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12 Attorneys for Plaintiff
13 OUR CHILDREN’S EARTH FOUNDATION

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 OUR CHILDREN’S EARTH FOUNDATION, a
17 non-profit corporation,

18 Plaintiff,

19 v.

20 ANDREW R. WHEELER, in his official
21 capacity as Administrator of the United States
22 Environmental Protection Agency,

23 Defendant.

Civil Case No. 20-cv-8530

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1 Our Children’s Earth Foundation (“OCE”) alleges as follows:

2 **INTRODUCTION**

3 1. OCE brings this action under section 304(a)(2) of the Clean Air Act, 42 U.S.C. §
4 7604(a)(2), against Andrew R. Wheeler, in his official position as Administrator of the U.S.
5 Environmental Protection Agency (“EPA”). This Complaint challenges Administrator Wheeler’s failure
6 to timely assemble, publish, and publish notice in the Federal Register of, as required by section
7 110(h)(1) of the Clean Air Act, 42 U.S.C. § 7410(h)(1), comprehensive documents setting forth the state
8 implementation plans (“SIPs”) for the States of California, Arizona, and Nevada.

9 **JURISDICTION**

10 2. This Court has subject matter jurisdiction under section 304 of the Clean Air Act, 42
11 U.S.C. § 7604(a)(2), which allows any person to institute a lawsuit against the Administrator where the
12 Administrator has failed to perform a nondiscretionary act under the Clean Air Act. This Court also has
13 jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361
14 (action to compel an officer of the United States to perform his duty).

15 3. This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment
16 Act, 28 U.S.C. § 2201. This Court has authority to grant injunctive relief pursuant to 28 U.S.C. § 2202.

17 4. This Court has authority to award costs and attorney fees pursuant to 42 U.S.C. §
18 7604(d).

19 5. This Court has personal jurisdiction over Administrator Wheeler because he is an EPA
20 official and EPA is an agency of the federal government operating within the United States.

21 **NOTICE**

22 6. By letter dated September 6, 2020, OCE provided the Administrator with written notice
23 of its claims concerning Administrator Wheeler’s failure to carry out his duty to assemble, publish, and
24 publish notice in the Federal Register of comprehensive SIP submissions for the 50 states, including
25 California, Arizona, and Nevada. OCE provided this notice pursuant to 42 U.S.C. § 7604(b)(2) and 40
26 C.F.R. §§ 54.2, 54.3. Administrator Wheeler received this notice letter on September 21, 2020.

27 Although more than 60 days have elapsed since OCE gave notice, Administrator Wheeler remains in

1 violation of the law. As a result, the Clean Air Act claims made in this Complaint are ripe for judicial
2 review and the harm Administrator Wheeler has caused and will cause to OCE and its members and
3 staff can be remedied by an order of this Court.

4 **VENUE**

5 7. Venue in the United States District for the Northern District of California is proper under
6 section 304 of the Clean Air Act, 42 U.S.C. § 7604, and 28 U.S.C. § 1391(b) and (e) because a
7 substantial part of the events or omissions giving rise to the claim occurred within this District, OCE
8 resides in this District, and because EPA maintains its Region IX¹ headquarters in this District.

9 **INTRADISTRICT ASSIGNMENT**

10 8. Intradistrict assignment of this matter to the San Francisco Division of the Court is
11 appropriate pursuant to Civil Local Rule 3-2(d) because EPA's Region IX headquarters, where the
12 events or omissions that are the source of this lawsuit occurred, is located in San Francisco, California;
13 OCE's principal place of business is located in Napa, California; and OCE's lead counsel resides in San
14 Francisco, California.

15 **THE PARTIES**

16 9. Plaintiff OUR CHILDREN'S EARTH FOUNDATION is a non-profit corporation based
17 in Napa, California that is dedicated to protecting the environment. OCE promotes public awareness of
18 domestic and international environmental impacts through information dissemination, education, and
19 private enforcement of environmental protection statutes. OCE enforcement cases aim to achieve public
20 access to government information, ensure proper implementation of environmental statutes and
21 permitting, and enjoin violations of environmental and government transparency laws. OCE has an
22 active membership of people from all over the United States with a significant number of members
23 residing in California, Arizona, and Nevada and in states harmed by interstate transport of air pollutants
24 originating in California, Arizona, and Nevada.

