

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:13-CV-710

STATE OF NORTH CAROLINA,)	
Plaintiff,)	
)	<u>COMPLAINT FOR DECLARATORY</u>
v.)	<u>AND INJUNCTIVE RELIEF</u>
)	28 USCS § 2201 and Clean Air Act, 42
REGINA MCCARTHY, in her official Capacity)	U.S.C. §§ 7401 <i>et seq.</i>
as Administrator of the United States)	
Environmental Protection Agency,)	
Defendant.)	

The State of North Carolina, by authority of the Attorney General of North Carolina and through the undersigned attorneys, alleges:

INTRODUCTION

1. The State of North Carolina (“Plaintiff”) files this suit to compel the Administrator of the U.S. Environmental Protection Agency (“Administrator” or “EPA”), to take action mandated by the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (“CAA”) to designate areas within North Carolina as nonattainment, attainment, or unclassifiable for the revised National Ambient Air Quality Standard (“NAAQS”) for sulfur dioxide (SO₂). On June 2, 2010, EPA promulgated a revision of the primary NAAQS for SO₂ (“revised SO₂ NAAQS”). 75 Fed. Reg. 35,520 (June 22, 2010). This promulgation triggered a nondiscretionary duty for EPA to promulgate designations of areas throughout the country as attainment, nonattainment, or unclassifiable with respect to the revised SO₂ NAAQS. EPA did not promulgate such designations for any areas in North Carolina for the revised SO₂ NAAQS. At the time of the filing of this Complaint, EPA continues to fail to promulgate such designations for any areas for the revised SO₂ NAAQS within the State of North Carolina.

JURISDICTION

2. This is an action to compel the Defendant to perform acts or duties under the CAA that are not discretionary. This Court has jurisdiction pursuant to 42 U.S.C. § 7604(a). This Court also has jurisdiction because the claim arises under the laws of the United States, namely the CAA, and because the United States is a defendant. 28 U.S.C. §§ 1331, 1346.

3. On August 2, 2013, pursuant to 42 U.S.C. § 7604(b)(2), North Carolina gave notice to Defendant of North Carolina's intent to sue EPA for failure to promulgate designations of areas for the revised SO₂ NAAQS. The sixty-day period indicated in 42 U.S.C. § 7604 has expired and the Administrator has not performed the nondiscretionary duties under the CAA as complained of herein. The Plaintiff has satisfied the requirements of 42 U.S.C. § 7604(b)(2).

4. As shown more fully by the facts set forth below, this case presents a case or controversy within the meaning of Article III of the United States Constitution, and, more particularly, the Plaintiff has standing to pursue this claim.

VENUE

5. Venue is proper in this district pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. §§ 1331, 1391. The relief requested by Plaintiff is authorized pursuant to 42 U.S.C. § 7604 and 28 U.S.C. §§ 2201, 2202, and 1361.

6. EPA's Office of Air Quality Planning and Standards ("OAQPS") is located in Research Triangle Park, North Carolina. The OAQPS has a principal role in the process of promulgating designations under the NAAQS.

PARTIES

7. The Plaintiff is a sovereign State. The Plaintiff is also a "person" as that term is used in 42 U.S.C. § 7604(a). *Id.* § 7602(d), (e).

8. Defendant Regina 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 duties at issue in this case.

STATUTORY BACKGROUND

9. The CAA requires the EPA to promulgate NAAQS for certain pollutants in the ambient air which are known as criteria pollutants, such as SO₂. 42 U.S.C. § 7408(a)(1).

10. The CAA states that within one year after promulgation of new or revised NAAQS, the Governor of each State shall submit to the Administrator of EPA a list designating “all areas (or portions thereof) in the State” as “nonattainment,” “attainment,” or “unclassifiable” for that NAAQS. 42 U.S.C. § 7407(d)(1)(A).

11. Upon promulgation or revision of a NAAQS, “the Administrator shall promulgate the designation of all areas” submitted by the Governor of each State “as expeditiously as practicable, but in no case later than two years from the date of promulgation of the new or revised [NAAQS].” *Id.* § 7407(d)(1)(B)(i). The Administrator must publish a notice in the Federal Register promulgating such designations and the deadline for doing so may be extended “for up to one year” in the event the Administrator determines that additional information is needed. *Id.* § 7407(d)(2)(A).

STATEMENT OF FACTS

12. On June 2, 2010, EPA promulgated a revision of the primary NAAQS for SO₂. 75 Fed. Reg. 35,520 (June 22, 2010). This promulgation triggered the States’ obligation to submit designations by June 3, 2011. 42 U.S.C. § 7407(d)(1)(a).

13. North Carolina complied with this obligation and submitted designations for SO₂ by June 3, 2011. In particular, North Carolina requested that its five counties with monitored attainment be designated as attainment, that 32 counties be designated as attainment due to having no or only small SO₂ sources, and that the remaining 63 counties be designated as unclassifiable/attainment.

