

The EPA's Dereliction of Duty

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Congressional Intent

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Executive Summary

Congress designed the Clean Air Act to act like a ratchet that, over time, will effectively squeeze all unduly harmful pollution out of the economy. Under the Act, stationary sources of air pollution—any fixed emitter of air pollutants, such as power plants, refineries, or factories—are subject to a handful of major regulations that the U.S. Environmental Protection Agency (EPA) is required to review and, if necessary, update periodically. In this manner, the Act's mandates become ever more stringent.

Four programs account for virtually all Clean Air Act regulations for stationary sources. They all require periodic renewal.

- The National Ambient Air Quality Standards (NAAQS), the primary regulatory regime established by the Clean Air Act, must be renewed by the agency every five years.
- The EPA's technology-forcing regulation, known as the New Source Performance Standards, must be reviewed every eight years.
- The Clean Air Act's program for hazardous air pollutants also must be reviewed every eight years.
- And the Regional Haze rule, whose purpose is to improve the view at national parks, is updated every 10 years.

By including in the Clean Air Act these date-certain responsibilities by which the EPA must update major rules, Congress sought to set the agency's priorities, rather than give it the ability to set its own agenda.

This oversight structure sets the Clean Air Act apart from most non-environmental regulatory regimes, which are characterized by broad congressional delegations of power to pursue the "public interest" as the agency sees fit. The Clean Air Act does not grant open-ended authority to the EPA. Rather, it is replete with non-discretionary and deadline-bound duties meant to constrain the agency's freedom of action.

This study assesses the EPA's performance of its core Clean Air Act responsibilities, reviewing more than 1,000 deadlines across every major regulatory program for stationary sources. The results indicate that the EPA's deadline performance is woeful. To date, 84 percent of the agency's Clean Air Act deadlines are late or outstanding by an average of 4.3 years. For industrial sector-wide regulations, such as New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants, the agency was late on average by 7.8 years. In reviewing State Implementation Plans (SIPs) to meet ambient air quality standards, the agency was late on average by 1.9 years.

The EPA, not Congress, is to blame for the agency's woeful record in achieving its Clean Air Act deadlines. Timely performance of Clean Air Act deadlines never has been a priority in the EPA's strategic planning for its annual budget request. In addition, the agency never has come to Congress claiming the Clean Air Act imposes too many tight deadlines and seeking relief. Rather than pursuing its non-discretionary responsibilities as stipulated by Congress, the EPA has given priority to discretionary programs of its own choosing.

The agency's failure to meet its deadline raises a number of troubling issues. For starters, the EPA cannot be said to be faithfully executing the law, as is required by the

Constitution, if it eschews congressional directives to instead focus on its own priorities. The EPA's woeful performance in meeting its deadlines also creates the opportunity for sue-and-settle lawsuits that empower ideological environmental activists to set agency policy. Finally, the agency's lack of timeliness in meeting its Clean Air Act responsibilities to review State Implementation Plans has forced states to chase moving compliance targets.

Congress has many tools available to remedy the constitutional and pragmatic concerns associated with the EPA's failure to meet its deadlines. For starters,

Congress can press the agency through greater oversight. Lawmakers should demand to know why the agency rejects its statutory priorities in favor of discretionary policies of its own choosing.

Congress also can rein in the EPA through the setting of budget priorities. If the agency refuses to make a priority of its statutory duties, then Congress should force the EPA's hand through the power of the purse. Lawmakers should attach conditions to EPA appropriations that clearly require the agency to complete its non-discretionary responsibilities under the Clean Air Act, and not allow the agency to freelance.

Introduction

Congress designed the Clean Air Act to act like a ratchet that, over time, will effectively squeeze all unduly harmful pollution out of the economy. Under the Act, stationary sources of air pollution—any fixed emitter of air pollutants, such as power plants, refineries, or factories—are subject to a handful of major regulations that the U.S. Environmental Protection Agency (EPA) is required to review and, if necessary, update periodically. In this manner, the Act’s mandates become ever more stringent.

Four programs account for virtually all Clean Air Act regulations for stationary sources. They all require periodic renewal.

- The National Ambient Air Quality Standards (NAAQS), the primary regulatory regime established by the Clean Air Act, must be renewed by the agency every five years.¹
- The EPA’s technology-forcing regulation, known as the New Source Performance Standards, must be reviewed every eight years.²
- The Clean Air Act’s program for hazardous air pollutants also must be reviewed every eight years.³
- And the Regional Haze rule, whose purpose is to improve the view at national parks, is updated every 10 years.⁴

By including in the Clean Air Act these date-certain responsibilities by which the EPA must update major rules, Congress sought to set the agency’s priorities, rather than give the agency the ability to set its own agenda. This oversight structure sets the Clean Air Act apart from most non-environmental regulatory regimes, which are characterized by broad congressional delegations of power to pursue the “public interest” as the agency sees fit.⁵ The Clean Air Act does not grant open-ended authority to the EPA. Rather, it is replete with non-discretionary and deadline-bound duties meant to constrain the agency’s freedom of action.⁶

This study assesses the EPA’s performance of its core Clean Air Act responsibilities, reviewing more than 1,000 deadlines across every major regulatory program for stationary sources. The results indicate that the EPA’s deadline performance is woeful. To date, 84 percent of the agency’s Clean Air Act deadlines are late or outstanding by an average of 4.3 years. For industrial sector-wide regulations, such as New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants, the EPA was late on average by 7.8 years. In reviewing State Implementation Plans (SIPs) to meet ambient air quality standards, the agency was late on average by 1.9 years.

