

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

DONALD van der VAART, in his official)
capacity as Secretary of the North Carolina)
Department of Environmental Quality; and)
the NORTH CAROLINA DEPARTMENT)
OF ENVIRONMENTAL QUALITY,)

File No.: _____

Plaintiffs,)

v.)

GINA McCARTHY, in her official capacity)
as Administrator of the United States)
Environmental Protection Agency;)
HEATHER McTEER TONEY, in her official)
capacity as Regional Administrator of the)
Southeast Region of the United States)
Environmental Protection Agency; and the)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendants.)
_____)

COMPLAINT

Donald van der Vaart, in his official capacity as Secretary of the North Carolina Department of Environmental Quality, and the North Carolina Department of Environmental Quality, by the authority of the Secretary of the North Carolina Department of Environmental Quality, and through the undersigned attorneys, allege and state the following:

INTRODUCTION

1. This action is brought under the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, to compel the United States Environmental Protection Agency (EPA) to undertake its mandatory,

non-discretionary duty to take action on a State Implementation Plan (SIP) submitted by the North Carolina Department of Environmental Quality (DEQ) to the EPA.

2. DEQ submitted its SIP to control fine particulate matter measuring 2.5 microns or less in diameter (PM_{2.5}) to the EPA for approval on September 5, 2013.

3. The EPA has failed to respond to DEQ's SIP submittal within the statutorily defined time period and, as such, has neglected its duty to faithfully execute the CAA.

4. This lawsuit seeks to compel EPA action regarding DEQ's PM_{2.5} SIP submittal, thereby providing regulatory certainty in North Carolina.

JURISDICTION

5. This Court has jurisdiction over this action to compel the performance of non-discretionary duties by the EPA pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. §1331.

6. Plaintiffs provided Defendants with written notice of the claims set forth herein at least sixty days prior to commencing this action as required by 42 U.S.C. § 7604(b)(2).

VENUE

7. Venue properly lies within this judicial district pursuant to 28 U.S.C. § 1391(e).

PARTIES

8. Plaintiff DONALD van der VAART is a party to this action in his official capacity as Secretary and principal head of the North Carolina Department of Environmental Quality.

9. Plaintiff NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY is an agency of a sovereign State and a "person" as defined in 42 U.S.C. § 7602(e).

10. Defendant GINA McCARTHY is the Administrator of the EPA. In that capacity, she is responsible for taking various actions to implement and enforce the CAA, including the actions Plaintiffs seek to compel in this Complaint.

11. Defendant HEATHER McTEER TONEY is the Regional Administrator of the EPA's Southeast Region (Region 4). Upon information and belief, in that capacity she is responsible for initially approving or disapproving a SIP submitted by States within her region (including North Carolina).

12. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is an agency of the United States within the meaning of the Administrative Procedure Act. *See* 5 U.S.C. § 551(1).

13. Defendants' failure to timely perform the mandatory, non-discretionary duties described herein adversely affects Plaintiffs by creating uncertainty as to Plaintiffs' ability to implement and enforce North Carolina's SIP.

LEGAL BACKGROUND

14. The CAA directs the EPA to prescribe national ambient air quality standards (NAAQS) that limit pollution to levels sufficient "to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(a), (b).

15. Each State must adopt a pollution control plan "provid[ing] for the implementation, maintenance and enforcement" measures the State will employ to ensure attainment of all NAAQS issued by the EPA. 42 U.S.C. § 7410(a)(1). Each State must adopt and submit a SIP to be approved by the EPA within three years after promulgation or revision of a NAAQS. *Id.*

16. When a State submits a revised SIP to the EPA, the EPA must first determine whether the SIP submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B). The EPA must make this determination "[w]ithin 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision." *Id.*

17. If the EPA determines that a SIP submittal is administratively complete, the CAA requires the EPA to approve, disapprove, approve in part, or disapprove in part the SIP within twelve months of that determination. 42 U.S.C. § 7410(k)(2), (3).

18. The CAA allows the EPA to conditionally approve a SIP or SIP revision “based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than one year after the date of approval of the plan revision.” 42 U.S.C. § 7410(k)(4). If the State does not adopt such measures within the specified timeframe, the conditional approval is treated as disapproval of the SIP. *Id.*

19. Once a SIP or SIP revision is approved by the EPA, the requirements set forth in the SIP become enforceable under federal law. 42 U.S.C. § 7413.

STATEMENT OF THE CASE AND CLAIM FOR RELIEF

20. On October 20, 2010, the EPA promulgated PM_{2.5} increments in its “PM_{2.5} Increments-Significant Impact Levels-Significant Monitoring Concentration Rule” (PM_{2.5} Increments Rule). 40 C.F.R. §51.166(c). The PM_{2.5} Increments Rule required “states to submit revised implementation plans to EPA for approval within 21 months of promulgation, that is, by July 20, 2012.” *PSD for PM_{2.5} – Increments, SILS and SMC*, 75 Fed. Reg. 64,864, 64,898 (October 20, 2010).

21. On September 5, 2013, Plaintiffs submitted the SIP revision required by the PM_{2.5} Increments Rule and requested that Defendant approve the revised SIP.

22. On December 13, 2013, Defendants notified Plaintiffs that Plaintiffs’ September 5, 2013 submission was administratively complete. Following a technical review, the EPA stated it would determine the approvability of Plaintiffs’ submission through public notice and rulemaking.

23. The CAA required Defendants to approve or disapprove Plaintiffs' revised SIP by December 13, 2014, one year from the date Defendants determined the revised SIP was administratively complete. 42 U.S.C. § 7410(k)(2).

24. To date, Defendants have failed to approve or disapprove Plaintiffs' revised SIP by the date prescribed by the CAA.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations stated above, Plaintiffs request that this Court:

1. Declare that Defendants are in violation of the CAA by virtue of their failure to perform the mandatory duties described above;
2. Issue an injunction directing Defendants to perform their mandatory duties by a date certain;
3. Retain jurisdiction over this matter until such time as Defendants have performed their mandatory duties under the CAA;
4. Award Plaintiffs their costs of litigation, including reasonable attorney and expert witness fees; and
5. Grant such additional relief as the Court may deem just and proper.

Respectfully submitted, this 13th day of November 2015.

/s/ Sam M. Hayes
Sam M. Hayes, NC Bar No. 25552
General Counsel
North Carolina Department of Environmental Quality
1601 Mail Service Center
Raleigh, North Carolina 27699-1601
Ph: (919) 707-8616 Fax: (919) 707-8626
sam.hayes@ncdenr.gov
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Donald van der Vaart, in his official capacity as
Secretary of the NC Department of Environmental
Quality, et al.

Plaintiff(s)

v.

Gina McCarthy, in her official capacity as
Administrator of the US Environmental Protection
Agency, et al.

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Gina McCarthy, Administrator
United State Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

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: Sam M. Hayes, General Counsel
North Carolina Department of Environmental Quality
1601 Mail Service Center, Raleigh, NC 27699-1601

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.

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:

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

Donald van der Vaart, in his official capacity as Secretary of the NC Department of Environmental Quality, et al.

DEFENDANTS

Gina McCarthy, in her official capacity as Administrator of the US Environmental Protection Agency, et al.

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

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)

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

Sam M. Hayes, General Counsel
North Carolina Department of Environmental Quality
1601 Mail Service Center, Raleigh, NC 27699-1601 | (919) 707-8616

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)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<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"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
			SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
			FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	
			IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	

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 (specify)
- 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):
42 U.S.C. § 7604

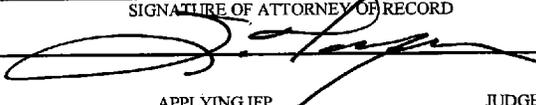
Brief description of cause:
Plaintiffs are suing Defendants for failure to perform a non-discretionary duty under the Federal Clean Air Act.

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 11/13/2015 SIGNATURE OF ATTORNEY OF RECORD 

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____