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Attorneys for Plaintiff Sierra Club

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

SIERRA CLUB
85 Second Street, Second Floor
San Francisco, CA 94105-3441

Plaintiff,

v.

REGINA MCCARTHY
Administrator,
United States Environmental Protection
Agency

Defendant.

Case No. 14-3541

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Clean Air Act, 42 U.S.C. § 7401 *et seq.*

INTRODUCTION

1. This is an action to compel the Administrator of the United States Environmental Protection Agency (“Administrator” or “EPA”) to perform a nondiscretionary duty mandated by the Clean Air Act (“CAA” or “the Act”). Effective April 2012, EPA disapproved (in part)

1 revisions to the State of Arkansas’s state implementation plan (“SIP”) for regional haze and
2 interstate transport. The Act requires that EPA promulgate a federal implementation plan
3 (“FIP”) or approve a revised SIP within two years of partially or wholly disapproving a SIP.
4 Arkansas has not corrected the deficient plan, the statutorily mandated two-year period has
5 elapsed, and EPA has failed to act. Plaintiff Sierra Club seeks to compel EPA to promulgate this
6 overdue FIP for Arkansas. EPA’s failure to perform this duty deprives Plaintiff’s members of
7 health and welfare as protected under the Act.
8

9 JURISDICTION

10 2. This action arises under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* This Court
11 has jurisdiction over this action pursuant to 42 U.S.C. § 7604 (CAA citizen suits), 28 U.S.C. §
12 1331 (federal question), and 28 U.S.C. § 1361 (mandamus action). The relief requested herein
13 by Plaintiff is authorized pursuant to 42 U.S.C. § 7604 and 28 U.S.C. §§ 2201 (declaratory
14 judgment), 2202, and 1361.
15

16 3. Sierra Club served notice on the Administrator of the violation alleged herein and
17 its intent to initiate the present action. *See* 42 U.S.C. § 7604(b) (notice requirements for CAA
18 citizen suits) and 40 C.F.R. Part 54 (same). This notice was provided via certified letter, posted
19 April 21, 2014, and addressed to the Administrator. More than 60 days have passed since the
20 notice was served and the violations complained of in the notice are continuing. *See* 42 U.S.C. §
21 7604(b)(2).
22

23 VENUE AND INTRADISTRICT ASSIGNMENT

24 4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (general venue statute)
25 that governs venue for “all civil actions brought in district courts of the United States” unless
26 otherwise provided by statute.
27

1 affected by the visibility impairment that the Act requires regional haze plans to remedy and
2 protect against.

3 9. EPA's failure to promulgate the overdue federal haze plan for Arkansas causes
4 injury to Sierra Club and its members by prolonging existing, and allowing future, visibility
5 impairment. The recreational, aesthetic, and environmental interests of Sierra Club's members
6 have been and continue to be adversely affected by EPA's failure to promulgate the required plan.
7

8 10. Defendant Regina McCarthy is the Administrator of the United States
9 Environmental Protection Agency and is charged with implementing and enforcing the Clean Air
10 Act. The Administrator's Clean Air Act responsibilities include promulgating a federal plan
11 within two years of disapproving a state plan. *See* 42 U.S.C. § 7410(c)(1). Defendant is sued in
12 her official capacity.
13

14 **FACTS AND REGULATORY BACKGROUND**

15 11. Haze is caused by air pollution that absorbs light and reduces visibility. Air
16 pollution that causes haze comes from a variety of sources such as power plants and factories. In
17 addition to inhibiting the visual enjoyment of the natural environment, haze exposure causes
18 respiratory health problems.

19 12. In 1977, Congress declared as a national goal "the prevention of any future, and
20 the remedying of any existing, impairment of visibility in mandatory Class I federal areas which
21 impairment results from manmade air pollution." 42 U.S.C. § 7491. Mandatory Class I federal
22 areas include 156 national parks and wilderness areas for which the Secretary of the Interior has
23 determined visibility is an important value. In Arkansas, Upper Buffalo and Caney Creek
24 Wilderness Areas have been designated as Class I areas.
25

26 13. Congress directed EPA to promulgate regulations requiring states to make
27 progress toward attaining the national visibility goal, including requiring amended SIPs with
28

1 emissions limits on certain sources of air pollutants that cause or contribute to visibility
2 impairments in Class I areas. 42 U.S.C. § 7491(b). The Act requires that some of these sources
3 implement Best Available Retrofit Technology (“BART”) to control visibility impacts.