By including in the Clean Air Act these date-certain responsibilities by which the EPA must update major rules, Congress sought to set the agency’s priorities.

During the time the EPA has refused to make deadlines a priority, the agency has elevated climate change to become its number one goal. This is troubling, because Clean Air Act deadlines are non-discretionary commands from Congress, whereas the EPA's climate policies are largely discretionary rules.

As Table 1 shows, 84 percent of the EPA's Clean Air Act deadlines are either performed late or are currently outstanding. Table 2 shows how late the EPA is in performing its deadline-bound duties for each regulatory program analyzed in this study.

Overall, the EPA's actions are late by an average of 4.3 years. For industrial sector-wide regulations like New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants, the EPA was late on average by 7.8 years. For reviewing State Implementation Plans, the agency was late on average by 1.9 years.

The EPA's poor record on achieving its date-certain duties raises an obvious question: Who is at fault? Did Congress impose far more deadlines than the

agency can possibly achieve?

Alternatively, is the EPA to blame for neglecting its date-certain duties? As the evidence presented in the first section shows, the EPA is responsible for this ongoing failure. Timely performance of Clean Air Act deadlines never has been a priority in the EPA's strategic planning for its annual budget request. In addition, the agency never has come to Congress claiming the Clean Air Act imposes too many tight deadlines and seeking relief.

The second section examines the unfortunate consequences of the EPA's failure to meet its Congress-imposed deadlines. The first is constitutional. During the time the EPA has refused to make deadlines a priority, the agency has elevated climate change to become

Summary Table 1. Overview of deadline performance

Regulation	Late Performance	Duty Outstanding	On Time Performance	Not Yet Due
2008 Lead NAAQS 110(a)(2)(A)	27	18	6	
2010 NOX NAAQS 110(a)(2)(A)	8	28	12	2
2010 NOX NAAQS 110(a)(2)(D)(i)(I)	9	12	7	3
2010 NOX NAAQS 110(a)(2)(D)(i)(II)	9	27	10	1
2006 PM2.5 NAAQS 110(a)(2)(A)	37	7	7	
2006 PM2.5 NAAQS 110(a)(2)(D)(i)(I)	27	9	9	1
2006 PM2.5 NAAQS 110(a)(2)(D)(i)(II)	28	17	6	
2008 Ozone NAAQS 110(a)(2)(A)	23	17	7	2
2008 Ozone NAAQS 110(a)(2)(D)(i)(I)	8	12	2	5
2008 Ozone NAAQS 110(a)(2)(D)(i)(II)	19	23	4	2
2010 SOX NAAQS 110(a)(2)(A)	8	27	6	4
2010 SOX NAAQS 110(a)(2)(D)(i)(I)	1	14		7
2010 SOX NAAQS 110(a)(2)(D)(i)(II)	5	33	3	4
1997 Ozone NAAQS 110(a)(2)(D)(i)(II)	15	12	18	
1997 PM2.5 NAAQS 110(a)(2)(D)(i)(II)	23	6	17	
Regional Haze	38		6	
NSPS 111(b)(1)(B)	13	50	3	
NESHAP 112(d)(3)	124			
NESHAP 112(d)(6)	41	47		6
NESHAP 112(f)(2)	41	65		18

Summary Stats
Total Deadlines 1106
Past Due/Outstanding 928
0.84

Summary Table 2. Overview of EPA's Lateness

Regulation	% of Date-Certain Duties EPA Is Late	Average Days Late	% of Date-Certain Duties Outstanding
2008 Lead NAAQS 110(a)(2)(A)	24	630	35
2010 NOX NAAQS 110(a)(2)(A)	16	344	56
2010 NOX NAAQS 110(a)(2)(D)(i)(I)	29	326	39
2010 NOX NAAQS 110(a)(2)(D)(i)(II)	19	430	57
2006 PM2.5 NAAQS 110(a)(2)(A)	73	585	14
2006 PM2.5 NAAQS 110(a)(2)(D)(i)(I)	59	575	20
2006 PM2.5 NAAQS 110(a)(2)(D)(i)(II)	55	870	33
2008 Ozone NAAQS 110(a)(2)(A)	47	408	35
2008 Ozone NAAQS 110(a)(2)(D)(i)(I)	30	811	44
2008 Ozone NAAQS 110(a)(2)(D)(i)(II)	40	442	48
2010 SOX NAAQS 110(a)(2)(A)	60	326	18
2010 SOX NAAQS 110(a)(2)(D)(i)(I)	5	491	64
2010 SOX NAAQS 110(a)(2)(D)(i)(II)	11	326	73
1997 Ozone NAAQS 110(a)(2)(D)(i)(II)	33	1038	27
1997 PM2.5 NAAQS 110(a)(2)(D)(i)(II)	50	1221	13
Regional Haze	86	645	0
NSPS 111(b)(1)(B)	20	7527	76
NESHAP 112(d)(3)	100	1765	0
NESHAP 112(d)(6)	33	2441	52
NESHAP 112(f)(2)	44	2441	50

