

ROCKY MOUNTAIN CLEAN AIR ACTION

1536 Wynkoop, Suite B501 • Denver, CO 80202 • (303) 454-3370

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

June 1, 2006

Stephen Johnson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Notice of Intent to Sue Over Unreasonable Delay in Responding to Petition to Require Revision of the Colorado SIP Provisions on Excess Emissions During Upset Conditions

Dear Administrator Johnson:

Rocky Mountain Clean Air Action and Jeremy Nichols intend to sue you and the Environmental Protection Agency (“EPA”) for your failure to require revision of the Colorado Clean Air Act State Implementing Plan (“SIP”) at Colorado Common Provisions Regulation, 5 CCR 1001-2 § II(E) related to upset conditions and breakdowns (hereafter “upset conditions exemption”) in response to a Petition submitted pursuant to the Administrative Procedure Act (“APA”), 5 USC § 551, *et seq.* and the Clean Air Act (“CAA”), 42 USC § 7401, *et seq.* We intend to bring a suit 180 days from the date of this letter, or shortly thereafter, under section 304 of the federal Clean Air Act, as Amended, 42 U.S.C. § 7604, against you for your unreasonable delay in responding to our December 22, 2005 Petition to Require Revision of the Colorado SIP Provisions on Excess Emissions During Upset Conditions (hereafter “Petition”) by requiring revision of the Colorado SIP with regards to the upset conditions exemption. The suit will seek injunctive and declaratory relief, the cost of litigation, and other relief.

Rocky Mountain Clean Air Action is a newly founded, Denver, Colorado based citizens group dedicated to protecting clean air in Colorado and the surrounding Rocky Mountain region for the health and sustainability of local communities. Jeremy Nichols is a resident of Denver, Colorado, an avid bicycle rider, outdoor enthusiast, volunteer for Rocky Mountain Clean Air Action, and father who is deeply concerned about air quality in Colorado and its effects to the health and welfare of people, plants, and animals. We are adversely affected by EPA’s failure to respond to the petition by requiring revision of the Colorado SIP with regards to the upset conditions exemption.

The upset conditions exemption in the Colorado SIP has been deemed by EPA to be illegal and has recommended the state of Colorado revise its SIP, but has yet to actually require a SIP revision, or formally issue a SIP call under the CAA. In fact, EPA has already expressed agreement with the Petition

In a July 13, 2001 memo to the Colorado Air Pollution Control Division, EPA Region 8 Director of the Air and Radiation Program stated:

We believe that the existing upset rule does not conform to the Clean Air Act requirements to protect NAAQS and PSD increments and should be revised. Specifically, the existing upset rule allows an exemption from enforcement (“shall not be deemed to be in violation”) for excess emissions that occur during certain defined “upset conditions.” It is our interpretation that the Clean Air Act requires that all periods of excess emissions must be treated as violations and not exempted from enforcement.

Memorandum from Richard R. Long, Region VIII Dir., Air and Radiation Program to Margie Perkins, Director, Colorado Air Pollution Control Division (June 13, 2001) (emphasis added).

In a subsequent May 7, 2002 memo to the Colorado Air Pollution Control Division, EPA Region 8 Director of the Air and Radiation Program stated further:

Our interpretation of the Clean Air Act regarding excess emissions during startup, shutdown and malfunctions is that they must be treated as violations of the relevant emission limitations....Accordingly, any provision that allows for an automatic exemption for excess emissions is prohibited.

Memorandum from Richard R. Long, Region VIII Dir., Air and Radiation Program to Douglas Lempke, Technical Secretary, Colorado Air Quality Control Comm’n and Margie Perkins, Dir., Colorado Air Pollution Control Division (May 7, 2002) (emphasis added).

Most recently, in a 2006 memo, EPA Region 8 Director of the Air and Radiation Program expressed agreement stated:

[W]e agree with the petitioners that Colorado’s upset rule does not meet the requirements of the Clean Air Act and that changes to the rule are needed.

Memorandum from Richard R. Long, Region VIII Dir., Air and Radiation Program to Margie Perkins, Dir., Colorado Air Pollution Control Division (April 14, 2006) (emphasis added).

On December 22, 2005, we submitted our Petition to Require Revision of the Colorado SIP Provisions on Excess Emissions During Upset Conditions to the Administrator pursuant to the APA. 5 USC § 551, *et seq.* The APA specifically requires that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 USC § 553(e).

The SIP is a living document which the State and EPA can, from time to time, revise as necessary. Approval and Promulgation of Air Quality Implementation Plans; Vermont, 68 Fed. Reg. 34,808-34813 (June 11, 2003) (codified at 40 CFR Part 52) (final rule; notice of administrative change). EPA is authorized pursuant to the CAA to initiate rulemaking proceedings and to call for SIP revisions when a SIP is inadequate or fails to meet the requirements of the CAA. See 42 USC § 7410. Further, EPA can “require the State to revise the SIP as necessary to correct such inadequacies.” 42 USC § 7410(k)(5) (emphasis added).

The APA requires EPA to conclude matters raised in petitions within a reasonable time. 5 USC §§ 555(b). Petitioners requested the EPA expedite resolution of this matter to close a significant and illegal loophole within the Colorado Regulations with regards to the upset conditions exemption that is incorporated into its SIP. This request was made in light of the fact that the EPA already stated that the upset conditions exemption within the Colorado SIP was illegal and therefore inadequate. The EPA echoed this statement on April 14, 2006, even expressing agreement with the Petition. The failure to respond to the December 22, 2005 petition by requiring revision of the Colorado SIP with regards to the upset conditions exemption in accordance with 42 USC § 7410 as of the date of this letter constitutes unreasonable delay under the APA and the CAA. 5 USC § 706(1).

The CAA, as Amended, provides that any citizen may file suit to compel action unreasonably delayed by the Administrator. 42 U.S.C. § 7604(f). Pursuant to the CAA, after 180 days, or shortly thereafter, we intend to sue you for your unreasonable delay in responding to our December 22, 2005 petition by requiring revision of the Colorado SIP with regards to the upset conditions exemption in accordance with 42 USC § 7410.

In keeping with the requirements of federal regulations, you are hereby notified that the full name and address of the persons giving the notice are Rocky Mountain Clean Air Action and Jeremy Nichols, 1536 Wynkoop, Suite B501, Denver, CO 80202. If you wish to discuss this matter, please contact us at the addresses indicated below.

Sincerely,

Jeremy Nichols
Rocky Mountain Clean Air Action
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Denver, CO 80202
(303) 454-3370
jeremy@voiceforthewild.org

cc: Richard Long, Director, Air and Radiation Program, U.S. Environmental Protection Agency, Region 8
Margie Perkins, Director, Colorado Air Pollution Control Division