UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT,
Plaintiff.

CIVIL NO.

v.

SCOTT PRUITT, in his official capacity as Administrator of the United States Environmental Protection Agency; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.

Defendants.

MAY 16, 2017

COMPLAINT

Plaintiff State of Connecticut brings this action to compel Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency (EPA), and the EPA (collectively, Defendants) to comply with the nondiscretionary duty under the Clean Air Act (Act) to act on a petition submitted on June 1, 2016 by the State to EPA under section 126 of the Act, 42 U.S.C. § 7426. Section 126, regarding interstate pollution abatement, mandates action by EPA on such a petition with 60 days of receipt. The petition seeks a finding by EPA that emissions from the Brunner Island Steam Electric Station (Brunner Island) in York County, Pennsylvania are significantly contributing to Connecticut's nonattainment of the 2008 ozone national ambient air quality standards (NAAQS), and/or are interfering with Connecticut's maintenance of the same. The State hereby seeks an order requiring EPA, by dates certain, to provide for public hearing with regard to the State's section 126 petition, and to either make the requested finding or deny the section 126 petition.

JURISDICTION AND VENUE

- 1. This Court has jurisdiction pursuant to section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2), which authorizes any person, after duly giving notice, to commence a citizen suit against EPA where the Administrator has failed to perform a nondiscretionary duty under the Act.
- 2. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) because the Administrator's failure to perform his nondiscretionary duty to timely take action on the State's section 126 petition is adversely impacting areas within this judicial district, in that Connecticut is in nonattainment with the ozone NAAQS based in part on the significant contribution of air pollution from Brunner Island, and the citizens and residents on whose behalf Connecticut brings this action reside in this district.

PARTIES

- 3. Plaintiff State of Connecticut is a sovereign entity that brings this action on behalf of its citizens and residents.
- 4. The Plaintiff is a "person" as defined in the applicable provision of the Act, 42 U.S.C. § 7602(e).
- 5. Defendant Scott Pruitt is Administrator of the EPA and is sued in his official capacity. The Administrator is charged with implementation and enforcement of the Act, including the requirements to hold a public hearing on the section 126 petition and to timely make the requested finding or to deny the section 126 petition. 42 U.S.C. § 7426(b).
- 6. Defendant EPA is an executive agency of the federal government charged with implementing and enforcing the Act, in coordination with the States.

STATUTORY FRAMEWORK

- 7. Pursuant to sections 108 and 109 of the Act, 42 U.S.C. §§ 7408 & 7409, EPA is required to establish and periodically revise NAAQS for certain pollutants, such as ozone. States are primarily responsible for ensuring attainment and maintenance of a NAAQS once EPA has established it.
- 8. Under section 110 of the Act, states submit, for EPA's approval, state implementation plans that provide for the attainment and maintenance of the NAAQS through control programs directed to sources of the relevant pollutants. 42 U.S.C. § 7410. The "good neighbor" provision in section 110(a)(2)(D) of the Act provides that "[e]ach implementation plan submitted by a State under this chapter shall...contain adequate provisions (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard...," and shall contain adequate provisions "(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement)." 42 U.S.C. § 7410(a)(2)(D).
- 9. Pursuant to section 126 of the Act, 42 U.S.C. § 7426(b), "[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 7410(a)(2)(D)(ii) of this title or this section."

- 10. 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." (Emphasis added.) 42 U.S.C. § 7426(b).
- 11. 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. The Administrator may permit the continued operation of a source referred to in paragraph (2) 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 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).

FACTUAL BACKGROUND

A. Ozone Pollution and the Significant Contribution of Brunner Island to Non-Attainment with the 2008 Ozone NAAQS in Connecticut

- 12. Ozone is a colorless, odorless gas that forms when other atmospheric pollutants, known as ozone "precursors," such as volatile organic compounds (VOC) and nitrogen oxide (NOx), react in the presence of sunlight.
- 13. EPA has found significant negative health effects in individuals exposed to elevated levels of ozone, including coughing, throat irritation, lung tissue damage, and aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema. Exposure to ozone has also been linked to premature mortality. Some subpopulations are particularly at risk from exposure to ozone pollution, including children, the elderly, and those with existing lung diseases, such as asthma.

- 14. EPA revised the ozone NAAQS in 2008 and again in 2015.
- 15. Despite enacting stringent controls at significant expense, Connecticut is in nonattainment with the 2008 ozone NAAQS and is currently measuring well above the 2015 NAAQS.
- 16. Brunner Island is a bituminous coal-fired electricity generating facility owned by Talen Energy and located in York County in southeastern Pennsylvania on the Susquehanna River, approximately 175 miles from the Connecticut border.
- 17. As demonstrated in the State's 126 petition, including its technical support documents, modeling and analysis have shown that interstate transport of air pollution from Brunner Island, a stationary source which is upwind of Connecticut, contributes significantly to nonattainment of the 2008 ozone NAAQS within Connecticut, and is projected to contribute to nonattainment of the 2015 ozone NAAQS in Connecticut.
- 18. As set forth in the petition, despite the existence of cost-effective and readily available control strategies to eliminate its significant contribution, Brunner Island has failed to take reasonable and necessary steps to control emissions as required by sections 126 and 110. For example, Brunner Island has no post-combustion pollution controls in place to limit the release of the ozone precursor pollutant NOx.

