

1

INTRODUCTION

2 1. Plaintiff Sierra Club brings this Clean Air Act citizen suit to compel the United
3 States Environmental Protection Agency to undertake overdue mandatory duties.
4 Specifically, Sierra Club challenges the failure of Defendant, Gina McCarthy, in her
5 official capacity as Administrator of the United States Environmental Protection Agency
6 (EPA), to perform certain mandatory duties required by the Clean Air Act, 42 U.S.C. §§
7 7401-7671q. These duties are failure to approve or disapprove under 42 U.S.C. §
8 7410(k)(2) - (4) state implementation plan (SIP) elements submittals from Louisiana,
9 Montana, New Jersey, New York, South Dakota, Wisconsin and Wyoming; and failure to
10 promulgate federal implementation plans (FIP) under 42 U.S.C. § 7410(c)(1) for certain
11 SIP elements for California and Kentucky, all for the 2008 ozone National Ambient Air
12 Quality Standard.

13

JURISDICTION

14 2. This case is a Clean Air Act citizen suit. Therefore, the Court has jurisdiction
15 over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 42
16 U.S.C. § 7604(a)(2) (citizen suits for failure to perform a non-discretionary duty required
17 by the Clean Air Act).

18

NOTICE

19 3. Plaintiff Sierra Club mailed a letter via certified mail, return receipt requested, on
20 June 1, 2015 to Defendant EPA stating that Sierra Club intends to sue EPA for the
21 violations alleged in Sierra Club's original Complaint. Plaintiff Sierra Club mailed a
22 letter via certified mail, return receipt requested, on September 21, 2015 to Defendant
23 EPA stating that Sierra Club intends to sue EPA for the violations alleged in this First

1 Amended Complaint regarding Wyoming. Plaintiff Sierra Club mailed a letter via
2 certified mail, return receipt requested, on November 2, 2015 to Defendant EPA stating
3 that Sierra Club intends to sue EPA for the violations alleged in this First Amended
4 Complaint regarding New Jersey. More than sixty days have passed since Sierra Club
5 mailed these notice of intent to sue letters. To date, Defendant has not remedied the
6 violations alleged in this Complaint. Therefore, an actual controversy exists.

7

8

VENUE

9 4. Defendant EPA resides in this judicial district. This civil action is brought against
10 an officer of the United States, acting in her official capacity, and a substantial part of the
11 events or omissions giving rise to the claims in this case occurred in the Northern District
12 of California. In addition, Plaintiff Sierra Club is headquartered in San Francisco.
13 Therefore, venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

14

15

INTRADISTRICT ASSIGNMENT

16 5. A substantial part of the events and omissions giving rise to the claims in this case
17 occurred in the County of San Francisco. Accordingly, assignment to the San Francisco
18 Division or the Oakland Division is proper pursuant to Civil L.R. 3-2(c) and (d).

19

20

PARTIES

21 6. Plaintiff SIERRA CLUB is a national grassroots nonprofit conservation
22 organization formed in 1892.

23

28

1 7. Sierra Club’s purpose includes practicing and promoting the responsible use of
2 earth’s ecosystems and resources, and protecting and restoring the quality of the natural
3 and human environment. Sierra Club has over 600,000 members nationally.

4 8. Members and staff of Sierra Club live, work, recreate, and travel throughout the
5 states at issue in this case and states downwind of those states and will continue to do so
6 on a regular basis. Ozone in and emissions from the affected States threatens and
7 damages, and will continue to threaten and damage, the health and welfare of Plaintiff’s
8 staff and members. Ozone diminishes Sierra Club staff’s and members’ ability to enjoy
9 the aesthetic qualities and recreational opportunities of the respective areas.

10 9. EPA’s failure to timely perform the mandatory duties described herein also
11 adversely affect Sierra Club, and its staff and members, by depriving them of procedural
12 protection and opportunities, as well as information they are entitled to under the Clean
13 Air Act. The failure of EPA to perform mandatory duties also creates uncertainty for
14 Sierra Club’s staff and members as to whether they are exposed to excess air pollution.

15 10. The above injuries will continue until the Court grants the relief requested herein.

16 11. Defendant Gina McCarthy is the Administrator of the United States
17 Environmental Protection Agency. In that role, Administrator McCarthy has been
18 charged by Congress with the duty to administer the Clean Air Act, including the
19 mandatory duties at issue in this case.