Overall average late (days)	1579
NSPS, NESHAP average late (days)	2836
SIP Review average late (days)	702

States, not environmental special interests, are supposed to act as the agency's partners.

its number one goal. This is troubling, because Clean Air Act deadlines are non-discretionary commands from Congress, whereas the EPA's climate policies are largely discretionary rules. The agency cannot be said to "take care that the law is faithfully executed" when it ignores its statutory responsibilities and instead gives priority to discretionary goals of the agency's own choosing.

The EPA's dereliction of duty also results in bad policy. For example, it leads to a phenomenon known as "sue and settle." Under the Clean Air Act "citizen suit" provision, individuals—in practice, environmental advocacy groups—are empowered to sue the agency to compel performance of non-discretionary duties. A missed

deadline is a plain violation that gives rise to such suits. Rather than litigate, the EPA settles virtually all of these cases. Often, states are shut out of these settlement talks, which are intended to decide how to allocate the agency's resources. Thus, through sue and settle, environmental special interests have a greater say on the agency's regulatory priorities than Congress and the states. This is not how the Clean Air Act's system of cooperative federalism is supposed to work. States, not environmental special interests, are supposed to act as the agency's partners, in order to tailor compliance plans in ways that meet each state's particular needs.⁷

The EPA's missed deadlines also force states to try to comply with moving

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targets. In order to instruct states what they are required to include in their State Implementation Plans (SIPs) to achieve national air quality standards, the EPA periodically issues guidance documents. However, the agency has been so late in reviewing SIPs that the compliance instructions often change during the review period. In other words, states frequently submit plans based on one set of guidance, only to have their plans judged by another.

Methodology

The responsibilities covered in this study account for virtually all Clean Air Act programs for stationary sources. Using database searches of the *Federal Register*, the *Code of Federal Regulations*, and public data made available by the EPA,⁸ this study examines the agency's performance in timely meeting deadlines for 11 discrete duties across four major Clean Air Act provisions:

1. NAAQS SIP Review;
2. Regional Haze Rule;
3. New Source Performance Standards; and
4. National Emissions Standards for Hazardous Air Pollutants.

NAAQS SIP Review

Under the Clean Air Act's National Ambient Air Quality Standards program, the EPA is required to establish nationwide air quality

standards for six "criteria" pollutants: carbon monoxide, nitrogen oxides, ozone, sulfur dioxides, lead, and particulate matter.⁹ These standards must be set at a level that is "requisite to protect public health" with an "adequate margin of safety."¹⁰ The EPA is required to review and, if necessary, update these NAAQS every five years.¹¹

After the EPA establishes or updates any one of these six NAAQS, states must submit compliance strategies, known as State Implementation Plans, by which the state intends to achieve the NAAQS.¹² After a state submits an SIP, the Clean Air Act requires that the agency accept or reject the plan within 18 months.¹³

By statute, SIPs must contain a number of criteria.¹⁴ Although these elements are known collectively as "infrastructure requirements," they are dissimilar enough for the EPA to review them separately rather than as a group. This study focuses on the three primary infrastructure programs:

- Clean Air Act Section 110(a)(2)(A) requires "enforceable emission limitations ... schedules and timetables for compliance, as may be necessary or appropriate to meet the [NAAQS]."¹⁵
- Clean Air Act Section 110(a)(2)(D)(I), known as the "Good Neighbor" provision, requires measures to ensure

that individual SIPs do not interfere with downwind states' compliance of a given NAAQS.¹⁶

- Clean Air Act Section 110(a)(2)(D)(II) requires measures to ensure that states' upwind emissions do not interfere with downwind states' compliance with Clean Air Act regulations to protect visibility.¹⁷

For NAAQS, the study examines the EPA's performance in timely reviewing state SIP submissions for each NAAQS promulgated in the last two decades:

- 1997 Ozone NAAQS¹⁸
- 1997 PM2.5 NAAQS¹⁹
- 2006 PM2.5 NAAQS²⁰
- 2008 Lead NAAQS²¹
- 2008 Ozone NAAQS²²
- 2010 Nitrogen Dioxide²³
- 2010 Sulfur Dioxide NAAQS²⁴

Only one of the three infrastructure requirements (§110(a)(2)(D)(II)) was analyzed for the 1997 Ozone NAAQS and the 1997 PM2.5 NAAQS.

