

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

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**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 25<sup>th</sup> 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. )

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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<sub>x</sub> 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 NOx 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<sub>x</sub> in the presence of heat and sunlight.

37. Exposure to NO<sub>x</sub>, 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<sub>x</sub>”), 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.<sup>1</sup> 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

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<sup>1</sup> 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](https://www.epa.gov/sites/production/files/2015-11/documents/air_quality_modeling_tsd_proposed_rule.pdf).

44. NO<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> controls at

the 36 EGUs are not being run effectively on every day of the ozone season (defined in Maryland regulations as May 1<sup>st</sup> to September 30<sup>th</sup> of a single year. COMAR 26.11.38.01.B(4)). In 2015, approximately 39,000 tons of NO<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> 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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