES ENVIRONMENTAL)

PROTECTION AGENCY,)

Defendants.)

Case No.: _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

STATEMENT OF THE CASE

1. Plaintiffs Chesapeake Bay Foundation, Inc., Adirondack Council, Chesapeake Climate Action Network, Environmental Defense Fund, Environmental Integrity Project, Physicians for Social Responsibility, Chesapeake, Inc., and Sierra Club (“Plaintiffs”), seek declaratory and injunctive relief pursuant to the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. § 7401 *et seq.*, to address air pollution that is crossing state lines and adversely affecting air quality in Maryland and other downwind states. Defendant, Scott Pruitt in his official capacity as the Administrator of the United States Environmental Protection Agency (“EPA”), has failed to perform his non-discretionary duty to take final action on a petition filed by the Maryland Department of the Environment (“MDE”), on behalf of the State of Maryland, pursuant to CAA Section 126(b), 42 U.S.C. § 7426(b) (“the Petition” or “Maryland’s Petition”). Maryland’s Petition is attached as Exhibit 1.

2. Maryland’s Petition requests that EPA make a finding that 36 electric generating units (“EGUs”), at 19 coal-fired power plants located in five upwind states, are emitting nitrogen oxides (“NOx”) that significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone National Ambient Air Quality Standards (“NAAQS”) in Maryland.

3. Pursuant to Section 126 of the CAA, EPA was required, within 60 days, to hold a public hearing and, either make the requested finding and grant Maryland’s Petition, or deny the Petition. 42 U.S.C. § 7426(b). On January 3, 2017, EPA granted itself a six-month extension to respond to the Petition, noting that the additional time was necessary for EPA to complete its “notice-and-comment rulemaking” on the Petition. 82 Fed. Reg. 22 (Jan. 3, 2017).

4. As of the date of this Complaint, more than 60 days have passed from the date on which

Maryland submitted the Petition to EPA and Administrator Pruitt has neither held a public hearing nor granted or denied Maryland's Petition, in violation of the Act's mandatory 60-day deadline for action. 42 U.S.C. § 7426(b). Without taking any position on the legitimacy of EPA's extension, the six-month extension deadline has also expired. Administrator Pruitt is therefore in violation of the Clean Air Act for failing to perform his nondiscretionary duty.

5. By certified letters, Plaintiffs provided Administrator Pruitt with written 60-day notice, pursuant to 42 U.S.C. § 7604(b) and 40 C.F.R. §§ 54.2 and 54.3, of their intent to file suit to remedy this Clean Air Act violation. As of the date of this Complaint, EPA has not responded to the notice letters. Accordingly, Plaintiffs seek a declaration that Administrator Pruitt is in violation of the Clean Air Act and an order compelling Administrator Pruitt to hold a public hearing and then grant or deny Maryland's Petition as expeditiously as possible, but no later than 60 days from the date of the order.

JURISDICTION AND VENUE

6. This Court has jurisdiction over Plaintiffs' claims pursuant to the Clean Air Act, 42 U.S.C. § 7604(a)(2), which authorizes any person, after providing notice, to commence a citizen suit against EPA where the Administrator has failed to perform a nondiscretionary duty under the Act, and 28 U.S.C. §§ 1331 and 1361. The nondiscretionary duty at issue in this action arises under Section 126 of the Clean Air Act, 42 U.S.C. § 7426. The relief requested by Plaintiffs is authorized by 42 U.S.C. § 7604 and 28 U.S.C. §§ 1361, 2201, and 2202.

7. All seven Plaintiffs provided Administrator Pruitt with written notice of their intent to sue, pursuant to 42 U.S.C. § 7604(b) and 40 C.F.R. § 54.3(a), to compel the Administrator to perform his mandatory duties under the Act. Chesapeake Bay Foundation sent a notice letter

postmarked on July 20, 2017 and the remaining six Plaintiffs sent a joint notice letter postmarked on August 4, 2017, both via certified mail. *See* Postmarked Certified Mail Receipts and Notice Letters attached as Exhibit 2. As of the date of this Complaint, more than 60 days have passed and Administrator Pruitt has not responded to the notice letters.

8. This action is properly filed in the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 1391(e)(1), because the Administrator's failure to perform his nondiscretionary duty to act on Maryland's Petition is adversely impacting areas within this judicial district and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred, and continue to occur, in the District of Maryland.

9. The State of Maryland filed a similar complaint against EPA, for failing to respond to its CAA Section 126 Petition, in this Court on September 27, 2017. Case 1:17-cv-02873.

PARTIES

10. Plaintiff Chesapeake Bay Foundation ("CBF") is a regional, not-for-profit, nonpartisan, public-interest advocacy organization dedicated to restoring and protecting the 64,000-square-mile Chesapeake Bay watershed and ensuring the success of the Chesapeake Bay Clean Water Blueprint, a federal-state partnership established pursuant to the federal Clean Water Act. CBF engages in public outreach and education, advocacy, and restoration throughout the Bay watershed to improve water quality, including reducing the atmospheric deposition of nitrogen from NO_x emissions. CBF owns facilities and operates educational and restoration programs that are adversely affected by air pollution from the 36 upwind power plant units identified in Maryland's Petition. CBF represents more than 225,000 members, many of whom live, work, and recreate in areas affected by air pollution from the coal-fired units identified in Maryland's

Petition. Those include 94,066 members in Maryland, 4,980 in Delaware, 5,375 in the District of Columbia, 1,183 in West Virginia, 34,102 in Pennsylvania, 71,730 in Virginia, and 12,370 members in New York. CBF's members enjoy swimming, boating, crabbing, fishing, birdwatching, hiking, kayaking, and other outdoor activities throughout the Chesapeake Bay watershed region.

11. Plaintiff Adirondack Council ("Council") is a regional, privately funded, nonpartisan, not-for-profit organization dedicated to ensuring ecological integrity and wild character of New York's six-million-acre Adirondack Park, which protects the world's largest intact temperate, deciduous forest. Since its founding in 1975, the Council has been a national leader in the struggle to curb the emissions of air pollutants that cause ozone, acid rain, soot particles, and poor visibility in and around the Adirondack Park. One of the Council's core missions is to limit the impact of air pollution on the Park, its inhabitants, visitors, infrastructure, buildings, memorials, and monuments, all of which are imperiled by nitrogen-based air pollution that causes ozone, acid rain, and poor visibility. Council members live in all 50 United States. In addition, many Council members live in states where air quality is adversely affected by pollution emitted from the 36 EGUs cited in Maryland's Petition. Approximately 3,137 Council members live in the Adirondack Park, and many additional members live elsewhere but visit the Park for recreational, educational, and other purposes.

12. Plaintiff Chesapeake Climate Action Network ("CCAN") is a grassroots non-profit organization dedicated to raising awareness about the health and environmental impacts of global warming, and promoting the transition to clean energy generation in the mid-Atlantic region, specifically Maryland, Virginia, and Washington, D.C. CCAN's mission is to educate and mobilize citizens in a way that fosters a rapid societal switch to clean energy solutions and away

from fossil fuel energy generation. In furtherance of its mission, CCAN's efforts include mobilizing its members to ensure that fossil-fuel-powered facilities that contribute to global warming, like coal-fired power plants, do not threaten public health or the environment through emissions of air pollutants such as nitrogen oxides. CCAN represents approximately 53,000 members, including 20,562 in Maryland, 19,747 in Virginia, 3,460 in the District of Columbia, and 352 in West Virginia. CCAN's members hike, fish, swim, run, and boat in areas where ground-level ozone would be reduced if EPA were to issue the order requested by Maryland's Petition.

13. Plaintiff Environmental Defense Fund ("EDF") is a national nonprofit organization representing over 400,000 members nationwide, including approximately 11,000 members in Maryland, 5,000 in Indiana, 2,500 in Kentucky, 13,500 in Ohio, 20,000 in Pennsylvania, 1,500 in West Virginia, 7,500 in Connecticut, 1,500 in the District of Columbia, 1,000 in Delaware, 13,500 in New Jersey, 38,000 in New York, and 11,500 in Virginia, many of whom live, work, and recreate in areas negatively impacted by air pollution from the coal units identified in Maryland's Petition. Since 1967, EDF has linked science, economics, and law to create innovative, equitable, and cost-effective solutions to urgent environmental problems. EDF, through its programs aimed at protecting human health, has long pursued initiatives at the state and national levels designed to reduce pollution from major sources, including power plants.

14. Plaintiff Environmental Integrity Project ("EIP") is a national non-profit corporation based in Washington, D.C., dedicated to ensuring the effective enforcement of state and federal environmental laws in order to protect public health and the environment. EIP has a specific focus on the Clean Air Act and on large stationary sources of air pollution, like coal-fired power plants, because of their significant impacts on public health and the environment. EIP has invested substantial time and effort in informing the public about the effects of emissions from

large power plants on public health and the environment. In addition, EIP has spent substantial time and effort advocating for the reduction of air pollution that adversely affects public health in the State of Maryland, with a particular focus on sources that contribute to concentrations of ground-level ozone in the Baltimore area. As part of these efforts, EIP participates in public comment opportunities and public meetings and hearings.

