

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.: 5:16-cv-138-D

Plaintiffs,)

v.)

FIRST AMENDED COMPLAINT

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

Defendants.)
_____)

FIRST AMENDED 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 and the EPA Administrator (collectively “EPA”) to undertake its mandatory, non-discretionary duty to either approve or disapprove a petition submitted under 42 U.S.C § 7506a(a).

2. On or about December 9, 2013, several states within the Ozone Transport Region (OTR) submitted a § 176A petition (2013 § 176A Petition), requesting EPA to expand the OTR to include, among other states, North Carolina. *See* Exhibit 1 (2013 176A Petition).

3. 42 U.S.C. § 7506a(a) imposes a mandatory, non-discretionary duty upon the EPA Administrator by requiring the EPA Administrator to either approve or disapprove a § 176A petition within eighteen months of its receipt.

4. To date, the EPA has failed to approve or disapprove the 2013 § 176A Petition.

5. This lawsuit seeks to compel the EPA to perform its mandatory, non-discretionary duty to either approve or disapprove the 2013 § 176A Petition.

6. On June 3, 2016, the Defendants filed a Motion to Dismiss For Lack of Jurisdiction, in which the Defendants allege that the North Carolina Department of Environmental Quality (NCDEQ) “fails to aver it has suffered any injury-in-fact—a key element necessary to establish this Court’s jurisdiction.”

7. Pursuant to Rule 15 of the Federal Rules of Civil Procedure, NCDEQ files this First Amended Complaint to include additional allegations relating to its standing to sue under the CAA.

JURISDICTION

8. This Court has jurisdiction over this action to compel the EPA to perform a mandatory, non-discretionary duty pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. § 1331.

9. 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). *See* Exhibit 2 (Plaintiff’s Notice of Intent to Sue).

VENUE

10. Venue properly lies within the Eastern District of North Carolina pursuant to 28 U.S.C. § 1391(e).

PARTIES

11. Plaintiff DONALD VAN DER VAART is a party to this action in his official capacity as Secretary and principal head of NCDEQ.

12. 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).

13. 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 action Plaintiffs seek to compel in this Complaint.

14. 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).

LEGAL BACKGROUND

15. By statute, Congress created the OTR, which is comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia. 42 U.S.C. § 7511c(a).

16. The Governor of any state may petition the EPA Administrator to add a state or portion of a state to an interstate transport region, such as the OTR. 42 U.S.C. § 7506a(a).

17. The EPA Administrator must approve or disapprove a § 176A petition or recommendation within eighteen (18) months of its receipt. *Id.* The EPA must also “establish

appropriate proceedings for public participation regarding such petitions and motions, including notice and comment.” *Id.*

18. The EPA Administrator may add a state to an interstate transport region, such as the OTR, only if the EPA Administrator determines that the interstate transport of air pollutants across state boundaries “contributes significantly” to a violation of a national ambient air quality standard in the interstate transport region. *Id.*

STATEMENT OF THE CASE AND CLAIM FOR RELIEF

19. On or about December 9, 2013, the Governors of Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont submitted a § 176A petition to the EPA. The 2013 § 176A Petition requested EPA to expand the OTR to include Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia. Subsequently, on or about December 10, 2013, the Governor of Pennsylvania signed the 2013 § 176A Petition.

20. Upon information and belief, EPA received the 2013 § 176A Petition on December 9, 2013, or shortly thereafter.

21. On February 14, 2014, the environmental agencies for Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia sent EPA a letter requesting that EPA deny the 2013 § 176A Petition in a timely manner and that EPA keep the states informed of the “expected review process and the timeline for its completion.” *See* Exhibit 3 (Joint Letter to EPA Opposing the 2013 176A Petition).

22. In a letter, dated March 27, 2014, EPA merely acknowledged receipt of the states’ February 14 letter and stated that it would “carefully review and consider the information” provided. *See* Exhibit 4 (EPA Response to NCDEQ).

23. To date, Defendants have failed to perform their mandatory, non-discretionary duty by failing to approve or disapprove the 2013 § 176A Petition by the date prescribed by the CAA.

24. On March 30, 2016, Plaintiffs filed their Complaint.

25. On June 3, 2016, in response to Plaintiffs' Complaint, the Defendants filed a Motion to Dismiss For Lack of Jurisdiction, in which the Defendants alleged that NCDEQ "fails to aver it has suffered any injury-in-fact—a key element necessary to establish this Court's jurisdiction."

26. Based upon Defendants' Motion to Dismiss, there appears to be no dispute as to whether EPA was required to and failed to carry out its statutory duty. Defendants' Motion to Dismiss states that "CAA § 176A imposes a non-discretionary duty upon EPA to either approve or disapprove a petition under § 176A within eighteen months." Further, EPA admits that "[t]o date, EPA has not acted on the December 9, 2013 176A Petition."

27. In regards to Plaintiffs' standing, the "irreducible constitutional minimum of standing consists of three elements...the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v Robins*, 136 S. Ct. 1540 (U.S. 2016). To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id.* A "concrete" injury must "actually exist" but need not be "tangible." *Id.*

28. The United States Supreme Court has noted that a litigant to whom Congress has "accorded a procedural right to protect his concrete interests [has] the right to challenge agency action unlawfully withheld [and] can assert that right without meeting all the normal standards for

redressability and immediacy.” *Massachusetts v. EPA*, 549 U.S. 497, 517-518 (U.S. 2007) (internal quotations and citations omitted).