20

21

LEGAL BACKGROUND

22 12. Congress enacted the Clean Air Act to “speed up, expand, and intensify the war
23 against air pollution in the United States with a view to assuring that the air we breathe

1 throughout the Nation is wholesome once again.” H.R. Rep. No. 1146, 91st Cong., 2d
2 Sess. 1,1, 1970 U.S. Code Cong. & Admin. News 5356, 5356. To promote this, the
3 Clean Air Act requires EPA to set National Ambient Air Quality Standards, establishing
4 maximum allowable concentrations for certain pollutants, including ozone.

5 13. Adverse impacts arise from ground-level ozone (“ozone”) pollution, commonly
6 referred to as smog. Exposure to ozone pollution causes numerous impacts to a person’s
7 respiratory system, including asthma, pneumonia, and bronchitis, and can result in the
8 permanent scarring of lung tissue. Ozone can also kill people. Moreover, the detrimental
9 effects extend beyond public health. Ozone pollution also interferes with vegetation’s
10 ability to function properly. This interference results in injuries such as decreased crop
11 yields and damage to native ecosystems.

12 14. The Clean Air Act requires each state to submit a state implementation plan for
13 every promulgation or revision of a National Ambient Air Quality Standard, within three
14 years of that standard’s promulgation or revision, that provides for the “implementation,
15 maintenance, and enforcement” of the standard. 42 U.S.C. § 7410(a)(1). These are often
16 referred to as “Infrastructure” State Implementation Plans. An Infrastructure State
17 Implementation Plan Submittal must meet the requirements listed under 42 U.S.C. §
18 7410(a)(2). *See* 42 U.S.C. §§ 7410(a)(2)(A)-(M).

19 15. The Clean Air Act requires EPA to determine whether any state implementation
20 plan submittal is administratively complete. 42 U.S.C. 7410(k)(1)(B). EPA must make
21 this determination by “no later than 6 months after the date, if any, by which a State is
22 required to submit the plan or revision.” *Id.* If EPA fails to make a determination of
23 whether a SIP submittal is administratively complete, then the submittal is deemed

1 administratively complete by operation of law six months after a state submitted the
2 submittal. *Id.*

3 16. EPA has a mandatory duty to take final action on any administratively complete
4 state implementation plan submittal by approving in full, disapproving in full, or
5 approving in part and disapproving in part, or conditionally approving, within 12 months
6 of the date the submittal is deemed administratively complete. 42 U.S.C. § 7410(k)(2),
7 (3) and (4).

8 17. If a state fails to submit any required state implementation plan, there is no
9 submittal that may be deemed administratively complete, and EPA must make a
10 determination stating that the state failed to submit the required state implementation
11 plan. 42 U.S.C. § 7410(k)(1)(B). This is referred to as a “finding of failure to submit.”

12 18. If EPA disapproves a SIP submittal, EPA must promulgate a Federal Implementation
13 Plan to take the place of the disapproved SIP submittal within two years of the disapproval.
14 42 U.S.C. § 7410(c)(1). Similarly, if EPA finds that a state has failed to submit a SIP by the
15 required deadline, EPA must promulgate a Federal Implementation Plan to fill in the gap of
16 the missing SIP submittal within two years of the finding of failure to submit.

17 **CLAIMS FOR RELIEF**

18 **CLAIM ONE**

19 (EPA Failure to Take Final Action on States’ Infrastructure State Implementation Plan
20 Submittals.)

21 19. Plaintiff incorporates by reference paragraphs 1 through 20.

22 20. The Clean Air Act requires EPA to determine whether any state implementation
23 plan submittal is administratively complete. *See* 42 U.S.C. 7410(k)(1)(B).

1 21. If six months after a state submits a state implementation plan, EPA has not made
2 the completeness finding and has not found the submittal to be incomplete, the submittal
3 is deemed administratively complete by operation of law. *Id.*

4 22. EPA must take final action on an administratively complete submittal by
5 approving in full, disapproving in full, approving in part and disapproving in part or
6 conditionally approving within 12 months of the date of the submittal's completeness
7 finding. 42 U.S.C. § 7410(k)(2) - (4).

8 23. EPA has failed to take final action on Louisiana's Infrastructure State
9 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)
10 element. By no later than December 7, 2013, either EPA or operation of law deemed
11 Louisiana's state implementation plan submittal, that included the infrastructure
12 requirements under 42 U.S.C. § 7410(a)(2)(D)(i), administratively complete. *See* EPA,
13 Status of State SIP Infrastructure Requirements—Louisiana (available at
14 http://www3.epa.gov/airquality/urbanair/sipstatus/reports/la_infrabypoll.html#x110_a__2__ozone__2008_
15 (last viewed September 17, 2015)).

16 24. Under the Clean Air Act, EPA is required to take final action on Louisiana's
17 submittal that addresses these infrastructure requirements by approving in full,
18 disapproving in full, or approving in part and disapproving in part by no later than
19 December 7, 2014. *See* 42 U.S.C. § 7410(k)(2) - (4).