15. Plaintiff Physicians for Social Responsibility, Chesapeake, Inc. (“Chesapeake PSR”) works to amplify the health science voice and energize medical and health professionals and health advocates to take action on issues of climate and energy, toxics and health, and peace and social justice in Maryland and Virginia. Chesapeake PSR actively promotes clean, renewable energy, energy-efficiency programs and policies, and builds the knowledge-base and advocacy skills so that health professionals and health advocates can play a part in addressing issues related to climate change, energy choices and human health. The health and well-being of Chesapeake PSR’s 1,200 donors and activists is adversely affected by ozone levels from the pollution from out-of-state coal-fired power plants. As health professionals and health advocates, Chesapeake PSR’s donors and activists know that the impacts of ground-level ozone pollution on human health include harm to the respiratory system, aggravation of asthma and lung diseases, and premature death, and many treat patients who have asthma and other chronic health conditions that are worsened by breathing ozone pollution and fine particulate matter.

16. Plaintiff Sierra Club is the oldest and largest grassroots environmental group in the United States, with over 840,000 members nationally, including more than 18,000 members in Maryland, more than 10,000 members in Indiana, more than 6,000 members in Kentucky, more than 23,000 members in Ohio, more than 33,000 members in Pennsylvania, more than 2,000 members in West Virginia, more than 12,000 members in Connecticut, more than 3,000

members in the District of Columbia, more than 2,000 members in Delaware, more than 22,000 members in New Jersey, more than 55,000 members in New York, and more than 21,000 members in Virginia, many of whom live, work, and recreate in areas negatively impacted by air pollution from the coal units identified in Maryland's Section 126 Petition. Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club and its members are greatly concerned about the effects of air pollution on human health and the environment and have a long history of involvement in activities related to air quality and permitting of air pollution sources under the Clean Air Act.

17. Plaintiffs are "person[s]" within the meaning of 42 U.S.C. § 7602(e), who may commence a civil action pursuant to the Act. 42 U.S.C. §7604(a). Plaintiffs sue on behalf of themselves and their individual members, including their members who live, work, travel, and/or recreate downwind from, or in the vicinity of, the 36 EGUs identified in the Petition and are thus exposed to the emissions from the 36 EGUs and the ground-level ozone pollution formed from these emissions.

18. Plaintiffs' members live, work, travel, raise families, and recreate in areas designated by EPA as nonattainment for the 2008 8-hour ozone National Ambient Air Quality Standards ("NAAQS") or areas adversely affected by pollution emitted by the 36 EGUs.

19. Plaintiffs' members include children, elderly individuals, and individuals suffering from asthma, bronchitis, emphysema, and other cardiopulmonary and respiratory conditions; the health of these vulnerable members is particularly susceptible to the harmful effects of ground-level ozone pollution.

20. Plaintiffs' members include persons who change their behavior due to air pollution. These members are forced to take absences from school or work, change recreation and exercise routines, and stay indoors to avoid exposure to the harmful effects of air pollution, especially ground-level ozone. In addition to physical harm, the excess emissions from the 36 EGUs have caused and will continue to cause Plaintiffs and their members to sustain economic loss due to medical expenses and lost work time.

21. Plaintiffs' members are adversely impacted by the NO_x emissions from the 36 EGUs, including actual and/or threatened harm to their health, their families' health, their professional well-being, their educational and economic interests, and their aesthetic and recreational enjoyment of the environment in these areas. Administrator Pruitt's acts and omissions injure Plaintiffs' members by threatening their health and welfare, and by denying them measures and procedures provided under the Clean Air Act to protect their health and welfare from air pollution in places where they live, work, recreate, and conduct other activities.

22. Plaintiffs invest significant resources in conservation, restoration, education, and advocacy activities to achieve and maintain a clean, healthy environment throughout Maryland and other downwind states where their members are located. These activities often rely on the requirements and procedures of the Clean Air Act, and Plaintiffs participate in CAA-related public hearings, provide testimony, comments, and expert analyses on air quality issues and government actions, and inform their members of opportunities to participate in such hearings and notice-and-comment processes. Plaintiffs and their members' ability to timely and meaningfully engage in these activities is incumbent upon EPA's adherence to the procedures in the Act that provide rights and protections to citizens. These advocacy activities, and the natural

resources they are meant to protect, have been and continue to be harmed by EPA's failure to comply with the Act, hold a public hearing, and respond to the Petition.

23. The Clean Air Act violations alleged in this Complaint have injured and will continue to injure the interests of Plaintiffs and their members, unless and until this Court grants the requested relief. Granting the relief requested in this Complaint would address these injuries by compelling EPA to perform its mandatory duty to either find that the 36 EGUs are impairing air quality and thus require that EPA place emission limitations and/or compliance schedules on the EGUs or require the EGUs to cease operation after three months per 42 U.S.C. § 7426(c), or in the alternative, deny the Petition by finding that the 36 EGUs are not impairing downwind air quality. Although Plaintiffs believe that the facts clearly require abatement of this harmful pollution, either finding will ensure that Plaintiffs' procedural rights are protected and reduce the uncertainty regarding the air pollution impacts detailed in the Petition.

24. The Clean Air Act violations alleged in this Complaint deprive Plaintiffs and their members of procedural rights and protections to which they are entitled. Section 126(b) of the Act requires that a finding be made "after public hearing" and EPA's actions under Section 126 are subject to the Act's rulemaking requirements, 42 U.S.C. § 7607(d)(1)(N). However, no notice-and-comment period has been initiated and no public hearing has been scheduled, depriving Plaintiffs and their members of their procedural right to comment on EPA's decision on the Petition and the Petition itself. Furthermore, the CAA gives Plaintiffs a procedural right to a timely decision on the Petition. EPA's failure to act on the Petition prevents Plaintiffs and their members from challenging an unfavorable EPA decision or benefiting from a favorable decision on the Petition.

25. Defendant Scott Pruitt is the Administrator of the EPA, within the meaning of 42 U.S.C.

§ 7602(a), against whom any person may commence a civil action under the citizen suit provision of the CAA, 42 U.S.C. § 7604(a)(2), where there is alleged a failure of the Administrator to perform any act or duty which is not discretionary with the Administrator.

26. Defendant EPA is the federal agency charged with implementation of the Clean Air Act, in coordination with the States.

STATUTORY BACKGROUND

The Federal Clean Air Act and Ozone Pollution

27. The federal Clean Air Act directs EPA to establish air quality standards for six “criteria” pollutants known to endanger human health and welfare, including ground-level ozone. 42 U.S.C. § 7408. For each of these pollutants, EPA establishes two sets of National Ambient Air Quality Standards (“NAAQS”): primary standards, to protect public health, and secondary standards, to protect the public welfare, including environmental resources. 42 U.S.C. § 7409.

28. In 2008, EPA set the primary 8-hour ozone NAAQS at 0.075 parts per million (ppm) measured as a three-year average of fourth-highest daily maximum 8-hour concentrations. 73 Fed. Reg. 16436 (Mar. 27, 2008). In 2015, EPA reduced the primary 8-hour ozone NAAQS to 0.070 ppm to better protect public health and welfare. 80 Fed. Reg. 65292 (Oct. 26, 2015).

29. States are charged with meeting these federal standards by regulating sources of air pollution within their geographic boundaries. To this end, states are required to develop and submit a pollution control plan to EPA called a State Implementation Plan (“SIP”). SIPs must include enforceable emissions limitations and other control measures to ensure the attainment, maintenance, and enforcement of NAAQS. 42 U.S.C. §§ 7410(a)(1), (a)(2)(A).

30. Geographic regions are classified by EPA as “nonattainment” when the NAAQS are not

being met or when air pollution from the region contributes to nonattainment in a nearby area, and states must then take actions to reduce the problem pollutants, including making necessary revisions to the SIP and further regulating the sources of the pollutants. 42 U.S.C. § 7407(d) (air quality control regions); § 7502 (nonattainment plan provisions).

31. The CAA also includes a “good neighbor” provision that requires each state to include sufficient measures in its State Implementation Plan to ensure its air pollution does not “contribute significantly to nonattainment in, or interfere with maintenance” of, air quality standards (NAAQS) in downwind or neighboring states. 42 U.S.C. § 7410(a)(2)(D).

32. Section 126 of the CAA provides that any state may petition EPA to make a finding that a source or group of sources is emitting air pollution in violation of the good neighbor provision. 42 U.S.C. § 7426(b).

33. Section 126(b) requires that “[w]ithin 60 days after receipt of any petition under this subsection and after public hearing, the Administrator *shall* make such a finding or deny the petition.” 42 U.S.C. § 7426(b) (emphasis added). EPA has violated this provision by failing to hold a public hearing and respond to Maryland’s Petition.