29. Plaintiffs’ Complaint alleges a procedural violation of the CAA and seeks a procedural remedy. In other words, Plaintiffs are not asking this Court for an order dictating the approval or denial of the 2013 § 176A Petition. Plaintiffs are merely asking for an order requiring that a decision be made. It is Plaintiffs’ position that the procedural right to sue and compel EPA action is available to those states who are named in the 2013 § 176A Petition, not just the petitioning states themselves. Congress imposed an eighteen-month time limit on EPA action and included a citizen suit provision to address the very situation in which NCDEQ now finds itself—waiting for over two years for EPA to make a decision on a § 176A petition with no indication from EPA as to if or when a decision will be made.

30. Regardless, Plaintiffs have an injury-in-fact that is concrete and particularized and actual or imminent. The fact that EPA has delayed taking action on this petition in a timely manner has created regulatory uncertainty in North Carolina—both for North Carolina’s regulatory agency and for its regulated community.

31. NCDEQ’s injury is concrete because it actually exists. NCDEQ’s injury began when EPA failed to meet its statutory deadline and will continue until EPA either approves or disapproves the 2013 § 176A Petition.

32. NCDEQ is a state agency and must allocate resources and implement regulatory programs. NCDEQ cannot simply put its air programs in an indefinite holding pattern until EPA makes a decision on the 2013 § 176A Petition. With no indication from EPA that it will make a decision on the 2013 § 176A Petition, NCDEQ must assume that EPA will, at some point in the indefinite future, either approve or disapprove the 2013 § 176A Petition.

33. All one hundred counties in North Carolina are in attainment under the National Ambient Air Quality Standards (NAAQS). North Carolina is operating under the assumption that it will not be added to the OTR. For example, NCDEQ has spent an estimated 3,671 staff hours (an estimated \$122,472 in staff time) studying and providing legislative reports on North Carolina's vehicle inspection and maintenance program. Based on this research, NCDEQ believes that it can remove thirty-one counties from its vehicle inspection and maintenance program, thereby saving its citizens \$29 million per year, and still maintain the ozone standard in North Carolina. If EPA eventually decides to add North Carolina to the OTR, then North Carolina will have to reverse course, resulting in a tremendous waste of resources for NCDEQ, the North Carolina Legislature, and North Carolina's regulated community. The longer EPA waits to make a decision on the 2013 § 176A Petition, the more costly such a reversal would be.

34. Similarly, NCDEQ has spent approximately 241 staff hours on rulemaking and a fiscal note to reduce the geographic scope of its volatile organic compounds (VOC) rules. Currently, Reasonable Available Control Technology (RACT) requirements are only applied in Charlotte, NC. NCDEQ has shown that controlling all of the manmade VOC emissions would not reduce ozone levels in North Carolina due to the large abundance of natural vegetation that emits VOCs; therefore, expanding VOC controls in North Carolina would not result in lower ozone levels. EPA's delay could result in NCDEQ undergoing final rulemaking (and North Carolina's regulated community undergoing implementation) that would have to be reversed should EPA approve the 2013 § 176A Petition. The longer EPA waits to make a decision on the 2013 § 176A Petition, the more costly such a reversal would be. Moreover, EPA had a chance to address the substantive issues related to the 2013 § 176A Petition in its proposed new "transport rule" to address the 2008 ozone standard, but did not.

35. Plaintiffs' injury is particularized because the injury suffered is specific to those states, including North Carolina, that are named in the 2013 § 176A Petition. As North Carolina's environmental regulatory agency, NCDEQ is specifically impacted by EPA's inaction as discussed above.

36. Additionally, the United States Supreme Court has stated that it can be of "considerable relevance that the party seeking review [] is a sovereign State and not... a private individual." *Massachusetts v. EPA*, 549 U.S. 497, 518 (U.S. 2007) (internal citations omitted). In *Massachusetts v. EPA*, the Supreme Court recognized Massachusetts' "desire to preserve its sovereign territory" with respect to air quality. *See Id.* Plaintiffs respectfully submit that it is equally relevant to the analysis of standing that Plaintiffs have a desire to, on behalf of its citizens, minimize regulatory uncertainty and wasted resources.

37. The injury that Plaintiffs have suffered is traceable to the Defendants. Plaintiffs' injury is, in fact, the direct result of EPA's failure to perform its non-discretionary duty within the mandatory statutory timeframe.

38. Plaintiffs' injury would be redressed by a court order that requires EPA to perform its non-discretionary duty to approve or disapprove the 2013 § 176A Petition, which is the very relief that Plaintiffs seeks.

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, non-discretionary duty described above;
2. Issue an injunction directing Defendants to perform their mandatory, non-discretionary duty by a date certain;
3. Retain jurisdiction over this matter until such time as Defendants have performed their mandatory, non-discretionary duty 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 the 24th day of June, 2016.

/s/ Sam M. Hayes
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed on Jun 24, 2016, and that all registered counsel are to receive notice of the filing via the Court's electronic case filing system.

/s/ Sam M. Hayes

Sam M. Hayes, NC Bar No. 25552

General Counsel

North Carolina Department of Environmental Quality