

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
	)	
SIERRA CLUB	)	
85 Second Street, 2 <sup>nd</sup> Floor	)	
San Francisco, CA 94105	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No.-
	)	
GINA McCARTHY	)	
in her Official Capacity as	)	
Administrator,	)	
United States Environmental Protection Agency	)	
Ariel Rios Building	)	
1200 Pennsylvania Avenue, N.W.	)	
Washington, DC 20460,	)	
	)	
Defendant.	)	
_____	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**I. INTRODUCTION**

1. Plaintiff Sierra Club brings this Clean Air Act citizen suit to compel the United States Environmental Protection Agency to undertake an overdue mandatory duty. Specifically, Defendant, Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (EPA), has failed to promulgate a Federal Implementation Plan under 42 U.S.C. § 7410(c)(1)(A) for Montana’s state implementation plan (SIP) approved Prevention of Significant Deterioration (PSD) program to properly regulate nitrogen oxides as an ozone precursor. Accordingly, Plaintiff SIERRA CLUB brings this action against Defendant

GINA McCARTHY, in her official capacity as EPA Administrator, to compel her to perform this mandatory duty.

## **II. JURISDICTION**

2. This is a Clean Air Act citizen suit. Therefore, the Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 42 U.S.C. § 7604(a)(2) (citizen suits for failure to perform a non-discretionary duty required by the Clean Air Act). An actual controversy exists between the parties. This case does not concern federal taxes, is not a proceeding under 11 U.S.C. §§ 506 or 1146, and does not involve the Tariff Act of 1930. Thus, this Court has authority to order the declaratory relief requested under 28 U.S.C. § 2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive relief.

## **III. NOTICE**

3. EPA received written notice of the violation alleged in this complaint no later than October 21, 2013. More than sixty days have passed since EPA received this “notice of intent to sue” letter. EPA has not remedied the violation alleged in this Complaint. Therefore, a present and actual controversy exists.

## **IV. VENUE**

4. This civil action is brought against an officer of the United States acting in her official capacity. EPA is headquartered in this judicial district. Defendant Gina McCarthy officially resides in the District of Columbia. In addition, a substantial part of the events or omissions giving rise to the claims in this case occurred in the District of Columbia. Accordingly, venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

## V. PARTIES

5. Plaintiff **SIERRA CLUB** brings this action on behalf of itself and its adversely impacted members. Sierra Club, founded in 1892, is a nonprofit public-benefit corporation organized and existing under the laws of California with more than 600,000 members in the United States and with one or more chapters in every state. The Sierra Club's purposes include, "to practice and promote responsible use of the earth's ecosystem and resources; to enlist and to educate 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 activities include hiking, canoeing, caving, swimming, fishing, nature study, and advocacy for the improvement and protection of air quality across the country.

6. Sierra Club members live, work, raise families, recreate and engage in economic and other activities in and around Montana. They are adversely affected by exposure to ozone and ozone precursors. The adverse effects of such pollution include 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.

7. The Clean Air Act violation alleged in this Complaint also deprive Sierra Club and its members of certain procedural rights, including notice and opportunity to comment, associated with EPA's failure to promulgate a Federal Implementation Plan. The Clean Air Act violation alleged in this Complaint also deprive Sierra Club and its members of certain information including but not limited to ambient monitoring data gathered in accordance with applicable regulations, public notice of exceedances of National Ambient Air Quality Standards and emission inventories.

8. Because Defendant has not promulgated a Federal Implementation Plan to address NOx as a precursor in the PSD program, Sierra Club and its members cannot be certain that the ozone NAAQS for the affected state conforms with the requirements of the Clean Air Act. Similarly, Defendant's failure to promulgate a Federal Implementation Plan prevents Sierra Club's members from being certain that they are protected by the 8-hour ozone NAAQS.

9. The Clean Air Act violations alleged in this Complaint have injured and will continue to injure the interests of Plaintiff's organization and its members, unless and until this Court grants the requested relief. Granting the relief requested in this lawsuit would address these injuries by compelling EPA action to perform its mandatory duties, thereby improving air quality and reducing the risk of exposure to air pollution and the uncertainty regarding that exposure.

10. The above injuries will continue until the Court grants the relief requested in this Complaint.

11. Defendant GINA MCCARTHY is the Administrator of the United States Environmental Protection Agency. In that role Administrator McCarthy has been charged by Congress with the duty to administer the Clean Air Act, including the mandatory duty at issue in this case.

## **VI. LEGAL BACKGROUND**

12. Congress enacted the Clean Air Act to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R.Rep. No. 1146, 91st Cong., 2d Sess. 1,1, 1970 U.S.Code Cong. & Admin. News 5356, 5356. To promote this, the Act requires EPA to set National Ambient Air Quality Standards for certain pollutants. National Ambient Air Quality Standards establish maximum allowable concentrations in the air of these pollutants, including ozone.