34. Section 126(c) provides that “it shall be a violation of this section and the applicable implementation plan in such State... (2) for any major existing source to operate more than three months after such finding has been made with respect to it.” 42 U.S.C. § 7426(c). Section 126 authorizes the Administrator to allow the continued operation of the source(s) “beyond the expiration of such three-month period if such source complies with such emission limitations and compliance schedules (containing increments of progress) as may be provided by the Administrator to bring about compliance with the requirements contained in section 7410(a)(2)(D)(ii) of this title [relating to interstate pollution abatement] or this section as

expeditiously as practicable, but in no case later than three years after the date of such finding." 42 U.S.C. § 7426(c).

35. The CAA citizen suit provision provides that any person may sue the Administrator of the EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary." 42 U.S.C. § 7604(a)(2).

FACTUAL BACKGROUND

36. Ground-level ozone, commonly referred to as smog, forms when volatile organic compounds ("VOCs") react with NO_x in the presence of heat and sunlight.

37. Exposure to NO_x, as well as ground-level ozone, can cause a range of acute and chronic health effects. Ozone impairs lung function, aggravates asthma, and has been linked to increases in school absences, emergency room visits, and hospital admissions. Studies have shown that exposure to ozone increases the risk of heart attacks and other cardiovascular conditions, and also increases the risk of low birth weight in babies. Exposure to ozone has also been correlated with increased risk of death for those suffering from cardiopulmonary conditions.

38. Ground-level ozone is particularly harmful for the most vulnerable members of society, including those with existing lung diseases, children, the elderly, and low-income families, as well as people who work or are active outdoors.

39. On November 16, 2016, the State of Maryland, through the Maryland Department of the Environment ("MDE"), petitioned EPA pursuant to CAA Section 126 to make a finding that 36 electric generating units ("EGUs"), at 19 separate power plants in five upwind states (Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia), are emitting air pollutants that significantly

contribute to nonattainment and interfere with maintenance of the 2008 8-hour ozone NAAQS in Maryland.

40. Technical support appendices submitted with Maryland’s Petition demonstrate that the interstate transport of nitrogen oxides (“NO_x”), a precursor to ground-level ozone, from the 36 EGUs is significantly contributing to Maryland’s nonattainment, or interfering with maintenance, of the 2008 and 2015 ozone NAAQS in violation of the CAA. 42 U.S.C. § 7426(b) (section 126); § 7410(a)(2)(D) (good neighbor provision).

41. The 36 EGUs identified in Maryland’s Petition contribute to the three, historical ozone nonattainment areas in Baltimore, Maryland; Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE; and Washington, DC-MD-VA.¹ If EPA ordered the remedy requested by Maryland’s Petition, it would enable the three areas to make progress towards meeting the 2008 or 2015 ozone NAAQS. *See* Exhibit 1, Maryland Petition, at 9.

42. Preliminary EPA data show that in the time since Maryland filed its Petition in November of 2016—and during which time EPA has failed to respond to the Petition—Baltimore City, Maryland has experienced at least 14 days when the ozone NAAQS was exceeded and the outdoor air was categorized as “Unhealthy for Sensitive Groups.” U.S. EPA, Air Data – Ozone Exceedances, <https://www.epa.gov/outdoor-air-quality-data/air-data-ozone-exceedances> (select Geographic Area: Baltimore-Columbia-Towson, MD; Baseline Period: Single Year: 2017; Comparison Period: Single Year: 2016).

43. EPA air modeling shows that interstate air pollution from the five upwind states

¹ A complete list of counties and cities included in the three regions is published at 40 C.F.R. § 81.12 (National Capital Interstate Air Quality Control Region (District of Columbia, Maryland, and Virginia)); § 81.15 (Metropolitan Philadelphia Interstate Air Quality Control Region (Pennsylvania-New Jersey-Delaware)); § 81.28 (Metropolitan Baltimore Intrastate Air Quality Control Region).

identified in Maryland's Petition significantly contributes to ozone nonattainment or maintenance in downwind states including Maryland, Kentucky, New Jersey, Pennsylvania, New York, Ohio, and Connecticut. U.S. EPA, Air Quality Modeling Technical Support Document for the 2008 Ozone NAAQS Cross-State Air Pollution Rule Proposal, at 23-28 (Nov. 2015), *available at* https://www.epa.gov/sites/production/files/2015-11/documents/air_quality_modeling_tsd_proposed_rule.pdf.

44. NO_x emissions also cause ecological harm when they react in the air to form acid rain or fall to the earth's surface as nitrogen deposition. As NO_x undergoes chemical reactions in the air, a portion of the nitrogen falls to the land and surface waters; this is called atmospheric deposition. Excess nitrogen in surface waters leads to algal blooms which block sunlight from reaching underwater grasses and, when decomposing, suck oxygen from the water and create dead zones. In 2010, EPA identified atmospheric deposition of nitrogen as the largest source of nitrogen to the Chesapeake Bay watershed.

45. Post-combustion control technologies, like Selective Catalytic Reduction ("SCR") and Selective Non-Catalytic Reduction ("SNCR"), can significantly reduce ozone-forming NO_x emissions when run effectively and in a manner consistent with manufacturers' specifications during the entire ozone season.

46. All 36 coal-fired EGUs identified in the Petition already have SCR or SNCR installed. *See, e.g.,* Maryland Petition Appendices, at A-5, *available at* <http://mde.maryland.gov/programs/Air/Documents/Transport/MD126PetitionAppendices.pdf> (listing control technology installation years between 1999 and 2004).

47. Despite the existing controls, EPA emissions data show that the installed NO_x controls at

the 36 EGUs are not being run effectively on every day of the ozone season (defined in Maryland regulations as May 1st to September 30th of a single year. COMAR 26.11.38.01.B(4)). In 2015, approximately 39,000 tons of NO_x reductions could have been achieved if the 36 EGUs had run their installed controls efficiently at emission levels reported by the operators in previous years. *See* Exhibit 1, Maryland Petition, at 3. This failure to optimize NO_x controls on every day of the ozone season contributes to the formation of ozone downwind and Maryland's inability to attain the ozone NAAQS. EPA's failure to respond to Maryland's Petition allows this significant contribution to continue with no opportunity for public input.

48. Maryland's Petition requests EPA to make a finding that the 36 EGUs are significantly contributing to nonattainment and interfering with maintenance of the 8-hour ozone NAAQS in Maryland, and requests EPA to order the 36 EGUs to run their existing controls effectively during each day of the ozone season. Maryland regulations already require power plants within the state to "operat[e] and optimiz[e] the use of all installed pollution control technology and combustion controls" for each operating day during the ozone season. COMAR 26.11.38.03.A(2).

49. By granting Maryland's Petition and ordering the requested remedy EPA would be requiring a significant reduction in the transport of NO_x emissions from the five upwind states to Maryland and other downwind states, would reduce the amount of harmful ground-level ozone that is formed in downwind states due to these NO_x emissions, and would reduce the amount of nitrogen that is deposited to land and surface waters. By granting Plaintiffs' requested remedy, this Court would provide Plaintiffs and their members with the opportunity to fully exercise the procedural rights, and advocate for the health protections, granted to them by the Clean Air Act.

CAUSE OF ACTION

50. Plaintiffs incorporate the allegations in all preceding paragraphs of this Complaint as if set forth in full herein.

51. Administrator Pruitt has nondiscretionary legal duties to hold a public hearing on Maryland's Section 126 Petition and to make the requested finding or deny the Petition within 60 days. 42 U.S.C. § 7426(b). It has been more than 60 days since the Petition was filed and Administrator Pruitt has not performed these duties.

52. These violations constitute a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" per the Clean Air Act, 42 U.S.C. § 7604(a)(2), and are ongoing, and will continue, unless remedied by this Court.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing the following relief:

A) A declaration that the Administrator has violated the Clean Air Act by failing to timely hold a public hearing and grant or deny Maryland's Section 126 Petition;

B) An order compelling Administrator Pruitt to perform his mandatory duty to hold a public hearing and then take final action on the Petition as expeditiously as possible, but no later than 60 days from the date of the order;

C) An order retaining jurisdiction over this matter until Administrator Pruitt has complied with his nondiscretionary duties under the Clean Air Act;

D) An order awarding Plaintiffs their costs of litigation, including reasonable attorneys' fees; and

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

Date: October 4, 2017

Respectfully submitted,

/s/ Jon A. Mueller

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EXHIBIT 1



Maryland

Department of
the Environment

Larry Hogan
Governor

Boyd Rutherford
Lieutenant Governor

Ben Grumbles
Secretary

November 16, 2016

Gina McCarthy, Administrator
United States Environmental Protection Agency
Office of the Administrator - Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Gina
Dear Administrator McCarthy:

The State of Maryland, through the Department of the Environment, hereby petitions the Administrator of the U.S. Environmental Protection Agency (EPA), under §126(b) of the Clean Air Act (CAA), to find that the 36 electric generating units (EGUs) listed in “Table 1” are emitting air pollutants in violation of the provisions of Section 110(a)(2)(D)(i) of the CAA with respect to the 2008 ozone National Ambient Air Quality Standard (NAAQS). These EGUs are located in five upwind states that EPA has already determined are significantly contributing to Maryland’s ozone problem under the 2008 ozone NAAQS.

Section 110(a)(2)(D)(i) of the CAA prohibits any source or other type of emission activity within a state, “from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other State with response to any such national primary or secondary ambient air quality standard.” Section 126(b) of the CAA provides that, “[a]ny State or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of Section 110(a)(2)(D)(ii) or this section.”

Over the past forty years, the CAA has benefited hundreds of millions of Americans by reducing air pollution and improving public health while our nation’s economy prospered. This success story is largely due to the state-federal partnership embodied in this landmark environmental law by which states cooperatively work with the EPA to adopt cost-effective programs to reduce air pollution within their jurisdictions and to prevent adverse impacts of air pollution emanating from their states on downwind jurisdictions.

The CAA strives for clean air for everyone, every day but unlawful interstate air pollution threatens our progress. The State of Maryland has worked with our partners in the Ozone Transport Commission over many years to reduce harmful regional emissions. We have also collaborated with upwind states outside of the OTR to voluntarily reduce transport emissions. These efforts, however, have come up short.

Despite our best efforts, Maryland is still not meeting the 2008 ozone standard in all respects. Our options at this point are significantly constrained by the framework of the CAA.

Gina McCarthy, Administrator
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Therefore, Maryland is asking EPA to require that existing control technology at 36 EGUs be run in a manner consistent with manufacturers' specifications during the ozone season. Because these 36 EGUs are no longer running their control technology efficiently, or sometimes not running the equipment at all, over 300 tons of nitrogen oxides (NO_x) emissions are being released on many high ozone days. These significant releases of NO_x would not occur if these controls were run consistent with best practices from earlier years.

The enclosed petition lays out the strong technical basis for this action. Maryland seeks a finding from EPA under CAA §126 on the enclosed petition, and requests that, pursuant to CAA Section 126, EPA order the 36 EGUs to discontinue the prohibited emissions by May 1, 2017.

CAA Section 126(b) requires that within 60 days after receipt of any petition and after public hearing, the Administrator shall make such a finding or deny the petition. We look forward to working with the Agency to protect the health and welfare of Maryland's citizens. Please do not hesitate contact me if you have any questions or need additional information regarding this petition.

Sincerely,

Thanks



Ben Grumbles
Secretary

Enclosures

cc: Shawn Garvin, Regional Administrator, Region 3
Janet McCabe, Acting Assistant Administrator, OAR

Petition to the United States Environmental Protection Agency Pursuant to Section 126 of the Clean Air Act for Abatement of Emissions from 36 Coal-Fired Electric Generating Units at 19 Plants in Five States that Significantly Contribute to Nonattainment of, and Interfere with Maintenance of, the 2008 Ozone National Ambient Air Quality Standard in the State of Maryland

I. Introduction, Summary of Conclusion and Requested Remedy¹

The State of Maryland, through the Department of the Environment (“MDE” or “the Department”) hereby petitions the United States Environmental Protection Agency (“EPA”) pursuant to section 126(b) of the Clean Air Act, 42 U.S.C. § 7426(b), to abate the emissions from thirty-six coal fired electric generating units (“the 36 EGUs”) in five upwind states that significantly contribute to nonattainment in Maryland. The 36 EGUs are identified in Table 1. These 36 EGUs significantly contribute to ozone levels that exceed the 2008 8-hour ozone National Ambient Air Quality Standard (“NAAQS”) in Maryland, and therefore interfere with both attainment and maintenance of the NAAQS. In addition, by EPA’s own projections, Maryland ozone monitors will continue to be nonattainment or maintenance sites in 2017 even after full implementation of the proposed Cross-State Air Pollution Rule Update (CSAPR Update).²

This petition clearly demonstrates in a manner consistent with EPA’s own regulatory approach under Clean Air Act section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), that emissions from the 36 EGUs are linked to downwind nonattainment and maintenance ozone receptor sites in Maryland and are located in states that EPA has already determined are significantly contributing to nonattainment in Maryland under the 2008 ozone NAAQS. Further, the emissions at the 36 EGUs can be reduced at reasonable cost. Because this petition simply asks for EPA to require these 36 EGUs to run existing control equipment in a manner consistent with manufacturers’ specifications on the days when ozone reductions are needed, there may actually be no new costs to the EGUs. Currently, these EGUs are not running existing controls effectively on days that the controls are needed most for ozone reductions. These controls have been run effectively in earlier years. It is illogical for EGU owners to purchase millions of dollars of control technology and then not plan to run those control technologies on days when

¹ This petition focuses on emissions from coal-fired boilers at thirty-six coal fired electric generating units in upwind States identified in Table 1. Maryland reserves its right to submit an additional petition or petitions under CAA Section 126 for other stationary sources or groups of stationary sources in these States and other States.

² 80 Fed. Reg. at 75725-75726, Tables V.C-1 and V.C-2.

they are needed. Again, based upon EPA's own regulatory approach under Clean Air Act section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), the requested remedy in this petition is highly cost-effective.

Table 1 – The 36 EGUs in States that Significantly Contribute to Maryland, are Clearly Not Running Controls Effectively, and are the Target of this Maryland 126 Petition

Facility Name	State	Plant ID	Unit ID
Alcoa Allowance Management Inc	IN	6705	4
Clifty Creek	IN	983	1
Clifty Creek	IN	983	2
Clifty Creek	IN	983	3
Gibson	IN	6113	3
Gibson	IN	6113	5
Petersburg	IN	994	2
Petersburg	IN	994	3
East Bend	KY	6018	2
Elmer Smith	KY	1374	1
Paradise	KY	1378	3
Killen Station	OH	6031	2
Kyger Creek	OH	2876	1
Kyger Creek	OH	2876	2
Kyger Creek	OH	2876	3
Kyger Creek	OH	2876	4
Kyger Creek	OH	2876	5
W H Zimmer Generating Station	OH	6019	1
Bruce Mansfield	PA	6094	1
Cambria Cogen	PA	10641	1
Cambria Cogen	PA	10641	2
Cheswick	PA	8226	1
Homer City	PA	3122	1
Homer City	PA	3122	2
Homer City	PA	3122	3
Keystone	PA	3136	1
Keystone	PA	3136	2
Montour	PA	3149	1
Montour	PA	3149	2
Grant Town Power Plant	WV	10151	1A
Grant Town Power Plant	WV	10151	1B
Harrison Power Station	WV	3944	1
Harrison Power Station	WV	3944	2
Harrison Power Station	WV	3944	3
Pleasants Power Station	WV	6004	1
Pleasants Power Station	WV	6004	2

A unique feature of this petition is that it focuses on ensuring that controls are run every day of the ozone season. The CSAPR Update, earlier federal cap-and-trade programs, and many state regulations allow for longer term averaging, where controls do not necessarily need to be run effectively every day. As shown in Appendix A, this has led to situations where sources in the five upwind, significantly contributing states, have not needed to run their controls efficiently on many bad ozone days. On some of those days, over 300 tons of nitrogen oxides (NO_x) emissions were released, that would not have been released, if the 36 EGUs in these states had simply run their control technologies efficiently. These days are often the same days where ozone levels are likely to be highest because of hot, ozone conducive weather.

Over the entire ozone season, the potential for reductions from this petition can become very large. In 2015, approximately 39,000 tons of NO_x reductions could have been achieved in the ozone season if the 36 targeted EGUs had simply run their control technologies efficiently.

Therefore, based on EPA's past approaches in establishing significant contributions and highly cost-effective controls³, the NO_x emissions from these 36 EGUs located in five states that significantly contribute to nonattainment and interfere with maintenance of the 2008 ozone NAAQS in Maryland, must be abated on each day of the ozone season starting in May of 2017.

As these 36 EGUs are physically located in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia, the State of Maryland is without other recourse to limit or otherwise address the ozone pollution that results from the NO_x emissions at the 36 EGUs. In light of this, the State of Maryland petitions EPA for a finding pursuant to section 126 of the Clean Air Act that these 36 EGUs are operated in a manner that directly significantly contributes to nonattainment and interferes with maintenance of the 2008 ozone NAAQS in Maryland, despite the existence of cost-effective and readily available control strategies to eliminate the significant contribution.

Maryland further seeks federally enforceable orders from EPA directing the operators of the 36 EGUs to reduce NO_x emissions that are significantly contributing to nonattainment and interfering with maintenance of the 2008 NAAQS in Maryland. Consistent with the law, these reductions must occur as expeditiously as practicable and in this case, because the controls are already installed, can be required almost immediately through a federal order. Maryland is

³ See, e.g., 63 Fed. Reg. 57356-57538 ("NO_x SIP Call"); 76 Fed. Reg. 48208-48483 ("Cross-State Air Pollution Rule" (CSAPR)); 80 Fed. Reg. 75706-75778 ("CSAPR Update").

asking EPA to move quickly and require the 36 targeted EGUs to run their controls in an optimal manner, every day of the ozone season, starting on May 1, 2017.