Convoluting litigation surrounding judicial review rendered the other two infrastructure requirements less representative for these particular NAAQS. Similarly, only one of the three infrastructure requirements (§110(a)(2)(A)) was analyzed for the 2008 Lead NAAQS. This is due to the fact that interstate emissions of lead are unregulated under §§110(a)(2)(D)(I) and 110(a)(2)(D)(II).

Regional Haze Rule

In 1977, Congress amended the Regional Haze program to the Clean Air Act.²⁵ The purpose of the Regional Haze provision is to protect and improve the view at 156 federal National Parks and Wilderness Areas in 36 states.²⁶ Under the program, states are required to submit to the EPA plans to make "Reasonable Progress" towards a goal of pristine air by 2064.²⁷ Upon receipt of a state's Regional Haze plan, the Clean Air Act requires the EPA to accept or reject the plan within a year.²⁸ This study examines the EPA's performance in timely reviewing the first set of state Regional Haze plans.

New Source Performance Standards

Clean Air Act §111(b) requires the EPA to establish emission standards, known as New Source Performance Standards (NSPS), for any category of new and modified stationary sources that the Administrator, in his or her judgment, finds "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."²⁹

Previously, the EPA has made endangerment findings and published NSPS regulations for more than 60 stationary source categories and subcategories, such as power plants, fertilizer manufacturers, and cement factories.³⁰ After promulgating a New Source Performance Standard, the

agency is required to review and, if necessary, update the regulation every eight years.³¹ This study examines the EPA's performance in timely reviewing these standards.

National Emissions Standards for Hazardous Air Pollutants

The National Emissions Standards for Hazardous Air Pollutants (NESHAP) was established in the original 1970 Clean Air Act and reformed substantially in the 1990 Clean Air Act Amendments.³² The NESHAP program applies to both "major" and "area" sources. "Major" sources are those that emit 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.³³ "Area" sources are defined simply as "any stationary source of hazardous air pollutants that is not a major source."³⁴ The EPA has established NESHAP standards for more than 120 industrial categories, including aluminum production and pesticide production.³⁵

In the 1990 Clean Air Act Amendments, Congress established a thorough timeline by which the EPA was required to promulgate NESHAP rules for all major and stationary sources.³⁶ Moreover, for all major sources, the EPA is required by Clean Air Act §112(f)(2) to conduct a residual risk review within eight years of the promulgation of the NESHAP in

order to determine whether additional controls are necessary.³⁷ For both major and area sources, Clean Air Act section 112(d)(6) requires the agency to review and, if necessary, update the NESHAP standards every eight years.³⁸ This study examines EPA's performance in timely reviewing NESHAP rules for stationary sources.

Who Is at Fault: Congress or the EPA?

Having determined that the EPA is not meeting its deadlines, it is necessary to ask why this is so. Is it because deadlines are impossible to meet? Or is the EPA shirking its responsibilities? Evidence regarding the agency's priority-setting supports the latter answer.³⁹

Under the 1993 Government Performance and Results Act, federal agencies are required to establish goals that guide the agency's policy making.⁴⁰ To that end, agencies issue five-year strategic plans that set the framework for both the agency's unified agenda entry and its budget.⁴¹ Not one of the EPA's strategic plans during the last two administrations has acknowledged the agency's woeful performance meeting its deadlines or otherwise made timely performance a priority.⁴² Moreover, this author can find no examples over the last two presidential administrations of congressional testimony or public statements whereby

EPA officials request that Congress cull Clean Air Act deadlines to lighten its workload.⁴³ Indisputably, the agency is able and willing to inform lawmakers when statutory deadlines get out of hand. During the Reagan administration, for example, agency officials complained to Congress and the public about the unreasonable deadlines imposed by the Resources Conservation and Recycling Act.⁴⁴

This is not to say the EPA altogether ignored its poor performance meeting Clean Air Act deadlines. Rather, the agency has addressed the problem in a half-hearted, desultory manner that befits its low priority status among its decision makers.

In 2007 and 2008, the agency employed a program known as EPAstat to track several rulemakings in order to monitor their adherence to an agreed-upon schedule for the completion of a standard set of development milestones along the regulatory process.⁴⁵ As intended by the agency, the EPAstat program would have identified and disseminated best practices for the timely completion of their duties. Whatever lessons were learned seem to have been quickly forgotten. I can find no trace of its summary findings, so it is unclear whether the program was completed. Given that the last mention of the program is in a blog post from early 2009, it appears that EPAstat was an afterthought in the late second term of the Bush administration,

and was immediately dropped by the Obama administration.⁴⁶

As during the Bush administration, the Obama administration's perfunctory effort to ameliorate its past-due Clean Air Act deadlines also began during the latter part of the President's second term. In February of 2014, the agency committed to work toward eliminating the backlog of State Implementation Plans that existed as of October 1, 2013 by the end of 2017.⁴⁷ There are two major flaws with this policy.

First, the agency's target is set to be accomplished at the end of the next president's first year, so it effectively punts the issue to the next administration. As noted, the Obama administration demurred on the Bush administration's EPAstat program. Likewise, there is nothing stopping the next administration from abandoning the current EPA's promise to clear its backlog of outstanding SIP reviews by the end of 2017.

Second, the agency's target for reducing backlogs is static, not cumulative. The agency's goal is measured against the number of overdue deadlines as of October 1, 2012. This makes no sense, because, the Clean Air Act is structured for rules to be reviewed and, if necessary, updated periodically. In this manner, hundreds of new deadlines to review SIPs will come due during the period—October 1, 2013 to December 31, 2017—when the agency is working on the "old" deadlines in the backlog.⁴⁸

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Why is the EPA giving priority to discretionary rules of its own choosing over non-discretionary duties imposed by Congress?

Finally, there is evidence that the agency has gotten worse performing its time-determined duties under the Clean Air Act. According to a 1993 report by the General Accounting Office (now the Government Accountability Office), the EPA met approximately 50 percent of its deadlines for reviewing State Implementation Plans.⁴⁹ Presently, the agency is meeting this responsibility for only 22 percent of its deadlines.

Why the EPA's Late Performance Matters 1: Constitutional Concerns

As explained above, the 1993 Government Performance and Results Act requires the EPA to establish goals that guide the agency's regulatory and budget processes. During the Bush and Obama administrations, the EPA has rendered two significant changes to its strategic goal for the Clean Air Act. The first, in the 2006 to 2011 strategic plan, was to include climate change mitigation as a component of the agency's top-line goal.⁵⁰ The second, in the 2011 to 2016 strategic plan, was to make climate change mitigation the agency's number one Clean Air Act goal.⁵¹ The agency's climate change spending has increased accordingly. In 2003, the agency spent \$130 million on climate change policy; this year, it will spend about \$200 million.⁵² Two years ago, EPA Administrator Gina McCarthy said

the agency was calling "all hands on deck" to fight global warming.⁵³

In this fashion, climate change mitigation climbed to the top of the EPA's to-do list, while timely performance of Clean Air Act deadlines remained a low priority. This is troubling, because virtually all of the agency's climate rules—including the Clean Power Plan,⁵⁴ Carbon Pollution Standards,⁵⁵ methane rules for new sources,⁵⁶ and hydroflourocarbon rules—are not required by the statute.⁵⁷ In contrast to the EPA's discretionary climate change regulatory regime, deadlines in the Clean Air Act are non-discretionary. They amount to congressional commands to set the agency's priorities. Why, then, is the EPA giving priority to discretionary rules of its own choosing over non-discretionary duties imposed by Congress?

The agency's lopsided priorities raise constitutional concern about the respective roles of the Executive and Legislative branches of government. The EPA does not possess an independent source of power; the agency's existence is a function only of enabling legislation and congressional appropriations. More to the point, Clean Air Act deadlines are express statutory directives, as was observed by Supreme Court Justice Tom Clark in a concurrence to the famous *Youngstown* ruling: "[T]he power to execute the laws starts and ends with

the laws Congress has enacted.”⁵⁸ The EPA can hardly be said to “take care that the laws be faithfully executed,” as is required by the Constitution,⁵⁹ if it ignores its statutory responsibilities and instead gives priority to policies of its own choosing.

Why the EPA’s Late Performance Matters 2: Moving the Goalposts

Under the Clean Air Act’s cooperative federalism framework, the EPA sets nationwide ambient air quality standards, which states achieve through strategies known as State Implementation Plans.⁶⁰ Clean Air Act Section 110(a)(2) specifies the substantive elements that make up the core components by which a given SIP implements, maintains, and enforces national standards.⁶¹ These key elements collectively are known as an “infrastructure” SIPs, which states are required to submit to the EPA for approval.⁶²

Of course, these infrastructure SIPs are not immune to politics. It is a bedrock principle of administrative law that presidential administrations of different stripes are allowed to adopt different, even inconsistent, policies.⁶³ In this manner, the EPA periodically issues guidance documents to direct states’ SIP formulation in accordance with the current administration’s political priorities. The problem is that the EPA has been so late in performing its date-certain duties that the review

period spans two or more contradictory sets of guidance across two different administrations. In practice, that means the rules of the game often change during the SIP review process. That is unfair to state governments and their constituents.

Consider the “Good Neighbor” infrastructure SIP requirement for the 1997 particulate matter standard, which requires states to include in their SIPs measures to ensure their upwind emissions do not interfere with downwind states’ compliance with Clean Air Act regulations to protect visibility.⁶⁴ Due to litigation and bureaucratic delay, the EPA did not expect the first such SIP until late 2006. After states submit infrastructure SIPs, the EPA has 18 months to review the plan.⁶⁵

In order to put the George W. Bush administration’s political imprint on the SIP process, the agency issued guidance in August 2006.⁶⁶ States relied on this 2006 guidance when they formulated and submitted their plans in 2007 and 2008. Yet the EPA refused to act on many SIPs. The agency was late on 23 of them by an average of 1,221 days. Six of the SIPs have not yet been reviewed, and they are overdue by an average of 2,100 days. In late 2009, while these states waited for the EPA to act on their SIPs, the agency updated its 2006 guidance to reflect the Obama administration’s priorities (some are still waiting).⁶⁷

The EPA has been so late in performing its date-certain duties that the rules of the game often change during the SIP review process.