25 _____
26 ¹ EPA Region IX's jurisdiction extends to California, Arizona, Nevada, Hawaii, the Pacific Islands, and
27 148 Tribal Nations.

1 10. OCE is a non-profit corporation. Therefore, OCE is a “person” within the meaning of 42
2 U.S.C. § 7602(e). As such, OCE may commence a civil action under 42 U.S.C. § 7604(a).

3 11. OCE has a direct stake in the outcome of this action. As a result of Administrator
4 Wheeler’s failure to timely assemble, publish, and publish notice in the Federal Register of the
5 comprehensive SIPs for California, Arizona, and Nevada, OCE is unable to ascertain the applicable
6 federal clean air requirements, for purposes of education, advocacy, and enforcement, in the same fashion
7 that OCE can with published laws. As a result of Administrator Wheeler’s failure to timely assemble,
8 publish, and publish notice in the Federal Register of the comprehensive SIPs for California, Arizona,
9 and Nevada, OCE’s goals of education, advocacy, and enforcement of clean air laws are more difficult to
10 achieve. For example, ascertaining the applicable federal clean air requirements for purposes of education,
11 advocacy, and enforcement is more time consuming, resulting in draining the few resources that are
12 available to OCE for achieving its mission. Comparisons between the different SIP provisions, which at
13 times is essential for advocacy, is also impossible without up-to-date, published SIPs.

14 12. A significant number of OCE’s members live in, work in, and/or visit the states of
15 California, Arizona, and Nevada and/or states harmed by interstate transport of air pollutants originating
16 in California, Arizona, and/or Nevada. OCE’s members and staff breathe the excessively polluted air
17 when they are located in these states. Air pollution is exacerbated in these states where regulated entities
18 are unaware of Clean Air Act requirements and where citizen and organization enforcement of Clean Air
19 Act requirements is hampered by compromised availability of information on current standards,
20 regulations, and rules. The health, wellbeing, and enjoyment of these members and staff have been and
21 continue to be adversely affected by Defendant’s failure to assemble, publish, and publish notice in the
22 Federal Register of the comprehensive SIPs for California, Arizona, and Nevada in that, among other
23 things, the SIPs are more difficult to enforce because of their inaccessibility to the public and publicly
24 minded enforcement groups and because the standards are more difficult for regulated entities to ascertain
25 and comply with. As a result, the interests of OCE and its members and staff have been, are being, and
26 will continue to be irreparably harmed by the Administrator’s failure to comply with his duty to
27

1 assemble, publish, and publish notice in the Federal Register of the comprehensive SIPs for California,
2 Arizona, and Nevada.

3 13. OCE has previously filed two lawsuits challenging the Administrator's failure to comply
4 with his SIP assembly and publication duties across the Nation. *See Our Children's Earth Foundation v.*
5 *EPA, et al.*, 01-cv-1475 (N.D. Cal. 2001) (EPA Region IX); *Our Children's Earth Foundation v. EPA, et*
6 *al.*, 03-cv-1705 (N.D. Cal. 2003) (EPA Regions I-VIII and X). However, the Administrator is again failing
7 to comply with his obligations with regard to these duties, requiring OCE to expend further resources in
8 the present enforcement action.

9 14. The violations alleged in this Complaint also deprive OCE and its members and staff of
10 certain information associated with the Administrator's required actions regarding the comprehensive
11 California, Arizona, and Nevada SIPs. These procedural, informational, and other injuries are directly
12 tied to the other harms OCE and its members and staff are experiencing.

13 15. The violations alleged in this Complaint have injured and continue to injure the interests
14 of OCE and its members and staff. These injuries are traceable to the Administrator's failures to act.
15 Granting the requested relief would redress these injuries by compelling the Administrator to act in
16 compliance with what Congress has determined is an integral part of the regulatory scheme for attaining
17 and maintaining National Ambient Air Quality Standards ("NAAQS"), discussed below.

18 16. Defendant ANDREW R. WHEELER is Administrator of the EPA. Mr. Wheeler is sued
19 in his official capacity. The Administrator is charged with implementation and enforcement of the Clean
20 Air Act. As described below, the Clean Air Act assigns the Administrator certain non-discretionary
21 duties, including the SIP assembly and publication duties that serve as the basis of this lawsuit, and
22 Administrator Wheeler has failed to comply with these duties.