II. Maryland's Ask: The Proposed Remedy

The State of Maryland, acting through the Department, hereby petitions the Administrator of the EPA pursuant to § 126(b) of the federal Clean Air Act, to find that the EGUs, identified in Table 1, are emitting air pollutants in violation of the prohibitions of § 110(a)(2)(D) of the Act. Further, the Department requests that EPA order the EGUs to reduce NO_x emissions sufficiently such that the EGUs no longer contribute to nonattainment of and interfere with maintenance of the 2008 ozone NAAQS in Maryland.

The remedy that Maryland is asking EPA to implement by May 1, 2017 is very simple. The State is petitioning EPA to require the 36 targeted EGUs to run their existing NO_x control technology effectively on each day of the ozone season. In 2015, after observing that EGUs in Maryland were not running their controls effectively during each day of the ozone season, Maryland adopted regulations to fix this problem. Therefore, the remedy being requested by Maryland at the 36 EGUs has already been adopted in Maryland.

In Maryland regulations, the requirement to run controls effectively every day of the ozone season can be found in the Code of Maryland Regulations, Title 26, Subtitle 11, Chapter 38 Control of NO_x Emissions from Coal-Fired Electric Generating Units at COMAR 26.11.38.03.A(2). This language is provided below and the full text of these regulations is included as Appendix B:

“Beginning on May 1, 2015, for each operating day during the ozone season, the owner or operator of an affected electric generating unit shall minimize NO_x emissions by operating and optimizing the use of all installed pollution control technology and combustion controls consistent with the technological limitations, manufacturers’ specifications, good engineering and maintenance practices, and good air pollution control practices for minimizing emissions (as defined in 40 C.F.R. § 60.11(d)) for such equipment and the unit at all times the unit is in operation while burning any coal.”

Similar language or other similar requirements are already in place in many states. The analyses included in Appendix A shows that for the 29 eastern states analyzed, only nine states did not

routinely require that controls be run effectively during the ozone season. Five of those states have been identified by EPA as significantly contributing to Maryland under the 2008 ozone NAAQS.

Maryland is also asking EPA to establish emission limits to ensure a minimum level of control, consistent with optimization of existing control equipment, for each of the 36 targeted EGUs. Table 2 identifies the specific limit for each of the 36 EGUs that Maryland is asking EPA to make federally enforceable by May 1, 2017. Appendix A also describes how these limits were calculated and why they represent a reasonable rate that has been achieved in the past, when controls were being run effectively, by each of the 36 targeted EGUs.

Appendix E provides specific language for each of the 36 EGUs that Maryland would like to see EPA include in federal orders to ensure that the proposed remedy is in place and enforceable by May 1, 2017.

Table 2 – Specific Maximum Allowable Rates that Must Be Required by EPA to Insure a Minimum level of NO_x Control at the 36 Targeted EGUs

State	Facility Name	Plant ID	Unit ID	Maximum 30-Day Rolling Average NO _x Emission Rate (lb/mmBtu)
IN	Alcoa Allowance Management Inc	6705	4	0.104
IN	Clifty Creek	983	1	0.090
IN	Clifty Creek	983	2	0.090
IN	Clifty Creek	983	3	0.084
IN	Gibson	6113	3	0.088
IN	Gibson	6113	5	0.084
IN	Petersburg	994	2	0.062
IN	Petersburg	994	3	0.061
KY	East Bend	6018	2	0.067
KY	Elmer Smith	1374	1	0.159
KY	Paradise	1378	3	0.120
OH	Killen Station	6031	2	0.097
OH	Kyger Creek	2876	1	0.085
OH	Kyger Creek	2876	2	0.084
OH	Kyger Creek	2876	3	0.084
OH	Kyger Creek	2876	4	0.084
OH	Kyger Creek	2876	5	0.084
OH	W H Zimmer Generating Station	6019	1	0.094
PA	Bruce Mansfield	6094	1	0.089
PA	Cambria Cogen	10641	1	0.115
PA	Cambria Cogen	10641	2	0.115
PA	Cheswick	8226	1	0.097
PA	Homer City	3122	1	0.072
PA	Homer City	3122	2	0.093
PA	Homer City	3122	3	0.105
PA	Keystone	3136	1	0.048
PA	Keystone	3136	2	0.046
PA	Montour	3149	1	0.100
PA	Montour	3149	2	0.088
WV	Grant Town Power Plant	10151	1A	0.077
WV	Grant Town Power Plant	10151	1B	0.077
WV	Harrison Power Station	3944	1	0.066
WV	Harrison Power Station	3944	2	0.085
WV	Harrison Power Station	3944	3	0.083
WV	Pleasants Power Station	6004	1	0.046
WV	Pleasants Power Station	6004	2	0.045

Table 3 shows how the proposed rates compare to rates in 2015 and 2016 and how they compare to rates achieved in the past by the targeted EGUs when controls were being run

effectively. Table 3 highlights some of the data analysis that MDE has conducted using 2005 to 2015 EGU emissions data managed by EPA's Clean Air Markets Division (CAMD). Appendix A provides much more detail on the MDE control technology optimization analyses.

This data analysis has shown that many EGUs in the East have stopped using NO_x control technologies in an efficient manner consistent with past practices. It appears that in some cases, the controls are not being used at all. This petition focuses on 36 of the worst EGUs (out of approximately 350 EGUs) analyzed. All of the 36 EGUs covered in this petition have measured average summertime NO_x rates in 2015 and 2016 that are more than double measured average summertime NO_x rates from earlier years, when control technologies were being run efficiently. Some EGUs, like the Keystone (PA) units 1 and 2, the Montour (PA) units 1 and 2, the Homer City 1 (PA) unit and the Harrison (WV) units 1, 2 and 3 measured average summertime NO_x rates in 2015 and 2016 that were more than four times greater than measured average summertime NO_x rates from earlier years when control technologies were being run efficiently.

The data analysis also shows that many states actually do a very good job of requiring EGUs in their state to run controls effectively. The MDE analyses focused on 29 Eastern states. 20 of the 29 states appear to be doing a very good job of requiring EGUs in their states to run controls effectively. Many EGUs in nine states are not running controls effectively or at all. EGUs in five of those states are covered by this petition. The EGUs that are not running controls effectively in the other four states are not included in this petition, as EPA has not determined that those four states significantly contribute to Maryland under the 2008 ozone NAAQS.

In working with the 36 EGUs and the five states covered in this petition, MDE has heard arguments that it has been difficult to run NO_x controls effectively in recent years because of market shifts that require coal-fired EGUs to operate differently. As shown in Appendix A, many other states with significant numbers of coal-fired EGUs that face similar market changes do not see their EGUs operating control technologies inefficiently. These states include Texas, Tennessee, Michigan, Illinois, Nebraska, Virginia and Maryland. These states generally have requirements in place that require NO_x controls to be run effectively every day of the ozone season. The proposed Maryland remedy would ask EPA to mandate similar requirements at the 36 EGUs that are located in states that do not have a specific requirement that NO_x controls be run effectively every day of the ozone season.

Table 3 – Proposed Rates Compared to 2015 Rates, 2016 Rates, and Best Rates from a Previous Year