13. In order to achieve and protect the National Ambient Air Quality Standards, states must adopt and submit to EPA a pollution control plan, known as a State Implementation Plan (“SIP”), that contains enforceable emissions limitations and other provisions to attain the NAAQS and meet applicable requirements of the Clean Air Act, including ensuring attainment, maintenance and enforcement of NAAQS. 42 U.S.C. §§ 7410(a)(1) (2010), (a)(2)(A) (2010); § 7401(a)(1),(k) (2010).

14. One element of these SIPs is the Prevention of Significant Deterioration (PSD) program which applies to major new sources or major modifications of existing major sources of pollution in areas designated attainment.

15. If EPA disapproves a SIP submission in whole or part, EPA has a mandatory duty to promulgate a Federal Implementation Plan (FIP) within 2 years of that disapproval. 42 U.S.C. § 7410(c)(1)(B).

## VII. FACTS

16. On November 29, 2005, EPA promulgated the phase 2 implementation rule for the 1997 ozone NAAQS, which includes requirements for PSD programs to treat nitrogen oxides as a precursor for ozone. 72 Fed. Reg. 71,612.

17. On July 22, 2011, EPA disapproved Montana’s section 110(a)(2) infrastructure elements (C) and (J) for the 1997 ozone NAAQS because the Montana SIP-approved PSD program does not meet the phase 2 implementation rule requirement to treat nitrogen oxides as a precursor for ozone. 76 Fed. Reg. 43,918, 42,922 (July 22, 2011). The effective date for the rule containing this disapproval was August 22, 2011. 76 Fed. Reg. at 43,918.

18. Thus, EPA has a mandatory duty to promulgate a FIP for Montana’s PSD program to treat nitrogen oxides as a precursor for ozone no later than August 22, 2013.

19. As of the date of this complaint, EPA has still not promulgated a Montana FIP to treat nitrogen oxides as a precursor for ozone.

## **VIII. CLAIM FOR RELIEF**

### **CLAIM ONE**

(Failure to promulgate a Federal Implementation Plan)

20. Plaintiff incorporates by reference paragraphs 1 through 19.

21. On July 22, 2011, EPA disapproved Montana's section 110(a)(2) infrastructure elements (C) and (J) for the 1997 ozone NAAQS because the Montana SIP-approved PSD program does not meet the phase 2 implementation rule requirement to treat nitrogen oxides as a precursor for ozone. 76 Fed. Reg. at 42,922. The effective date for the rule containing this disapproval was August 22, 2011. 76 Fed. Reg. at 43,918.

22. The Clean Air Act requires EPA to promulgate a Federal Implementation Plan by no later than August 22, 2013 satisfying the above requirement. 42 U.S.C. § 7410(c)(1)(A).

23. EPA has failed to promulgate a Federal Implementation Plan in violation of its mandatory duty.

### **REQUEST FOR RELIEF**

WHEREFORE, Sierra Club respectfully requests that the Court:

- A. Declare that the Administrator is in violation of the Clean Air Act with regard to her failure to perform the mandatory duty listed above;
- B. Issue a mandatory injunction requiring the Administrator to perform her mandatory duty by a certain date;
- C. Retain jurisdiction of this matter for purposes of enforcing the Court's order;

- D. Grant Sierra Club its reasonable costs of litigation, including attorneys' and expert witness fees; and
- E. Grant such further relief as the Court deems proper.

Respectfully submitted,

/s Robert Ukeiley

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Robert Ukeiley  
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Tel: (859) 986-5402  
Fax: (866) 618-1017  
Email: rukeiley@igc.org

Counsel for Sierra Club

Dated: February 17, 2014



<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  *(If pro se, select this deck)*	<input type="radio"/> <b>I. FOIA/Privacy Act</b>  <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  *(If pro se, select this deck)*	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran’s Benefits <input type="checkbox"/> 160 Stockholder’s Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
 1 Original Proceeding  
  2 Removed from State Court  
  3 Remanded from Appellate Court  
  4 Reinstated or Reopened  
  5 Transferred from another district (specify)  
  6 Multi-district Litigation  
  7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 Failure to perform a mandatory duty under 42 U.S.C. § 7604(a)(2)

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: 2/17/14	SIGNATURE OF ATTORNEY OF RECORD /s Robert Ukeiley
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**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk’s Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

AO 440 (Rev. 12/09; DC 03/10) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

SIERRA CLUB

Plaintiff

v.

GINA MCCARTHY

Defendant

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Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) ERIC H. HOLDER, JR., Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Law Office of Robert Ukeiley
507 Center Street
Berea, KY 40403

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify):* \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09; DC 03/10) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

SIERRA CLUB

Plaintiff

v.

GINA MCCARTHY

Defendant

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)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) GINA MCCARTHY, Administrator
U.S. Environmental Protection Agency
Ariel Rois Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20004

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Law Office of Robert Ukeiley
507 Center Street
Berea, KY 40403

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

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on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

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*Server's signature*

\_\_\_\_\_  
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Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09; DC 03/10) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

SIERRA CLUB

Plaintiff

v.

GINA MCCARTHY

Defendant

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)
)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) RONALD C. MACHEN, JR. U.S. Attorney
United States Attorney's Office
Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Law Office of Robert Ukeiley
507 Center Street
Berea, KY 40403

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

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My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: