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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

April 13, 2011

Lisa P. Jackson
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Clean Air Act Notice of Intent to Sue pursuant to 42 U.S.C. § 7604(b)(2) for failure to take final action on a state implementation plan submittal under 42 U.S.C. § 7410(k)(2) and (3)

Dear Administrator Jackson,

On behalf of the Kentucky Environmental Foundation (“KEF”) I write to inform you that KEF intends to file suit against you for “a failure of the Administrator [of the United States Environmental Protection Agency (EPA)] to perform any act or duty [] which is not discretionary with the Administrator” within the meaning of the Clean Air Act. 42 U.S.C. § 7604(a)(2). Specifically, under 42 U.S.C. §§ 7410(k)(2) and (3) EPA must take final action, and publish notice of that action in the Federal Register, on three Kentucky state implementation plan submittals addressing the 1997 annual particulate matter less than 2.5 microns in diameter (“PM2.5”) requirements for the nonattainment areas of Cincinnati-Hamilton, Louisville and Huntington-Ashland. As explained below, EPA has violated this mandatory duty.

EPA should remedy this violation of its mandatory duty to better protect the people of Kentucky, as well as people in surrounding areas, from the harmful effects of PM2.5. PM2.5 is “produced chiefly by combustion processes and by atmospheric reactions of various gaseous pollutants,” thus “[s]ources of fine particles include . . . motor vehicles, power generation, combustion sources at industrial facilities, and residential fuel burning.” 71 Fed. Reg. 61144, 61146 (Oct. 17, 2006). The effects of PM2.5 on humans are profound. For example, short-term exposure to PM2.5 is associated with “premature mortality, hospital admissions or emergency

department visits for respiratory disease, and effects on lung function and symptoms.” 71 Fed. Reg. 2619, 2627 (Jan. 17, 2006). Furthermore, PM2.5 adversely affects our natural surroundings. For example, regional haze is caused in part by particulates in the air scattering sunlight. EPA, Haze- How Air Pollution Affects the View (available at http://www.epa.gov/ttn/oarpg/t1/fr_notices/haze.pdf). It is vital that EPA take the required action in order to strengthen protection of public health and welfare against PM2.5.

Under the Clean Air Act, EPA is required to determine whether a state implementation plan submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B). If, six months after a state submits a state implementation plan submittal, EPA has not made a completeness finding and has not found the submittal to be incomplete, the submittal is deemed administratively complete by operation of law. *Id.* EPA must take final action on an administratively complete submittal by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of the completeness finding. 42 U.S.C. §§ 7410(k)(2) and (3). EPA has violated this mandatory duty for the following submittals.

a. Cincinnati-Hamilton

EPA has failed to take final action on Kentucky’s submittal for its portion of the 1997 PM2.5 NAAQS nonattainment area of Cincinnati-Hamilton. On June 5, 2009, either EPA or operation of law deemed Kentucky’s submittal, which included the attainment demonstration, contingency measures, emission inventory and reasonably available control measures/reasonably available control technology (“RACM/RACT”) requirements for the Cincinnati-Hamilton area, administratively complete. *See* EPA, Status of SIP Requirements for Designated Areas – Kentucky: Cincinnati-Hamilton (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elebypoll.html#pm-2.5_1997_754) (last viewed April 13, 2011). Thus, the Clean Air Act requires EPA to take final action on Kentucky’s submittal addressing the 1997 PM2.5 nonattainment area of Cincinnati-Hamilton by approving in full, disapproving in full, or approving in part and disapproving in part by no later than June 5, 2010. *See* 42 U.S.C. §§ 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

b. Louisville

EPA has failed to take final action on Kentucky’s submittal for its portion of the 1997 PM2.5 NAAQS nonattainment area of Louisville. On June 5, 2009, either EPA or operation of law deemed Kentucky’s submittal, which included the attainment demonstration, contingency measures, emission inventory and RACM/RACT requirements for the Louisville area, administratively complete. *See* EPA, Status of SIP Requirements for Designated Areas – Kentucky: Louisville (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elebypoll.html#pm-2.5_1997_775) (last viewed April 13, 2011). Thus, the Clean Air Act requires EPA to take final action on Kentucky’s submittal addressing the 1997 PM2.5 nonattainment area of Louisville by approving in full, disapproving in full, or approving in part and disapproving in part by no later than June 5,

2010. *See* 42 U.S.C. §§ 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

EPA's proposal to determine Louisville has attained the 1997 PM_{2.5} NAAQS does not satisfy the Administrator's mandatory duty to take final action. *See* 76 Fed. Reg. 12861 (March 9, 2011). Proposed rules have no legal effect and provide no environmental benefit. Furthermore, EPA has in the past taken years or even a decade or more to finalize proposed rules or in some cases, has never finalized a proposed rule. Moreover, while such a determination does suspend the obligation of a state to submit specific SIP components, this notice is about EPA's mandatory duty to take final action by approving, disapproving, or approving in part and disapproving in part once a state submits SIP components. 42 U.S.C. §§ 7410(k)(2) and (3). The regulations permitting a determination of "has attained" do not suspend this obligation. *See* 40 CFR 51.1004(c) (2010); 40 CFR 51.918 (2010). *See also* 76 Fed. Reg. 6590, 6592 (Feb. 7, 2011) (Although 40 CFR 51.918, which uses the same language as 40 CFR 51.1004(c), suspends a state's requirements to submit an attainment demonstration and RACM, RFP plan, contingency measures, and any other planning requirements related to attainment of the NAAQS for as long as the area continues to attain the NAAQS, "EPA is not precluded from acting upon these elements, if [the state] submits them for EPA review and approval."). Thus, EPA is still in violation of its mandatory duty to take final action on Kentucky's submittal addressing the Louisville 1997 PM_{2.5} NAAQS nonattainment area by approving in full, disapproving in full, or approving in part and disapproving in part.

c. Huntington-Ashland

EPA has failed to take final action on Kentucky's submittal for its portion of the 1997 PM_{2.5} NAAQS nonattainment area of Huntington-Ashland. On June 5, 2009, either EPA or operation of law deemed Kentucky's submittal, which included the contingency measures, emission inventory and RACM/RACT requirements for the Huntington-Ashland area, administratively complete. *See* EPA, Status of SIP Requirements for Designated Areas – Kentucky: Huntington-Ashland (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elembypoll.html#pm-2.5_1997_764) (last viewed April 13, 2011). Thus, the Clean Air Act requires EPA to take final action on Kentucky's submittal addressing the contingency measures, emission inventory and RACM/RACT requirements for the 1997 PM_{2.5} nonattainment area of Huntington-Ashland by approving in full, disapproving in full, or approving in part and disapproving in part by no later than June 5, 2010. *See* 42 U.S.C. §§ 7410(k)(2) and (3). EPA has failed to do so in violation of its mandatory duty.

As required by 40 C.F.R. § 54.3, the person providing this notice is:

Kentucky Environmental Foundation
P.O. Box 467
Berea, KY 40403
Phone: (859) 986-0868

Administrator Lisa P. Jackson

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While EPA regulations require this information, please direct all correspondences and communications regarding this matter to the undersigned counsel.

KEF and its counsel would prefer to resolve this matter without the need for litigation. Quickly and fairly resolving this matter would also be a clear indication that you do indeed intend to respect the rule of law. Therefore we look forward to EPA contacting undersigned counsel to resolve this matter. If we do not hear from EPA in 60 days, however, we will have to assume that you are not interested in settling this matter and file or amend a complaint.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Schroeder', with a long horizontal flourish extending to the right.

Darin Schroeder
Counsel for KEF