State	Facility Name	Unit ID	Maryland Proposed Maximum 30-Day Rolling Average NO _x Emission Rate (lb/mmBtu)	Best Ozone Season Average Rate from the Past (lb/mmBtu and Year)	2015 Ozone Season Average Rate (lb/mmBtu)	2016 Ozone Season Average Rate (lb/mmBtu)	Maximum Percent Increase from Best Rate from the Past
IN	Alcoa Allowance Management Inc	4	0.104	0.095 (2007)	0.283	0.304	220%
IN	Clifty Creek	1	0.090	0.074 (2005)	0.228	0.361	391%
IN	Clifty Creek	2	0.090	0.075 (2005)	0.229	0.369	391%
IN	Clifty Creek	3	0.084	0.074 (2005)	0.229	0.353	376%
IN	Gibson	3	0.088	0.066 (2005)	0.201	0.175	204%
IN	Gibson	5	0.084	0.060 (2007)	0.341	0.111	471%
IN	Petersburg	2	0.062	0.051 (2005)	0.205	0.175	301%
IN	Petersburg	3	0.061	0.047 (2005)	0.269	0.201	478%
KY	East Bend	2	0.067	0.052 (2006)	0.216	0.131	316%
KY	Elmer Smith	1	0.159	0.123 (2006)	0.356	0.254	190%
KY	Paradise	3	0.120	0.100 (2005)	0.154	0.249	148%
OH	Killen Station	2	0.097	0.089 (2005)	0.241	0.238	172%
OH	Kyger Creek	1	0.085	0.079 (2005)	0.213	0.205	170%
OH	Kyger Creek	2	0.084	0.079 (2005)	0.202	0.231	192%
OH	Kyger Creek	3	0.084	0.079 (2005)	0.256	0.243	225%
OH	Kyger Creek	4	0.084	0.079 (2005)	0.282	0.207	258%
OH	Kyger Creek	5	0.084	0.079 (2005)	0.295	0.226	276%
OH	W H Zimmer Generating Station	1	0.094	0.056 (2006)	0.228	0.211	306%
PA	Bruce Mansfield	1	0.089	0.082 (2008)	0.242	0.154	195%
PA	Cambria Cogen	1	0.115	0.095 (2005)	0.170	0.228	141%
PA	Cambria Cogen	2	0.115	0.095 (2006)	0.166	0.216	128%
PA	Cheswick	1	0.097	0.090 (2006)	0.254	0.349	287%
PA	Homer City	1	0.072	0.067 (2006)	0.351	0.268	425%
PA	Homer City	2	0.093	0.083 (2006)	0.351	0.334	325%
PA	Homer City	3	0.105	0.087 (2005)	0.282	0.226	223%
PA	Keystone	1	0.048	0.043 (2006)	0.232	0.220	438%
PA	Keystone	2	0.046	0.043 (2008)	0.243	0.218	460%
PA	Montour	1	0.100	0.058 (2006)	0.309	0.355	512%
PA	Montour	2	0.088	0.058 (2006)	0.336	0.369	538%
WV	Grant Town Power Plant	1A	0.077	0.072 (2005)	0.343	0.315	375%
WV	Grant Town Power Plant	1B	0.077	0.072 (2005)	0.340	0.314	370%
WV	Harrison Power Station	1	0.066	0.063 (2005)	0.318	0.101	401%
WV	Harrison Power Station	2	0.085	0.066 (2005)	0.364	0.235	450%
WV	Harrison Power Station	3	0.083	0.066 (2005)	0.342	0.163	420%
WV	Pleasants Power Station	1	0.046	0.039 (2005)	0.219	0.209	455%
WV	Pleasants Power Station	2	0.045	0.039 (2005)	0.371	0.199	850%

III. Urgency of Timely EPA Response to This Petition

Section 126 establishes clear deadlines for action by the Administrator in response to a petition under that section. 42 U.S.C. § 7426; *GenOn Rema, LLC v. EPA*, 722 F.3d 513, 521-22 (3rd Cir. 2013). The Administrator must make the requested finding or deny the petition within 60 days after receipt of the petition, and after a public hearing. 42 U.S.C. § 7426(b).

Once EPA makes a finding under section 126(b), section 126(c) requires that the violating source(s) shall not operate three months after the finding regardless of whether the source has been operating under a duly issued state operating permit. 42 U.S.C. § 7426(c). The Administrator may allow the source(s) to operate beyond such time only if the source(s) comply with emission limitations and compliance schedules as the Administrator may direct to bring about compliance. *Id.* Such compliance must be brought about “as expeditiously as practicable,” and in no case later than three years after the date of the Administrator’s finding. *Id.* Consistent with the law, these reductions must occur as expeditiously as practicable and in this case, because the controls are already installed, can be required almost immediately through a federal order.

In this petition, Maryland further asks EPA to require that the remedy be in place and effective by May 1, 2017. This is critical to Maryland’s efforts to attain and maintain the 2008 ozone NAAQS and may be the difference between an attainment and nonattainment designation for areas in Maryland under the 2015 ozone NAAQS. Maryland’s three historical ozone nonattainment areas have design values of 71 parts per billion (ppb), 73 ppb and 76 ppb. Modeling included in Appendix D indicates that if the proposed Maryland remedy is implemented by May 1, 2017, the Philadelphia area could attain the 2008 ozone NAAQS. The modeling also shows that the Baltimore area and the Washington, DC multi-state area could be designated attainment for the 2015 ozone NAAQS if the remedy is in place for the 2017 ozone season.

To expedite the EPA action, Maryland has provided specific language in Appendix E to be included in federal orders for each of the 36 EGUs covered by this petition. MDE believes this expedited timeframe is possible and mandated by the Clean Air Act as no new controls need to be added and EGU operators have already demonstrated that compliance with the Maryland remedy is achievable. EPA simply needs to require that the 36 targeted EGUs run their existing

controls in a manner consistent with manufacturers' specifications and good engineering, maintenance and air pollution control practices.

IV. MDE Efforts to Work Collaboratively with the Five Significantly Contributing Upwind States, EGU Owners and Operators and EPA

For the past five years, Maryland has been trying to work collaboratively with the five upwind states in which the 36 EGUs are located. This collaboration also involved approximately 20 additional states. In 2013 and 2014, there were Commissioner level discussions that focused on the issue of coal-fired EGUs that are no longer running their NO_x controls effectively.

There was general agreement amongst the Commissioners that the data showed that NO_x emission rates had increased over recent years and that efforts should be made to analyze and when necessary work with EGU operators to fix the problem. Many of the collaborating states conducted their own independent research and many states, including the five states where the 36 EGUs are located, reached out to EGU operators and asked them to voluntarily work to improve the performance of existing NO_x control technologies for the 2015 ozone season. Some states, like Pennsylvania, wrote letters to EGU operators. Other states, like Ohio, worked more directly with EGU operators in their state.

Maryland also worked directly with some of the operators of coal-fired EGUs in the East. In 2013, 2014 and 2015, Maryland attended many meetings to discuss this issue directly with EGU operators.

These efforts to work collaboratively with upwind states and coal-fired EGU operators resulted in some progress, but that progress was very limited. Although some EGU operators did work voluntarily to improve the performance of existing NO_x control technologies, overall, the problem actually got worse in 2015 and 2016. Appendix A shows how the performance of existing NO_x control technologies at many coal-fired EGUs in the East has become an even greater problem in 2015 and 2016.

Maryland has also worked collaboratively with EPA on this issue. Most importantly, Maryland had many discussions with EPA on the CSAPR Update and asked that EPA include the remedy proposed in this petition as part of Maryland's comments on the CSAPR Update. Specifically, Maryland asked EPA to include the control technology optimization and the 30-day rolling average NO_x limit requirements (described above in Section II of the petition) for all

EGUs covered in the CSAPR Update. Maryland included recommendations on specific rates for about 350 EGUs as part of those comments.

Equally important, Maryland has asked EPA Region III to conduct an investigation over whether or not the failure of Pennsylvania EGUs to run NO_x control technologies effectively, sometimes not at all, is a violation of the Clean Air Act's Reasonably Available Control Technology (RACT) requirement that Pennsylvania must comply with statewide. Logically, it appears to be impossible to interpret the Clean Air Act's RACT requirement to allow for sources to purchase controls, but then not run those controls on the days where the air pollutant they were required for in the first place (ozone) is at its worst.

V. Overwhelming Transport - The Maryland Ozone Transport Research Program

For over thirty years, Maryland has struggled with meeting the federal ozone standard. During that period, MDE has partnered with the University of Maryland at College Park and other researchers to study how air pollution transport, meteorology, photochemistry and geography combine to make the ozone problem in the Mid-Atlantic so challenging. Appendix C provides a more detailed summary of the Maryland ozone transport research program.

Processes on both the local and regional scale influence ozone formation and transport. Maryland's research has played a significant role in the progress the State has made in reducing exposure to ozone (and other pollutants) and provides a clear path forward for continuing to reduce ozone levels in the eastern half of the Country. In the East, field experiments and numerical models have shown that NO_x emissions combined with biogenic hydrocarbons are sufficient to generate ozone events.

Ozone in the Mid-Atlantic is complicated, but not that complicated. There are two separate pieces of the problem. A regional transport piece, that comes from upwind sources, primarily power plants and mobile sources, across a large portion of the East and a local piece. In very general terms, on bad ozone days in Baltimore, Maryland, about 70% of the problem is regional transport, about 30% is local. As part of the States research efforts, we measure "incoming" ozone levels with ozone-sondes, airplanes and mountain-top monitors that routinely approach or exceed the 2008, 75 ppb, ozone NAAQS.

The regional transport component of Maryland's problem, builds up and collects in an "elevated reservoir" of ozone and ozone precursors that sits about 1000 meters above the Mid-Atlantic and much of the East from May to September. Ozone levels in the elevated reservoir can routinely be 70 ppb or greater on episode days.

The influence of the elevated reservoir can best be seen by analyzing the morning "surge" of ozone seen in the ground level monitoring data between 8:00 and 11:00 a.m. At night, ground level monitors measure low ozone concentrations while monitors aloft measure much higher levels. At night, the elevated reservoir is separated from the surface by the nocturnal inversion. As the next day begins, temperatures increase, the inversion begins to collapse and the elevated ozone reservoir begins mixing down to the surface. In general, the ozone levels measured aloft at night mix down and create a regional transport contribution that is seen in ground level monitors across the region. This "regional transport signal" can often approach or exceed 75 ppb. Local emissions begin to contribute to ozone production in the morning as well. By afternoon, regional transport and local emissions combine to drive daily peak ozone levels in the late afternoon.

The Maryland ozone transport research program has shown that reducing NO_x emissions from upwind power plants is a proven strategy for reducing ground-level ozone in Maryland and in other downwind nonattainment areas. The 2004 "NO_x SIP Call" dramatically reduced NO_x emissions from EGUs across the East. As described in more detail in Appendix C, these measured NO_x reductions at EGUs lead to significant reductions in measured ozone in the aloft elevated reservoir, which resulted in large decreases in measured ground-level ozone in Maryland and across much of the East.

VI. Ozone Benefits From the Maryland 126 Petition

EPA has already determined that the five states where the 36 targeted EGUs operate are significantly contributing to nonattainment of and interference with maintenance of the 2008 ozone NAAQS in the State of Maryland. On page 22 of the modeling technical support document of the CSAPR Update, EPA identifies Pennsylvania, West Virginia, Ohio, Kentucky, Indiana, Illinois, Michigan, Texas, Virginia and the District of Columbia as significant contributors to Maryland's ozone problem. As part of the analyses described in Appendix A,

Maryland found that the EGUs in Illinois, Michigan, Texas, Virginia and the District of Columbia were already operating their existing controls in an optimal manner and therefore are not included in this petition.

As demonstrated in Appendix A, on many days the proposed Maryland remedy could result in up to 304 tons of NO_x reductions in a single day. This reduction, which is a huge reduction compared to other remaining NO_x reduction strategies (as an example the 2017 NO_x reductions in the East from the clean fuel provisions of the Tier 3 Vehicle and Fuel Standards are estimated to be just slightly greater than 300 tons per day), can be achieved by simply requiring the 36 targeted EGUs to run their control technology in an optimal manner consistent with manufacturers specifications and best practices from earlier years. Ozone is measured over an eight hour average to ensure public health protection from short term exposures. This means that achieving emission reductions on every single day of the ozone season is critical. Having higher emissions on some days and lower emissions on others may allow EGUs to meet federal requirements, but it will not be sufficient to insure that ozone levels comply with the standard every single day and that public health is protected.

Modeling conducted by Maryland and Sonoma Technology Incorporated shows that the proposed Maryland remedy will allow existing monitors in Maryland that are not complying with the 2008 NAAQS to attain, or come very close to attaining that standard. A more detailed summary of the modeling used to support this petition is included in Appendix D.

The proposed Maryland remedy will also be very important to how areas in Maryland and other Mid-Atlantic states are designated under the new 2015 ozone, 70 ppb, NAAQS. The proposed remedy, if implemented in 2017, would most likely allow the Washington, DC, multi-state area, that Maryland is part of, and the Baltimore area to both be designated attainment for the 2015 ozone NAAQS.

The modeling analyses also show that if the proposed Maryland remedy was required by EPA in a timeframe consistent with Good Neighbor State Implementation Plans (SIPs) under the 2008 NAAQS (2011) and implemented in a timeframe to support attainment for marginal and moderate areas under the 2008 ozone NAAQS, that it is almost certain that the Philadelphia multi-state nonattainment area, which Maryland is a part of, would be attaining the 2008 NAAQS and the Washington, DC and Baltimore areas would have data to support being designated attainment under the 2015 ozone NAAQS. The Philadelphia area would also have

much cleaner data and may have also been able to support an attainment designation for the 2015 ozone NAAQS.

Tables 4 and 5 show, based upon the modeling described in Appendix D, how the remedy proposed by Maryland would have affected the Baltimore nonattainment area and the Washington, DC and Philadelphia multi-state nonattainment areas for the 2008 and 2015 ozone NAAQS if the remedy was required in the timeframe required under the Act.

Table 4 – Projected Ozone Levels if the Proposed Maryland Remedy Was Already in Place - For the 2008 NAAQS

Key Monitors	2014-2016 Design Value	2014-2016 Design Value With Remedy	Comment/Conclusion
Baltimore Nonattainment Area			
Edgewood	73 ppb	71 ppb	Attainment of the 2008 ozone NAAQS with controls run effectively at 36 targeted EGUs
Aldino	73 ppb	71 ppb	Attainment of the 2008 ozone NAAQS with controls run effectively at 36 targeted EGUs
Washington, DC Multi-State Nonattainment Area			
Arlington, VA	72 ppb	69 ppb	Attainment of the 2008 ozone NAAQS with controls run effectively at 36 targeted EGUs
PG Equestrian Center	71 ppb	68 ppb	Attainment of the 2008 ozone NAAQS with controls run effectively at 36 targeted EGUs
Philadelphia Multi-State Nonattainment Area			
Fair Hill, MD	76ppb	74 ppb	Attainment of the 2008 ozone NAAQS with controls run effectively at 36 targeted EGUs
Bristol, PA	77 ppb	74 ppb	Attainment of the 2008 ozone NAAQS with controls run effectively at 36 targeted EGUs
Camden, NJ	75 ppb	73 ppb	Attainment of the 2008 ozone NAAQS with controls run effectively at 36 targeted EGUs

Table 5 – Projected Ozone Levels if the Proposed Maryland Remedy Was Already in Place - For the 2015 Ozone NAAQS

Key Monitors	2014-2016 Design Value	2014-2016 Design Value With Remedy	Comment/Conclusion
Baltimore Nonattainment Area			
Edgewood, MD	73 ppb	71 ppb	Very Close to Attainment of the 2015 ozone NAAQS with controls run effectively at 36 targeted EGUs
Aldino, MD	73 ppb	71 ppb	Very Close to Attainment of the 2015 ozone NAAQS with controls run effectively at 36 targeted EGUs
Washington, DC Multi-State Nonattainment Area			
Arlington, VA	72 ppb	69 ppb	Attainment of the 2015 ozone NAAQS with controls run effectively at 36 targeted EGUs
PG Equestrian Center, MD	71 ppb	68 ppb	Attainment of the 2015 ozone NAAQS with controls run effectively at 36 targeted EGUs

Table 6 shows, based upon the modeling described in Appendix D, what the modeled maximum daily contribution for a subset of the 19 plants where the 36 targeted EGUs are located was estimated to be in 2011.

Table 6 – Maximum Daily Ozone Contribution in Maryland in 2011 For a Subset of the 19 Plants Where the 36 EGUs are Located

Facility Name	State	Plant ID	Maximum Daily Contribution in ppb
Clifty Creek (Units 1, 2 & 3)	IN	983	0.28 ppb
Elmer Smith	KY	1374	0.10 ppb
Kyger Creek (Units 1, 2, 3, 4 & 5)	OH	2876	0.26 ppb
Bruce Mansfield	PA	6094	0.31 ppb
Cheswick	PA	8226	0.22 ppb
Homer City (Units 1, 2 & 3)	PA	3122	0.38 ppb
Keystone (Units 1 & 2)	PA	3136	1.24 ppb
Montour (Units 1 & 2)	PA	3149	1.98 ppb
Harrison Power Station (Units 1, 2 & 3)	WV	3944	0.62 ppb
Pleasants Power Station (Units 1 & 2)	WV	6004	0.25 ppb

Table 7 shows the average ozone benefit and the daily maximum ozone benefit for the most critical Maryland monitors in the Baltimore, Philadelphia and Washington, DC nonattainment areas.

Table 7 – Average Summertime and Daily Maximum Ozone Benefits at Key Maryland Monitors After the Proposed Maryland Remedy is Implemented

Key Monitors	2014-2016 Design Value	Average Summertime Ozone Reduction With Remedy	Maximum Daily Ozone Reduction With Remedy
Baltimore Nonattainment Area			
Edgewood	73 ppb	0.6 ppb	1.7 ppb
Washington, DC Multi-State Nonattainment Area			
PG Equestrian Center	71 ppb	0.7 ppb	2.5 ppb
Philadelphia Multi-State Nonattainment Area			
Fair Hill, MD	76ppb	1.0 ppb	1.9 ppb

VII. Environmental and Economic Equity

This petition is also intended to help address environmental and economic inequities, caused by the upwind states' significant contribution to ozone nonattainment in Maryland. The proposed Maryland remedy should have been required as part of Good Neighbor SIPs that were due in 2011. This would have provided cleaner air and greater public health protection to Maryland citizens.

Because of the continued failure to implement the Clean Air Act's provisions designed to reduce transport in a timely manner (section 110(a)(2)(D)(i)), Maryland has also been placed at an economic disadvantage. The State has been forced to adopt some less effective and more expensive "inside Maryland" control measures to try and comply with the federal ozone NAAQS. Over the past five years, these regulatory initiatives have become more difficult to implement and routinely have an impact on small businesses. One of Maryland's most recent actions to adopt regulations was to require a third round of volatile organic compound emission reductions from architectural and industrial maintenance (AIM) coatings. This regulation is estimated to cost approximately \$2,240 for each ton of emissions removed. In contrast, the proposed Maryland remedy, under this petition, costs about \$670 to \$800 for each ton of

emissions removed and results in a much larger ozone reductions. Appendix F provides additional information on cost and cost-effectiveness.