23 17. Administrator Wheeler failed to assemble, publish, and publish notice in the Federal
24 Register of the comprehensive SIPs for California, Arizona, and Nevada. As of this filing, Administrator
25 Wheeler's failure is ongoing.

STATUTORY AND REGULATORY BACKGROUND

1
2 18. The Clean Air Act, 42 U.S.C. §§ 7401-7671q, enacted in 1970 and amended in 1977 and
3 1990, establishes a comprehensive program to “protect and enhance the quality of the Nation’s air
4 resources so as to promote the public health and welfare and the productive capacity of its population.” 42
5 U.S.C. § 7401(b)(1). This program is founded on shared federal and state responsibility.

6 19. Sections 108 and 109 of the Clean Air Act require EPA to establish, review, and revise
7 nationally applicable standards for certain common air pollutants, called the NAAQS. 42 U.S.C. §§
8 7408-7409. The NAAQS establish permissible concentrations of those pollutants in the “ambient,” or
9 outside, air.

10 20. Section 110 of the Clean Air Act, 42 U.S.C. § 7410, in turn requires each state to adopt,
11 and submit to EPA for approval, a plan for the implementation, maintenance, and enforcement of the
12 NAAQS in each air quality control region within the state. These plans are known as SIPs, and states
13 regularly submit revisions to the comprehensive SIP for their state.

14 21. Among other things, SIPs contain controls on individual sources of air pollution as
15 necessary to attain and maintain the NAAQS. 42 U.S.C. § 7410. SIPs approved by EPA become federal
16 law. Thus, violations of SIP requirements, applicable to state agencies and individual sources of air
17 pollution, are subject to enforcement actions by the United States, as well as by citizens.

18 22. Section 110 of the Clean Air Act requires that any SIP submission that is approved, or
19 portion thereof that is approved, be included in the comprehensive SIP for each state and that EPA must
20 assemble, publish, and publish notice in the Federal Register of these comprehensive SIPs “[n]ot later
21 than 5 years after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15,
22 1990], and every 3 years thereafter...” 42 U.S.C. § 7410(h)(1); *see also* H.R. Rep. No. 95-294 at 15
23 (1977) (noting that Section 110 of the Clean Air Act “requires the Administrator to compile and . . .
24 publish copies of each State’s air pollution control plan which have been federally approved or
25 promulgated. The intended purpose of the section is to provide a clear statement for the State, industry,
26 and the public of the air pollution rules which are in effect in each state.”).

1 beginning five years after the November 1990 passage of the Clean Air Act Amendments of 1990. *See*
2 42 U.S.C. § 7410(h)(1). As a result, Administrator Wheeler failed to comply with at least his November
3 2019 obligation to assemble and publish the comprehensive SIP for Arizona. As a result, the published
4 “comprehensive” SIP for Arizona is not available to anyone, including the public. The currently available
5 “comprehensive” SIP for Arizona is missing SIP revisions and, on information and belief, contains
6 superseded SIP provisions that appear to be current to those reviewing the “comprehensive” Arizona SIP.
7 Thus, Administrator Wheeler has frustrated the intended purpose of section 110(h)(1) of the Clean Air
8 Act, 42 U.S.C. § 7410(h)(1), with regard to the Arizona SIP.

9 27. Administrator Wheeler has failed to publish any updates to the “comprehensive” SIP for
10 the State of Nevada since 2014. *See* [https://www.epa.gov/sips-nv/epa-approved-nevada-wide-air-quality-](https://www.epa.gov/sips-nv/epa-approved-nevada-wide-air-quality-statutes-and-regulations#compiled)
11 [statutes-and-regulations#compiled](https://www.epa.gov/sips-nv/epa-approved-nevada-wide-air-quality-statutes-and-regulations#compiled) (most recent SIP revision dated May 2014). This is despite the fact that
12 EPA has approved amendments to the Nevada SIP numerous times since 2014. *See, e.g.*, 84 Fed. Reg.
13 44,699 (Nov. 26, 2019) (final approval of revision to the State of Nevada SIP). As discussed above, the
14 Clean Air Act requires the Administrator to assemble and publish a comprehensive SIP for each state
15 every three years, beginning five years after the November 1990 passage of the Clean Air Act
16 Amendments of 1990. *See* 42 U.S.C. § 7410(h)(1). As a result, the EPA Administrator failed to comply
17 with at least their November 2016 and November 2019 obligations to assemble and publish the
18 comprehensive SIP for Nevada. As a result, the published “comprehensive” SIP for Nevada is not
19 available to anyone, including the public. The currently available “comprehensive” SIP for Nevada is
20 missing SIP revisions and, on information and belief, contains superseded SIP provisions that appear to
21 be current to those reviewing the “comprehensive” Nevada SIP. Thus, Administrator Wheeler has
22 frustrated the intended purpose of section 110(h)(1) of the Clean Air Act, 42 U.S.C. § 7410(h)(1), with
23 regard to the Nevada SIP.