4 14. Further, the “interstate transport” provision of the Act, also known as the “good
5 neighbor” provision, requires that states control their in-state emissions that may result in
6 visibility impairment in neighboring states’ Class I areas. 42 U.S.C. § 7410(a)(2)(D)(i)(II).

7 15. The Act provides that if EPA disapproves a state’s proposed implementation plan
8 in whole or in part, it has a mandatory duty to promulgate a FIP within two years of its
9 disapproval decision unless the state corrects the proposed SIP to EPA’s satisfaction before the
10 promulgation of the FIP. 42 U.S.C. § 7410(c)(1).

11 16. Between 2008 and 2011, Arkansas submitted SIP revisions intended to address
12 the Act’s regional haze requirements and interstate transport requirements for visibility. *See* 77
13 Fed. Reg. 14,603, 14,604 (Mar. 12, 2012) (describing history of Arkansas haze submissions).

14 17. On March 12, 2012, EPA issued a final rule approving in part and disapproving in
15 part Arkansas’s regional haze and interstate transport SIP revisions. 77 Fed. Reg. 14,603 (Mar.
16 12, 2012). EPA disapproved parts of Arkansas’s proposed regional haze SIP because it found,
17 among other reasons, that Arkansas “did not satisfy all the regulatory and statutory requirements
18 in making BART determinations” for certain sources. *Id.* at 14,605. EPA also disapproved parts
19 of Arkansas’s proposed interstate transport SIP due to the same inadequate BART
20 determinations, finding that “Arkansas’s emissions will interfere with other states’ SIPs to
21 protect visibility.” *Id.* at 14,607.

22 18. EPA’s disapproval decision took effect on April 11, 2012. The Act therefore
23 required EPA to issue a FIP by April 11, 2014 in the absence of a revised plan from the state.
24 *See* 77 Fed. Reg. at 14,604, 14,606; 42 U.S.C. § 7410(c)(1).

1 19. EPA has failed to issue a FIP by the two-year deadline. Nor has EPA approved a
2 revised plan submitted by Arkansas that corrects the deficiencies EPA identified. In fact,
3 Arkansas has not submitted a revised regional haze plan since EPA's disapproval decision.

4
5 **CLAIM FOR RELIEF**
Failure to promulgate Federal Implementation Plan

6 20. Plaintiff hereby incorporates all previous paragraphs by reference.

7 21. Under the Clean Air Act, any person may commence a civil action against the
8 EPA Administrator "where there is alleged a failure of the Administrator to perform any act or
9 duty under [the Clean Air Act] which is not discretionary with the Administrator." 42 U.S.C. §
10 7604(a)(2).

11
12 22. EPA's partial disapproval of Arkansas's regional haze and interstate transport
13 SIPs took effect on April 11, 2012. *See* 77 Fed. Reg. at 12,604, 14,606 (Mar. 12, 2012).

14 23. Under 42 U.S.C. § 7410(c)(1), EPA is required to issue a FIP within two years of
15 disapproving a SIP in whole or in part. The two-year period ended on April 11, 2014.

16 24. Because EPA has failed to timely promulgate an Arkansas FIP to address regional
17 haze and interstate transport, it has failed to meet its mandatory duty to establish a FIP within
18 two years of disapproving a SIP.

19
20 25. EPA's failure to promulgate a FIP constitutes a failure to perform acts or duties
21 that are not discretionary with the Administrator within the meaning of 42 U.S.C. § 7604(a)(2).
22 Such failure is ongoing and, on information and belief, will continue absent the relief sought
23 herein.

24 26. Accordingly, Plaintiff is entitled to an order from this Court directing EPA to
25 promulgate a FIP for regional haze in Arkansas by a date certain.

26
27 27. THEREFORE, Plaintiff asks that this Court:

1 (1) Declare that EPA's failure to promulgate a regional haze and interstate
2 transport Federal Implementation Plan for Arkansas as complained of herein constitutes a
3 failure to perform a nondiscretionary duty;

4 (2) Order the Administrator to issue a regional haze and interstate transport
5 Federal Implementation Plan for Arkansas by a date certain;

6 (3) Award Plaintiff its reasonable costs of litigation, including attorneys' fees,
7 under 42 U.S.C. § 7604(d);

8 (4) Retain jurisdiction over this action to ensure compliance with the Court's
9 orders; and
10

11 (5) Grant such other relief as the Court deems just and proper.

12 DATED: this 6th day of August, 2014.

13
14 Respectfully submitted,

15 /s/ Casey A. Roberts
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26 *Attorneys for Plaintiff Sierra Club*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service 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. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

05/4+

(Place an "X" in One Box Only) () SAN FRANCISCO/OAKLAND () SAN JOSE () EUREKA