14. The promulgation of the revised SO₂ NAAQS also triggered the Administrator's nondiscretionary duty to promulgate designations of nonattainment, attainment or unclassifiable for the revised SO₂ NAAQS for all areas pursuant to CAA Section 107(d)(1)(B) by no later than June 2, 2012, and to publish a notice in the Federal Register promulgating those designations. 42 U.S.C. § 7407(d)(1)(B)(i).

15. On August 3, 2012, EPA announced in the Federal Register that it was using its authority under Section 107(d)(1)(B)(i) of the CAA to extend the deadline for promulgating area designations for the revised SO₂ NAAQS by one year. 77 Fed. Reg. 46,295 (Aug. 3, 2012). The notice stated that, "[w]ith this extension, the EPA is now required to complete . . . designations for this NAAQS by June 3, 2013." *Id.*

16. On February 6, 2013, EPA acknowledged that no monitors showed violations of the revised SO₂ NAAQS in North Carolina. EPA stated that it was "not yet prepared to propose designation action in North Carolina," and therefore, in direct contravention of the CAA, indicated that it was "deferring action to designate areas in North Carolina." EPA stated that it anticipated that it would "proceed with designation action in North Carolina once additional data are gathered pursuant to our comprehensive implementation strategy."

17. On April 8, 2013, the Secretary of the North Carolina Department of Environment and Natural Resources responded to EPA, noting that there is no "deferral" option for

designations under the CAA and requesting that EPA designate all areas in North Carolina as attainment/unclassifiable.

18. On August 2, 2013, pursuant to Section 304(b)(2) of the CAA, 42 U.S.C. § 7604(b)(2), North Carolina gave notice to Defendant of North Carolina's intent to sue Defendant for failure to designate areas for the revised SO₂ NAAQS.

19. On August 5, 2013, EPA published in the Federal Register final air quality designations for the revised SO₂ NAAQS for only 29 areas, encompassing parts of only sixteen states. 78 Fed. Reg. 47,191 (Aug. 5, 2013). EPA only promulgated designations for areas that included air quality monitors showing nonattainment. EPA did not designate any areas as attainment even if monitors in those areas showed attainment. EPA did not designate any areas in North Carolina – including areas with monitored attainment – for the revised SO₂ NAAQS. EPA also did not designate any areas in North Carolina as “unclassifiable.”

20. At the time of the filing of this Complaint, EPA continues to fail to designate any areas for the revised SO₂ NAAQS within the State of North Carolina.

21. North Carolina is prejudiced by EPA's failure to follow the requirements of the CAA. North Carolina is charged with submitting a plan that provides for implementation, maintenance, and enforcement of the revised SO₂ NAAQS. 42 U.S.C. § 7410(a). North Carolina's efforts to implement the requirements of the CAA are adversely impacted by EPA's failure to promulgate designations. EPA's failure to designate areas as required by the CAA subjects North Carolina to a detrimental uncertainty that will negatively affect the State's economy, private development, and the public interest.

CLAIM FOR RELIEF

Failure to Perform Nondiscretionary Duty to Promulgate Designations of Areas in North Carolina Regarding the Revised SO₂ NAAQS

22. All allegations in paragraphs 1 to 19 of this Complaint are incorporated into this Claim for Relief as if they were set forth fully herein.

23. The CAA required the Defendant to promulgate designations of all areas in North Carolina as attainment, nonattainment or unclassifiable by no later than June 3, 2013.

24. The Defendant failed to perform that duty by said deadline and the Defendant continues to fail to perform that duty.

25. Section 304 of the CAA, 42 U.S.C. § 7604, permits any person, which includes a State, to bring an action for injunctive relief to compel the Defendant to perform the aforesaid nondiscretionary duty.

26. The Plaintiff has satisfied the prerequisites to suit set forth in the CAA as set forth above.

27. For all of the foregoing reasons, the Administrator is in violation of the nondiscretionary duty imposed by 42 U.S.C. § 7407(d)(1) and (d)(2) and the Plaintiff is entitled to a declaration of such violation under 28 U.S.C. § 2201 and injunctive relief compelling the Defendant to perform her duty under 42 U.S.C. § 7604.

REQUEST FOR RELIEF

WHEREFORE, the State of North Carolina respectfully requests that the Court:

1. Declare that the Administrator is in violation of the CAA with regard to her failure to perform the mandatory duties as established above;
2. Issue a mandatory injunction requiring the Administrator to perform her mandatory duties by a certain date set by the Court;

3. Retain jurisdiction of this matter for purposes of enforcing the Court's order;
4. Grant North Carolina its reasonable costs of litigation, including attorneys' and expert witness fees; and
5. Grant such further relief as the Court deems proper.

This 9th day of October, 2013.

Respectfully submitted,

ROY COOPER
Attorney General

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