24 28. Furthermore, on information and belief, the published “comprehensive” SIPs for
25 California, Arizona, and Nevada are not comprehensive even to the date of their last publication or
26 addition and are missing certain approved elements of these states’ SIPs. This indicates that the EPA
27

1 Administrator's failure to assemble and publish comprehensive SIPs for California, Arizona, and Nevada
2 appear to extend even further into the past than discussed above.

3 29. In addition to Administrator Wheeler's failure to assemble and publish comprehensive
4 SIPs for California, Arizona, and Nevada, Administrator Wheeler has also failed to publish notice in the
5 Federal Register of the availability of the comprehensive SIPs for the states of California, Arizona, and
6 Nevada. The EPA Administrator's last Federal Register notice indicating the availability of comprehensive
7 SIPs for the states is from November 2013. *See* 78 Fed. Reg. 71,508 (Nov. 29, 2013) (EPA's last
8 publication of a notice of the "Availability of Federally-Enforceable State Implementation Plans for All
9 States"). As discussed above, the Clean Air Act requires the Administrator to publish these notices every
10 three years, beginning five years after the November 1990 passage of the Clean Air Act Amendments of
11 1990. *See* 42 U.S.C. § 7410(h)(1). As a result, the EPA Administrator failed to comply with both their
12 November 2016 and November 2019 obligations to publish notice in the Federal Register of the
13 comprehensive SIPs for California, Arizona, and Nevada. This is yet another way in which the EPA
14 Administrator frustrated the intended purpose of section 110(h)(1) of the Clean Air Act, 42 U.S.C. §
15 7410(h)(1).

16 **FIRST CLAIM FOR RELIEF**

17 **Violation of the Clean Air Act – Failure to Assemble and Publish the** 18 **Comprehensive California SIP**

19 30. OCE repeats and incorporates by reference the allegations in the above paragraphs and all
20 paragraphs of this Complaint.

21 31. Administrator Wheeler last provided some updates to California's "comprehensive" SIP
22 in 2017, despite EPA having approved revisions to the SIP since that time.

23 32. On information and belief, the "comprehensive" California SIP is not even
24 comprehensive through the date of this last update.

25 33. Administrator Wheeler did not assemble and publish the comprehensive SIP for the State
26 of California in at least November 2019, as he is required to do by the Clean Air Act. *See* 42 U.S.C. §
27 7410(h)(1).

1 34. Administrator Wheeler therefore has violated Section 110(h)(1) of the Clean Air Act, 42
2 U.S.C. § 7410(h)(1), by failing to timely assemble and publish the comprehensive California SIP.

3 35. These violations constitute “failure[s] of the Administrator to perform any act or duty
4 under this chapter which [are] not discretionary with the Administrator,” within the meaning of the
5 Clean Air Act’s citizen suit provision. *See* 42 U.S.C. § 7604(a)(2). Administrator Wheeler’s violations
6 are ongoing and will continue unless remedied by this Court.

7 **SECOND CLAIM FOR RELIEF**

8 **Violation of the Clean Air Act – Failure to Assemble and Publish the**
9 **Comprehensive Arizona SIP**

10 36. OCE repeats and incorporates by reference the allegations in the above paragraphs and all
11 paragraphs of this Complaint.

12 37. Administrator Wheeler last updated the Arizona “comprehensive” SIP in 2018, despite
13 EPA having approved revisions to the SIP since that time.

14 38. On information and belief, the “comprehensive” Arizona SIP is not even comprehensive
15 through the date of this last update.

16 39. Administrator Wheeler did not assemble and publish the comprehensive SIP for the State
17 of Arizona in at least November 2019, as he is required to do by the Clean Air Act. *See* 42 U.S.C. §
18 7410(h)(1).