20 25. EPA has failed to do so.

21 26. EPA has failed to take final action on Montana's Infrastructure State
22 Implementation Plan submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)(I)
23 elements. On July 8, 2013, either EPA or operation of law deemed Montana's state
24 implementation plan submittal that included the infrastructure requirements under 42
25 U.S.C. § 7410(a)(2)(D)(i)(I) administratively complete. *See* EPA, Status of State SIP
26 Infrastructure Requirements—Montana (available at
27 http://www3.epa.gov/airquality/urbanair/sipstatus/reports/mt_infrabypoll.html#x110_a__2__ozone__2008_
28 (last viewed September 17, 2015)).

1 27. Under the Clean Air Act, EPA is required to take final action on Montana's
2 submittal that addresses these infrastructure requirements by approving in full,
3 disapproving in full, or approving in part and disapproving in part by July 8, 2014. *See* 42
4 U.S.C. § 7410(k)(2) - (4).

5 28. EPA has failed to do so.

6 29. EPA has failed to take final action on New York's Infrastructure State
7 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)
8 elements. On October 4, 2013, either EPA or operation of law deemed New York's state
9 implementation plan submittal that included the infrastructure requirements under
10 110(a)(2)(D)(i) administratively complete. *See* EPA, Status of State SIP Infrastructure
11 Requirements—New York (available at
12 [http://www3.epa.gov/airquality/urbanair/sipstatus/reports/ny_infrabypoll.html#x110_a__](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/ny_infrabypoll.html#x110_a__2__ozone__2008_)
13 [2__ozone__2008_](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/ny_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed September 17, 2015).

14 30. Under the Clean Air Act, EPA is required to take final action on New York's
15 submittal that addresses these infrastructure requirements by approving in full,
16 disapproving in full, or approving in part and disapproving in part by October 4, 2014.
17 *See* 42 U.S.C. § 7410(k)(2) - (4).

18 31. EPA has failed to do so.

19 32. EPA has failed to take final action on South Dakota's Infrastructure State
20 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)(I)
21 elements. By no later than November 30, 2013, either EPA or operation of law deemed
22 South Dakota's state implementation plan submittal that included the infrastructure
23 requirements under 42 U.S.C. § 7410(a)(2)(D)(i)(I) administratively complete. *See* EPA,
24 Status of State SIP Infrastructure Requirements—South Dakota (available at
25 [http://www3.epa.gov/airquality/urbanair/sipstatus/reports/sd_infrabypoll.html#x110_a__](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/sd_infrabypoll.html#x110_a__2__ozone__2008_)
26 [2__ozone__2008_](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/sd_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed September 17, 2015).

27 33. Under the Clean Air Act, EPA is required to take final action on South Dakota's
28 submittal that addresses these infrastructure requirements by approving in full,

1 disapproving in full, or approving in part and disapproving in part by no later than
2 November 30, 2014. *See* 42 U.S.C. § 7410(k)(2) - (4).

3 34. EPA has failed to do so.

4 35. EPA has failed to take final action on Wisconsin's Infrastructure State
5 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)(I) &
6 (II)(prong 3 only) elements. By no later than December 20, 2013, either EPA or
7 operation of law deemed Wisconsin's state implementation plan submittal that included
8 the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(D)(i)(I) & (II)(prong 3
9 only) administratively complete. *See* EPA, Status of State SIP Infrastructure
10 Requirements—Wisconsin (available at
11 [http://www3.epa.gov/airquality/urbanair/sipstatus/reports/wi_infrabypoll.html#x110_a__](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/wi_infrabypoll.html#x110_a__2__ozone__2008_)
12 [2__ozone__2008_](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/wi_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed September 17, 2015).

13 36. Under the Clean Air Act, EPA is required to take final action on Wisconsin's
14 submittal that addresses these infrastructure requirements by approving in full,
15 disapproving in full, or approving in part and disapproving in part by no later than
16 December 20, 2014. *See* 42 U.S.C. § 7410(k)(2) - (4).

17 37. EPA has failed to do so.

18 38. EPA has failed to take final action on Wyoming's Infrastructure State
19 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)
20 elements. By no later than August 7, 2014, either EPA or operation of law deemed
21 Wyoming's state implementation plan submittal that included the infrastructure
22 requirements under 42 U.S.C. § 7410(a)(2)(D)(i) administratively complete. *See* EPA,
23 Status of State SIP Infrastructure Requirements—Wyoming (available at
[http://www3.epa.gov/airquality/urbanair/sipstatus/reports/wy_infrabypoll.html#x110_a__](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/wy_infrabypoll.html#x110_a__2__ozone__2008_)
[2__ozone__2008_](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/wy_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed February 2, 2016).