Environmental special interests routinely are afforded an outsized role in negotiating which EPA deadlines will take precedence.

The problem is that both the 2006 and 2009 guidance documents call for mutually exclusive policies. So states based their “Good Neighbor” infrastructure SIPs on guidance from 2006, but their plans were judged based on substantially different guidance from 2009.

In sum, the EPA is chronically late, often for years in meeting its responsibility to review SIPs within 18 months. EPA’s failure to timely review SIPs creates a situation whereby states are subject to a moving target. They submit SIPs in accordance with one set of guidance only to have their plans reviewed in accordance with another.

Why the EPA’s Late Performance Matters 3: Sue and Settle

The EPA’s failure to meet its duties as prescribed by Congress is often exacerbated by a phenomenon known as “sue and settle,” whereby environmental special interests leverage the legal process to dictate the EPA’s priorities.⁶⁸ The Clean Air Act affords environmental advocacy groups the right to sue the EPA to compel the agency to perform its non-discretionary responsibilities, including meeting deadlines.⁶⁹ Since the existence of a mandatory deadline is indisputably clear, these cases are easy to win. This leads the agency to settle such suits rather than litigate them. The result is that environmental special interests routinely are afforded an outsized role in negotiating which

EPA deadlines will take precedence.

Through sue-and-settle consent decrees, groups like the Sierra Club have been responsible for the timing of entire regulatory regimes, such as the National Emissions Standards for Hazardous Air Pollutants program. For example, in *Sierra Club v. Jackson* (09-00152 (N.D. Cal.)), which was settled on July 6, 2010, the Sierra Club negotiated deadlines to review Hazardous Air Pollutant standards for 28 source categories.⁷⁰ Of course, setting a schedule is a way of setting priorities, which necessarily entails policy making—after all, it is a decision on how to allocate of the agency’s limited resources.

Sue-and-settle is bad policy for two reasons. First, the EPA during the Obama administration repeatedly has litigated to keep states from intervening in settlement negotiations with environmental special interests.⁷¹ This is an affront to the Clean Air Act’s system of cooperative federalism. In effect, the EPA is using sue and settle to cut states out of their rightful role under the Act and replacing them with green advocacy groups.

Second, expanding the input of green special interests through sue and settle elevates politics over disinterested policy making. Environmental policy is cast in moral terms by the organizations that engage in sue-and-settle, primarily the Natural Resources Defense Council, Sierra Club, and

WildEarth Guardians.⁷² For these groups, ending the use of fossil fuels is an ideological goal to be pursued at all costs, regardless of the effectiveness of the alternatives.⁷³ Dispassionate policy making is impossible from stakeholders that share such moralistic assumptions about an industry. By affording these ideological groups an outsized role, sue-and-settle litigation undermines sound policy making.

Conclusion

Congress designed the Clean Air Act to function unlike other enabling statutes. Instead of granting the EPA open-ended power to regulate in the “public interest,” Congress sought to limit the EPA’s discretion by setting the agency’s priorities. In large part, Congress achieved this enhanced level of oversight (relative to other regulatory regimes) by including deadlines by which the EPA must act. Generally, the statute is structured such that the EPA periodically is required to update existing standards, in order for the regulatory requirements become ever more stringent. In this manner, pollution is squeezed from the economy.

As shown in this study, the EPA’s performance in meeting its deadlines for its date-certain duties is woeful. Eighty-four percent of the EPA’s Clean Air Act deadlines are either late or outstanding, often by years.

The EPA, not Congress, is to blame for the agency’s woeful record achieving its Clean Air Act deadlines. The agency’s failure carries major unfortunate consequences, including usurpation of lawmaking power by the agency, sue-and-settle lawsuits that empower ideological environmental activists to set agency policy, and changing agency criteria for evaluating State Implementation Plans that force states to chase moving compliance targets.

Congress has many tools available to remedy the constitutional and pragmatic concerns associated with the EPA’s failure meeting its deadlines. For starters, Congress can press the agency through greater oversight. Lawmakers should demand to know why the agency rejects its statutory priorities in favor of discretionary policies of its own choosing.

Congress also can rein in the EPA through the setting of budget priorities. If the agency refuses to make a priority of its statutory duties, then Congress should force the EPA’s hand through the power of the purse. Lawmakers should attach conditions to EPA appropriations that clearly require the agency to complete its non-discretionary responsibilities under the Clean Air Act, and not allow the agency to freelance.

The EPA, not Congress, is to blame for the agency’s woeful record achieving its Clean Air Act deadlines.