19 40. Administrator Wheeler therefore has violated Section 110(h)(1) of the Clean Air Act, 42
20 U.S.C. § 7410(h)(1), by failing to timely assemble and publish the comprehensive Arizona SIP.

21 41. These violations constitute “failure[s] of the Administrator to perform any act or duty
22 under this chapter which [are] not discretionary with the Administrator,” within the meaning of the
23 Clean Air Act’s citizen suit provision. *See* 42 U.S.C. § 7604(a)(2). Administrator Wheeler’s violations
24 are ongoing and will continue unless remedied by this Court.

THIRD CLAIM FOR RELIEF

**Violation of the Clean Air Act – Failure to Assemble and Publish the
Comprehensive Nevada SIP**

42. OCE repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

43. The EPA Administrator last updated Nevada’s “comprehensive” SIP in 2014, despite EPA having approved revisions to the SIP since that time.

44. On information and belief, the “comprehensive” Nevada SIP is not even comprehensive through the date of this last update.

45. The EPA Administrator did not assemble and publish the comprehensive SIP for the State of Nevada in at least November 2016 and November 2019, as the Administrator is required to do by the Clean Air Act. *See* 42 U.S.C. § 7410(h)(1).

46. The EPA Administrator therefore violated Section 110(h)(1) of the Clean Air Act, 42 U.S.C. § 7410(h)(1), by failing to timely assemble and publish the comprehensive Nevada SIP.

47. These violations constitute “failure[s] of the Administrator to perform any act or duty under this chapter which [are] not discretionary with the Administrator,” within the meaning of the Clean Air Act’s citizen suit provision. *See* 42 U.S.C. § 7604(a)(2). The EPA Administrator’s violations are ongoing and will continue unless remedied by this Court.

FOURTH CLAIM FOR RELIEF

**Violation of the Clean Air Act – Failure to Publish Notice in the Federal Register of the
Comprehensive SIPs for California, Arizona, and Nevada**

48. OCE repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

49. The EPA Administrator last published notice in the Federal Register of the availability of comprehensive SIPs for every state, including California, Arizona, and Nevada, on November 29, 2013. *See* 78 Fed. Reg. 71,508.

- 1 D. Pursuant to section 304 of the Clean Air Act, 42 U.S.C. § 7604, order Administrator Wheeler to
2 comply with section 110(h)(1) of the Clean Air Act, 42 U.S.C. § 7410(h)(1), by promptly
3 publishing in the Federal Register notice of the availability of comprehensive SIPs for California,
4 Arizona, and Nevada on a court-ordered schedule,
- 5 E. Pursuant to section 304 of the Clean Air Act, 42 U.S.C. § 7604, order Administrator Wheeler to
6 comply with section 110(h)(1) of the Clean Air Act, 42 U.S.C. § 7410(h)(1), by assembling,
7 publishing, and publishing notice in the Federal Register of comprehensive SIPs for California,
8 Arizona, and Nevada in November 2022 and every three years thereafter as required by the
9 Clean Air Act,
- 10 F. Pursuant to section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), order Administrator
11 Wheeler to pay to OCE its costs of litigation, including reasonable attorney and expert witness
12 fees, and
- 13 G. Award such other and further relief as this Court deems just and proper or such other relief as
14 OCE may subsequently request.

15 **RESPECTFULLY SUBMITTED, December 2, 2020.**

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17 

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24 *Attorney for Our Children's Earth Foundation*

CIVIL COVER SHEET

The JS-CAND 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 in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

OUR CHILDREN'S EARTH FOUNDATION, a non-profit corporation

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

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

Christopher Sproul, Stuart Wilcox, and Brian Orion; Environmental Advocates; 5135 Anza Street, San Francisco, CA 94121; (415) 533-3376

DEFENDANTS

ANDREW R. WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency 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)

Unknown

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

- 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)
X 2 U.S. Government Defendant 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)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, 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)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

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

- X 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-Transfer 8 Multidistrict Litigation-Direct File

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(a)(2) and 42 U.S.C. § 7410(h)(1)

Brief description of cause:

Andrew Wheeler has failed to timely assemble, publish, and publish notice of comprehensive state implementation plans for California, Arizona, and Nevada as required by the Clean Air Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes X No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

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

DATE 12/02/2020

SIGNATURE OF ATTORNEY OF RECORD

Christopher Sproul