B. The State's Section 126 Petition and EPA's Failure to Timely Act on the Petition

19. On June 1, 2016, the State of Connecticut, through its Department of Energy and Environmental Protection (DEEP), submitted a section 126 petition to EPA, including technical support documents. *See* Exhibit 1. The petition requested that EPA make a finding that emissions from Brunner Island are significantly contributing to Connecticut's nonattainment of the 2008 NAAQS, and/or are interfering with Connecticut's maintenance of the same. The State also requested that EPA hold the statutorily-required public hearing with regard to the petition.

- 20. The petition, and the technical support documents attached to it, demonstrated that interstate transport of emissions from Brunner Island significantly contributes to nonattainment of the 2008 ozone NAAQS in Connecticut, in violation of Sections 126 and 110 of the Act.
- 21. EPA has failed to hold a public hearing or act on the State's petition, despite a legal obligation pursuant to section 126 to do so within 60 days of receipt.
- 22. On July 25, 2016, EPA issued itself an extension of time to act upon the June 1, 2016 petition, citing section 307(d)(10) of the Act, which provides that "[e]ach statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection." 42 U.S.C. § 7607(d)(10). Without conceding that any such extension was appropriate or authorized, it has in any case expired, and is not subject to renewal.
- 23. Despite the passage of more than eleven months since submission, and despite its statutory mandate to timely act, EPA has to date taken no action on the State's section 126 petition in regard to interstate transport of emissions from Brunner Island.
- 24. A finding by EPA that Brunner Island is in violation of Section 126 will require Brunner Island, within three months, to either cease operations or to operate subject to an EPA-imposed incremental schedule to come into compliance as expeditiously as possible, but in no case later than three years after the date of the finding. 42 U.S.C. § 7426(c). This will reduce precursor emissions that significantly contribute to 2008 ozone NAAQS nonattainment in

Connecticut and will result in a more equitable distribution of the burden of controlling ozone pollution due to interstate transport.

C. The State's Notice of Violation to EPA

- 25. On March 9, 2017, the State sent a citizen suit notice letter pursuant to 42 U.S.C. § 7604 by certified mail to the Administrator notifying him of the State's intention to commence suit against him and the EPA if they did not act within 60 days to hold a public hearing with regard to the State's section 126 petition, and make the requested finding or deny the petition. *See* Exhibit 2.
- 26. According to the United States Postal Service receipt, the Administrator received the letter on March 14, 2017. *Id.* More than 60 days have passed since EPA received the notice letter, and EPA has not taken the statutorily-required actions.

<u>COUNT ONE</u> <u>Failure to Perform a Nondiscretionary Duty</u> to Timely Take Action on a Section 126 Petition

- 27. As set forth above, the Administrator had nondiscretionary legal duties to hold a public hearing on the State's section 126 petition and to timely make the requested finding or to deny the petition within 60 days of receipt.
- 28. The Administrator's failure to hold a public hearing on the State's section 126 petition and to make the requested finding or to deny the petition within 60 days of receipt are violations of 42 U.S.C. § 7426(b), which continue to this day.
- 29. These violations constitute a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" under 42 U.S.C. § 7604(a)(2).

30. The Administrator's inaction on the section 126 petition has harmed and continues to harm the State and its citizens and residents, by delaying action to address the interstate transport of air pollution from Brunner Island, which significantly contributes to nonattainment of the 2008 ozone NAAQS in Connecticut, to the detriment of the health and welfare of the State's citizens and residents.

PRAYER FOR RELIEF

WHEREFORE, the State of Connecticut respectfully requests that this Court enter

judgment against Defendants as follows:

Α. Declare that Defendants are in violation of section 126 of the Act for failing to

timely hold a public hearing with regard to the State's section 126 petition, and for failing to

timely make the requested finding or to deny the petition;

В. Enjoin Defendants, by dates certain, to (1) hold a public hearing on the State's

section 126 petition, and (2) make the requested finding or to deny the section 126 petition, after

considering the comments at public hearing;

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

D. Retain jurisdiction over this matter until such time as Defendants have made the

requested finding or denied the State's section 126 petition, after having held a public hearing

with regard to the petition; and

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

Dated: May 16, 2017

THE STATE OF CONNECTICUT

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