NOTES

- 1 42 U.S.C. §7409(d)(2)(B).
- 2 42 U.S.C. §7411(b)(1)(B) .
- 3 42 U.S.C. §7412(d)(6).
- 4 40 C.F.R. §51.308(f).
- 5 William Yeatman, “Deadline Citizen Suits: An Idea Whose Time Has Expired,” *Appalachian Natural Resources Law Journal*, Vol. 8 (2013-2014), p. 51, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470127.
- 6 *New York v. Gorsuch*, 554 F.Supp. 1060, 1063 (1983) (“The strict deadlines for EPA action...were not the inadvertent product of uninformed congressional action, but were the deliberate result of a studied effort by a joint congressional conference.”)
- 7 William Yeatman, “How the EPA Is Undermining Cooperative Federalism under the Clean Air Act,” *On Point* No. 197, Competitive Enterprise Institute, September 14, 2014, <https://cei.org/content/how-epa-undermining-cooperative-federalism-under-clean-air-act>.
- 8 Based on database searches to track the EPA’s performance meeting its deadlines under the New Source Performance Standards and the National Emissions of Hazardous Air Pollutants programs. EPA data, including the agency’s “SIP Status” webpage, available at <https://www3.epa.gov/airquality/urbanair/sipstatus/>.
- 9 42 U.S.C. §§7408-7409 et seq.
- 10 42 U.S.C. §7409(b)(1)
- 11 42 U.S.C. §7409(d)(2)(B)
- 12 42 U.S.C. §7410(a)(2)
- 13 The agency has six months to decide whether the SIP is “complete” before it is automatically deemed complete. 42 U.S.C. §7410(k)(1)(B). Thereafter, the agency has 12 months to review the SIP. 42 U.S.C. §7410(k)(2).
- 14 42 U.S.C. §7410(a)(2) et seq.
- 15 42 U.S.C. §7410(a)(2)(A).
- 16 42 U.S.C. §4710(a)(2)(D)(I).
- 17 42 U.S.C. §4710(a)(2)(D)(II).
- 18 62 FR 38856 (July 18, 1997).
- 19 62 FR 38652 (July 18, 1997).
- 20 71 FR 61144 (October 17, 2006).
- 21 75 FR 81126 (December 27, 2010).
- 22 73 FR 16483 (March 27, 2008).
- 23 75 FR 6474 (February 9, 2010).
- 24 75 FR 35520 (June 22, 2010).
- 25 42 U.S.C. §7492 et seq.
- 26 EPA, List of 156 Federal Class I Areas, <https://www.epa.gov/visibility/list-156-mandatory-class-i-federal-areas>.
- 27 40 C.F.R. §51.308(f).
- 28 42 U.S.C. §7410(k)(2).
- 29 42 U.S.C. §7411(b).
- 30 See 40 C.F.R. §60 et seq. (establishing New Source Performance Standards for categories of major sources)
- 31 42 U.S.C. §7411(b)(1)(B).
- 32 42 U.S.C. §7412 et seq.
- 33 42 U.S.C. §7412(a)(1).
- 34 42 U.S.C. §7412(a)(2).
- 35 See 40 C.F.R. §63 et seq. (setting Hazardous Air Pollutant standards for categories of major and area sources)
- 36 See 42 U.S.C. §7412(e) et seq. (describing schedule for standards and review thereof)
- 37 42 U.S.C. §7412(f)(2).
- 38 42 U.S.C. §7412(d)(6).
- 39 My position has evolved on the question of who is to blame. In previous studies, I simply assumed that EPA’s poor performance meeting its deadlines was attributable to the existence of an unmanageable surfeit of date-certain duties imposed by Congress in the Clean Air Act. However, when I investigated the matter, it became clear that the EPA shoulders the blame, for the reasons that are set forth in this subsection.
- 40 Pub. L. 103-62 .
- 41 5 U.S.C. §306.
- 42 EPA, 2005 – 2005 Strategic Plan, EPA 190-R-00-002; EPA, 2006 – 2011 Strategic Plan; EPA, 2011 – 2015 Strategic Plan; EPA, 2014-2018 Strategic Plan. All plans available at <https://www.epa.gov/planandbudget/archive#StrategicPlan>.
- 43 Database searches of congressional testimonies, looking for the keywords “deadline” and “Clean Air Act.”
- 44 “Environment: EPA Official Says Agency May Miss One-Third of Deadlines Under 1984 Waste Law Amendments,” 44 Daily Report for Executives (BNA) at A-1-A-2 (March 6, 1986).