Maryland's ozone research now clearly shows that local control measures alone are unlikely to reduce ozone levels in a meaningful way. The progress in reducing ozone over the past 10 years that has been achieved in Maryland and many other Eastern states was driven by strong regional NO_x reductions across the Eastern United States combined with additional local controls in many areas.

There is also a significant inequity created when sources in upwind states do not effectively control their emissions, and these emissions are significant enough to push the downwind areas from attainment to nonattainment for a new NAAQS. That is exactly what is happening because the 36 targeted EGUs are not running their control equipment effectively. Both the Baltimore area and the Washington, DC multi-state area are very close to attaining the new 2015, 70 ppb, ozone NAAQS and would likely be designated attainment if the controls from the five upwind states were run in an optimal way on each day of the ozone season.

The 36 EGUs have also experienced windfall profits from not running controls effectively. Because of cost savings associated with reduced reagent use and other operational savings from not running controls or running controls less effectively, in 2014, the owners of the 36 EGUs saved approximately \$24 Million. Appendix F also provides additional analysis of cost savings at the 36 EGUs.

VIII. Conclusion

The State of Maryland has demonstrated that the 36 EGUs are causing and significantly contributing to exceedances of the 2008 ozone NAAQS in Maryland, as evaluated according to best practices and all available EPA guidance. As such, EPA should grant Maryland's petition and quickly issue a finding that the 36 EGUs are significantly contributing to nonattainment and interfering with maintenance of the 2008 ozone NAAQS in the State. Per that finding, EPA should immediately, through a federal order, require the owners of the 36 EGUs to implement the remedy described above, and in Appendix E, to ensure that controls are run effectively by May 1, 2017.

More importantly, the action requested in this petition is too simple and too important to delay. The controls at the 36 EGUs are already in place. Past performance shows that the proposed remedy can easily be achieved by simply optimizing the performance of existing control technology. Millions of citizens in the East are breathing air that is healthier because the operators of the 36 EGUs are not running existing control technologies effectively.

EPA must move quickly and take action to require the owners of the 36 EGUs to run existing NO_x control equipment in an optimal manner during the ozone season.

EXHIBIT 2

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July 20, 2017

Via Certified Mail – Return Receipt Requested

Administrator Scott Pruitt
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Notice of Intent to Sue Pursuant to the Clean Air Act for Failure to Perform a Nondiscretionary Duty to Act on Maryland’s Section 126 Petition

Dear Administrator Pruitt:

This letter provides notice, pursuant to 42 U.S.C. § 7604(b), that the Chesapeake Bay Foundation, Inc. (“CBF”) intends to file a citizen suit against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA for failure to perform a nondiscretionary duty as mandated by Section 126 of the Clean Air Act (“CAA”), 42 U.S.C. § 7426(b). Specifically, EPA has failed to hold a public hearing and either grant or deny the Section 126 Petition filed by the Maryland Department of the Environment (“MDE”) on November 16, 2016 regarding emissions from 36 coal-fired electric generating units (“EGUs”).

On November 16, 2016, the State of Maryland, through MDE, petitioned EPA to make a finding that 36 EGUs, at 19 separate power plants in five upwind states, are emitting air pollutants that significantly contribute to nonattainment and interfere with maintenance of the 2008 and 2015 8-hour ozone National Ambient Air Quality Standards (“NAAQS”) in Maryland. Pursuant to Section 126 of the CAA, “[w]ithin 60 days after receipt of any petition under this subsection and after public hearing, the Administrator *shall* make such a finding or deny the petition.” 42 U.S.C. § 7426(b) (emphasis added).

On January 3, 2017, EPA granted itself a 6-month extension to hold a public notice-and-comment process and respond to Maryland’s 126 Petition. *See* 82 Fed. Reg. 22 (Jan. 3, 2017). As of the date of this notice letter, both the 60 days and the 6-month extension have expired and EPA has not granted or denied Maryland’s 126 Petition, nor held a public hearing. EPA has therefore failed to perform its mandatory, nondiscretionary duty as required by CAA Section 126. 42 U.S.C. § 7426(b).

The citizen suit provision of the CAA provides that any person may sue the Administrator of the EPA “where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.” 42 U.S.C. § 7604(a)(2). The CAA requires citizens to provide the Administrator with 60 days’

notice prior to commencing an action under the citizen suit provision. 42 U.S.C. § 7604(b)(2); *see also* 40 C.F.R. § 54.2(a).

The Chesapeake Bay Foundation hereby notifies the EPA Administrator that, absent corrective action by EPA within the 60-day notice period, CBF intends to file a citizen suit against EPA and the Administrator for failure to perform the nondiscretionary duty mandated by CAA Section 126. 42 U.S.C. § 7426(b). Pursuant to 40 C.F.R. § 54.3(a), the Chesapeake Bay Foundation's address is 6 Herndon Avenue, Annapolis, Maryland, 21403. CBF will seek injunctive and declaratory relief, the costs of litigation, and other appropriate relief as allowed.

If you have any questions concerning this notice letter or if you believe this notice is incorrect in any respect, please contact the undersigned counsel. During the notice period, we are available to discuss this matter with you.

Sincerely,



Jon A. Mueller
Chesapeake Bay Foundation
6 Herndon Ave.
Annapolis, MD 21403
Telephone: (410) 268-8816
Email: jmueller@cbf.org
Counsel for the Chesapeake Bay Foundation, Inc.

cc via certified mail:

Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

August 4, 2017

Via Certified Mail

Administrator Scott Pruitt
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Notice of Intent to Sue for Failure to Perform a Nondiscretionary Duty to Act on Maryland's "Good Neighbor" Petition Under Section 126 of the Clean Air Act

Dear Administrator Pruitt:

This letter provides notice, pursuant to 42 U.S.C. § 7604(b), that the undersigned public health, environmental, and conservation organizations intend to file a citizen suit against the United States Environmental Protection Agency ("EPA" or "Agency") and its Administrator for failure to perform a nondiscretionary duty as mandated by Section 126 of the Clean Air Act ("CAA"), 42 U.S.C. § 7426(b). Specifically, EPA has failed to hold a public hearing and failed to either grant or deny the Section 126 Petition filed by the Maryland Department of the Environment on November 16, 2016 regarding emissions from 36 coal-fired electric generating units ("EGUs").

On November 16, 2016, the State of Maryland submitted a "Good Neighbor" Petition to EPA under CAA Section 126, which asked the Agency to make a finding that 36 EGUs, at 19 separate power plants in five upwind states, are emitting air pollutants that significantly contribute to nonattainment and interfere with maintenance of the 2008 and 2015 ozone National Ambient Air Quality Standards in Maryland. The impacts of ground-level ozone pollution on human health are well-documented and include harm to the respiratory system, aggravation of asthma and lung diseases, and premature death. Notably, each of the power plants identified by Maryland's petition—plants located in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia—has modern pollution controls already installed that the owners are not fully operating to reduce dangerous ozone-forming pollution. In its petition, Maryland asked EPA to require the affected power plants to effectively run their already-installed pollution controls every day during the ozone season, which extends from May 1 through September 30. Maryland's petition included rigorous air quality modeling showing that its proposed solution would not only help Maryland meet the national, health-based, air quality standards for ozone, but would also help other areas in the region make progress towards achieving those public health standards.

Pursuant to Section 126 of the CAA, "[w]ithin 60 days after receipt of any petition under this subsection and after public hearing, the Administrator *shall* make such a finding or deny the petition." 42 U.S.C. § 7426(b) (emphasis added). On January 3, 2017, EPA granted itself a 6-month extension to hold a public notice-and-comment process and respond to Maryland's Section 126 Petition. *See* 82 Fed. Reg. 22 (Jan. 3, 2017). As of the date of this notice letter, both the 60 days and the 6-month extension have expired. Yet EPA has not granted or denied

Maryland's Section 126 Petition, and has also failed to hold a public hearing. EPA has, therefore, failed to perform its mandatory, nondiscretionary duty as required by CAA Section 126. 42 U.S.C. § 7426(b). The citizen suit provision of the CAA provides that any person may sue the Administrator of the EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). The CAA requires citizens to provide the Administrator with 60 days' notice prior to commencing an action under the citizen suit provision. 42 U.S.C. § 7604(b)(2); *see also* 40 C.F.R. § 54.2(a). The district courts have jurisdiction over these suits. 42 U.S.C. § 7604(a).

The undersigned organizations hereby notify you that they intend to file a citizen suit against you, in your official capacity as EPA Administrator, for failure to timely respond to the State of Maryland's November 16, 2016 Petition as mandated by CAA Section 126 and to hold a public hearing on this matter. 42 U.S.C. § 7426(b). Pursuant to 40 C.F.R. § 54.3(a), each organization's address is listed below. The undersigned organizations intend to seek injunctive and declaratory relief, the costs of litigation, and other appropriate relief as allowed.

If you believe any of the foregoing information to be in error or would like to discuss the matters identified in this letter for any reason, please contact Graham McCahan at Environmental Defense Fund at (303) 447-7228 or gmccahan@edf.org.

Sincerely,

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