39. Under the Clean Air Act, EPA is required to take final action on Wyoming's
submittal that addresses these infrastructure requirements by approving in full,

23

1 disapproving in full, or approving in part and disapproving in part by no later than August
2 7, 2015. *See* 42 U.S.C. § 7410(k)(2) - (4).

3 40. EPA has failed to do so.

4 41. EPA has failed to take final action on New Jersey's Infrastructure State
5 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)
6 elements. By no later than October 28, 2014, either EPA or operation of law deemed
7 New Jersey's state implementation plan submittal that included the infrastructure
8 requirements under 42 U.S.C. § 7410(a)(2)(D)(i) administratively complete. *See* EPA,
9 Status of State SIP Infrastructure Requirements—New Jersey (available at
10 [http://www3.epa.gov/airquality/urbanair/sipstatus/reports/nj_infrabypoll.html#x110_a__2](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/nj_infrabypoll.html#x110_a__2__ozone__2008_)
11 [__ozone__2008_](http://www3.epa.gov/airquality/urbanair/sipstatus/reports/nj_infrabypoll.html#x110_a__2__ozone__2008_) (last viewed February 2, 2016).

12 42. Under the Clean Air Act, EPA is required to take final action on New Jersey's
13 submittal that addresses these infrastructure requirements by approving in full,
14 disapproving in full, or approving in part and disapproving in part by no later than
15 October 28, 2015. *See* 42 U.S.C. § 7410(k)(2) - (4).

16 43. EPA has failed to do so.

17 **CLAIM TWO**
18 (EPA Failure to Promulgate Federal Implementation Plans)

19 44. Plaintiff incorporates by reference paragraphs 1 through 43.

20 45. On January 15, 2013, EPA published notice of its finding that California had
21 failed to submit a 2008 ozone Infrastructure SIP covering 42 U.S.C. § 7410(a)(2)(A) –
22 (C), (D)(i)(II) – (H), & (J) – (M). 78 Fed. Reg. 2,882, 2,889 (Jan. 15, 2013). This rule
23 was effective February 14, 2013.

24 46. The Clean Air Act requires EPA to promulgate a Federal Implementation Plan by
25 no later than February 14, 2015 satisfying the above requirement. 42 U.S.C. §
26 7410(c)(1)(A).

1 47. EPA has failed to promulgate a Federal Implementation Plan for California's
2 2008 ozone Infrastructure SIP covering 42 U.S.C. § 7410(a)(2)(A) – (C), (D)(i)(II) – (H),
3 & (J) – (M) in violation of its mandatory duty.

4 48. On March 7, 2013, EPA published notice of its disapproval of Kentucky's 2008
5 ozone Infrastructure SIP covering 42 U.S.C. § 7410(a)(2)(D)(i)(I). 78 Fed. Reg. 14,681
6 (March 7, 2013). This rule was effective April 8, 2013.

7 49. The Clean Air Act requires EPA to promulgate a Federal Implementation Plan by
8 no later than April 8, 2015 satisfying the above requirement. 42 U.S.C. § 7410(c)(1)(B).

9 50. EPA has failed to promulgate a Federal Implementation Plan for Kentucky's 2008
10 ozone Infrastructure SIP covering 42 U.S.C. § 7410(a)(2)(D)(i)(I) in violation of its
11 mandatory duty.

12

13 **REQUEST FOR RELIEF**

14 WHEREFORE, Sierra Club respectfully requests that the Court:

15 A. Declare that the Administrator is in violation of the Clean Air Act with regard to
16 her failure to perform each mandatory duty listed above;

17 B. Issue a mandatory injunction requiring the Administrator to perform her
18 mandatory duties by certain dates;

19 C. Retain jurisdiction of this matter for purposes of enforcing and effectuating the
20 Court's order;

21 D. Grant Sierra Club its reasonable costs of litigation, including attorneys' and
22 experts' fees; and

23 E. Grant such further relief as the Court deems just and proper.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Respectfully submitted,

/s Robert Ukeiley

Robert Ukeiley (Admitted *Pro Hac Vice*)
Law Office of Robert Ukeiley
255 Mountain Meadows Rd.
Boulder, CO 80302
(303) 442-4033
rukeiley@igc.org

Kristin Henry (Cal. Bar No. 220908)
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
Telephone: (415) 977-5716
Facsimile: (415) 977-5793
Kristin.Henry@sierraclub.org

Counsel for Sierra Club

Dated: February 9, 2016