- 45 The EPAstat program is described in EPA’s State of Priorities in the Preamble to the agency’s Unified Regulatory Agenda entries for fall 1997 and fall 1998.
- 46 The last mention of EPAstat on the EPA’s website is a March 25, 2009 blog post by Jay Messer (Science Wednesday: Planning for the Future, <https://blog.epa.gov/blog/2009/03/science-wednesday-planning-for-the-future/>). Notably, the link to the EPAstat program in the post is defunct.
- 47 EPA, NACAA-ECOS-EPA SIP Reform Workgroup Commitments and Best Practices for Addressing the SIP Backlog, February 4, 2014, <http://4cleanair.org/Documents/State-EPA-Commitments-revisions-2-4-142.pdf>.
- 48 SIPs will be due for 1) 2010 NOx NAAQS, 2) 2010 SO2 NAAQS, 3) 2012 PM2.5 NAAQS, and 4) 2015 ozone NAAQS. That is 200 hundred new deadlines.
- 49 U.S. General Accounting Office, “Air Pollution: State Planning Requirements Will Continue to Challenge EPA and the States,” GAO/RCED-93-112, June 1993, <http://www.gao.gov/products/RCED-93-113>.
- 50 Compare the EPA’s 2001–2005 Strategic Plan with the agency’s 2006–2011 Strategic Plan. In the former, “Goal 1” is “Clean Air,” while climate change mitigation was subsumed in “Goal 6: Reduction of Global and Cross-Border Environmental Risks.” In the latter, climate change mitigation is incorporated into a new “Goal 1,” which is titled “Clean Air and Global Climate Change.”
- 51 Compare the EPA’s 2006–2011 Strategic Plan with the agency’s 2011–2015 Strategic Plan. In the former, Goal 1 is “Clean Air and Global Climate Change,” and climate change is listed as an objective after “Healthier Outdoor Air,” “Healthier Indoor Air,” “Protect the Ozone Layer,” and “Radiation.” In the latter, Strategic Plan, the order is reversed, so that Goal 1 is “Taking Action on Climate Change and Improving Air Quality,” and climate change policies are listed as the first objective.
- 52 Compare 2003 Budget in Brief with 2006 Budget in Brief.
- 53 Ned Resnikoff, “EPA’s Gina McCarthy Calls for All Hands on Deck in Climate Fight,” MSNBC, June 26, 2014, <http://www.msnbc.com/msnbc/epa-gina-mccarthy-calls-all-hands-deck-climate-fight#50352>.
- 54 90 FR 64662 (October 23, 2015).
- 55 80 FR 64510 (October 23, 2015).
- 56 Not yet published in *Federal Register*. Prepublication version available: <https://www3.epa.gov/airquality/oilandgas/may2016/nsps-finalrule.pdf>.
- 57 See the suite of regulations promulgated pursuant to the Clean Air Act Significant New Alternatives Policy, <https://www.epa.gov/snap>.
- 58 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 663 (1952) (Clark, J. concurring)
- 59 United States Constitution, Article 2, Section 3.
- 60 Yeatman, “How the EPA Is Undermining Cooperative Federalism under the Clean Air Act.”
- 61 42 U.S.C. §7410(a)(2) et seq.
- 62 42 U.S.C. §7410(k)(3) and 42 U.S.C. §7410(k)(4)
- 63 *Motor Vehicles Mfrs. of U.S., Inc. v. State Farm Mut. Autos. Ins. Co.*, 463 U.S. 29, 59 (1983) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of . . . its programs and regulations.”), *Nat’l Cable Telecomm. Ass’n v. Brand X Servs.*, 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”).
- 64 The Good Neighbor visibility provision is found at 42 U.S.C. §7410(a)(2)(D)(II). The 1997 PM2.5 NAAQS is at 62 FR 38652 (July 18, 1997).
- 65 The agency has six months to decide whether the SIP is “complete” before it is automatically deemed complete. 42 U.S.C. §7410(k)(1)(B). Thereafter, the agency has 12 months to review the SIP. 42 U.S.C. §7410(k)(2).
- 66 Office of Air Quality Planning and Standards, EPA, “Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM 2.5 National Ambient Air Quality Standards,” at 9-10 (August 15, 2006).
- 67 Office of Air Quality Planning & Standards, EPA, “Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM 2.5) National Ambient Air Quality Standards (NAAQS),” at 5 (September 25, 2009).
- 68 William Yeatman, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs*, U.S. Chamber of Commerce, July 2012, https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf.
- 69 42 U.S.C. §7604(a)(2).
- 70 *Sierra Club v. Jackson* (09-00152 (N.D. Cal.)).
- 71 For example, the EPA litigated to oppose North Dakota from intervening in *WildEarth Guardians v. Jackson* (09-02453 (N.D. Cal. 2010)), which led to deadlines for the EPA to review 1997 Ozone NAAQS SIPs. The agency also sued to oppose a North Carolina and North Dakota from intervening in *Sierra Club et al. v. McCarthy* (13-3953 (N.D. Cal. 2013)), which pertained to the agency’s non-discretionary duty to set attainment designations for the 2010 SO2 NAAQS.
- 72 A 2013 report by the U.S. Chamber of Commerce identifies these groups as the most frequent litigants in sue and settle suits. William L. Kovacs, Keith W. Holman, and Jonathan A. Jackson, “Sue and Settle: Regulating behind Closed Doors,” U.S. Chamber of Commerce, May 2013, <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.
- 73 William Yeatman, “Attack of the Scare Ads,” *Green Watch*, Capital Research Center, July 2012, http://capitalresearch.org/wp-content/uploads/2012/06/GW0712.indd_2.pdf.

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