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12 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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SIERRA CLUB,

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Plaintiff,

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v.

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GINA MCCARTHY,
in her official capacity as Administrator of the
21 United States Environmental Protection Agency,

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Defendant.

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)
) Case No. 3:15-cv-4328-JD
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) **SECOND AMENDED**
) **COMPLAINT**
) **FOR DECLARATORY AND**
) **INJUNCTIVE RELIEF**
)
)
) (Clean Air Act, 42 U.S.C. §§ 7401
) *et. seq.*)

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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 New Jersey, New York, Wisconsin and Wyoming; and failure to promulgate federal
10 implementation plans (FIP) under 42 U.S.C. § 7410(c)(1) for certain SIP elements for
11 California and Kentucky, all for the 2008 ozone National Ambient Air Quality Standard.

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JURISDICTION

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

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NOTICE

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

1 certified mail, return receipt requested, on November 2, 2015 to Defendant EPA stating
2 that Sierra Club intends to sue EPA for the violations alleged in this First Amended
3 Complaint regarding New Jersey. Plaintiff Sierra Club mailed a letter via certified mail,
4 return receipt requested, on June 6, 2016 to Defendant EPA stating that Sierra Club
5 intends to sue EPA for failure to promulgate a federal implementation plan (FIP) for
6 Kentucky's 2008 ozone national ambient air quality standard obligations pursuant to 42
7 U.S.C. § 7410(a)(2)(D)(i)(I) even if EPA's mandatory duty did not arise until June 2,
8 2016. More than sixty days have passed since Sierra Club mailed these notice of intent
9 to sue letters and since EPA received these notice of intent to sue letters. To date,
10 Defendant has not remedied the violations alleged in this Complaint. Therefore, an
11 actual controversy exists.

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VENUE

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

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INTRADISTRICT ASSIGNMENT

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

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PARTIES

3 6. Plaintiff SIERRA CLUB is a national grassroots nonprofit conservation
4 organization formed in 1892.

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

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

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

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

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

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LEGAL BACKGROUND

3 12. Congress enacted the Clean Air Act to “speed up, expand, and intensify the war
4 against air pollution in the United States with a view to assuring that the air we breathe
5 throughout the Nation is wholesome once again.” H.R. Rep. No. 1146, 91st Cong., 2d
6 Sess. 1,1, 1970 U.S. Code Cong. & Admin. News 5356, 5356. To promote this, the
7 Clean Air Act requires EPA to set National Ambient Air Quality Standards, establishing
8 maximum allowable concentrations for certain pollutants, including ozone.

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

16 14. The Clean Air Act requires each state to submit a state implementation plan for
17 every promulgation or revision of a National Ambient Air Quality Standard, within three
18 years of that standard’s promulgation or revision, that provides for the “implementation,
19 maintenance, and enforcement” of the standard. 42 U.S.C. § 7410(a)(1). These are often
20 referred to as “Infrastructure” State Implementation Plans. An Infrastructure State
21 Implementation Plan Submittal must meet the requirements listed under 42 U.S.C. §
22 7410(a)(2). *See* 42 U.S.C. §§ 7410(a)(2)(A)-(M).

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

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

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

17 18. If EPA disapproves a SIP submittal, EPA must promulgate a Federal Implementation
18 Plan to take the place of the disapproved SIP submittal within two years of the disapproval.
19 42 U.S.C. § 7410(c)(1). Similarly, if EPA finds that a state has failed to submit a SIP by the
20 required deadline, EPA must promulgate a Federal Implementation Plan to fill in the gap of
21 the missing SIP submittal within two years of the finding of failure to submit.

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CLAIMS FOR RELIEF

CLAIM ONE

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

19. Plaintiff incorporates by reference paragraphs 1 through 18.

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

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

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

23. EPA has failed to take final action on Louisiana’s Infrastructure State Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)(II) element. By no later than December 7, 2013, either EPA or operation of law deemed Louisiana’s state implementation plan submittal, that included the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(D)(i)(II), administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Louisiana (available at http://www3.epa.gov/airquality/urbanair/sipstatus/reports/la_infrabypoll.html#x110_a_2_ozone_2008_ (last viewed September 17, 2015)).

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

25. EPA has failed to do so.

1 26. EPA has failed to take final action on New York's Infrastructure State
2 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS
3 110(a)(2)(D)(i)(II)(prong 3 only) element. On October 4, 2013, either EPA or operation
4 of law deemed New York's state implementation plan submittal that included the
5 infrastructure requirements under 110(a)(2)(D)(i)(II)(prong 3 only) administratively
6 complete. *See* EPA, Status of State SIP Infrastructure Requirements—New York
7 (available at
8 http://www3.epa.gov/airquality/urbanair/sipstatus/reports/ny_infrabypoll.html#x110_a_2_ozone_2008_ (last viewed September 17, 2015).

9 27. Under the Clean Air Act, EPA is required to take final action on New York's
10 submittal that addresses this infrastructure requirement by approving in full, disapproving
11 in full, or approving in part and disapproving in part by October 4, 2014. *See* 42 U.S.C. §
12 7410(k)(2) - (4).

13 28. EPA has failed to do so.

14 29. EPA has failed to take final action on Wisconsin's Infrastructure State
15 Implementation Plan Submittal for the 2008 ozone 8-hour NAAQS 110(a)(2)(D)(i)
16 (II)(prong 3 only) elements. By no later than December 20, 2013, either EPA or
17 operation of law deemed Wisconsin's state implementation plan submittal that included
18 the infrastructure requirements under 42 U.S.C. § 7410(a)(2)(D)(i)(II)(prong 3 only)
19 administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—
20 Wisconsin (available at
21 http://www3.epa.gov/airquality/urbanair/sipstatus/reports/wi_infrabypoll.html#x110_a_2_ozone_2008_ (last viewed September 17, 2015).

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

26 31. EPA has failed to do so.

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

9 33. Under the Clean Air Act, EPA is required to take final action on Wyoming's
10 submittal that addresses these infrastructure requirements by approving in full,
11 disapproving in full, or approving in part and disapproving in part by no later than August
12 7, 2015. *See* 42 U.S.C. § 7410(k)(2) - (4).

13 34. EPA has failed to do so.

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

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

26 37. EPA has failed to do so.

CLAIM TWO

(EPA Failure to Promulgate Federal Implementation Plans)

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38. Plaintiff incorporates by reference paragraphs 1 through 37.

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

40. EPA has failed to promulgate a Federal Implementation Plan for California’s 2008 ozone Infrastructure SIP covering 42 U.S.C. § 7410(a)(2)(B)(with respect to the ambient air quality monitoring/data system for the Bakersfield Metropolitan Statistical Area (“MSA”) in the San Joaquin Valley Air Pollution Control District (“APCD”), (C)(with respect to the program for enforcement of control measures and regulation of new and modified stationary sources for the Northern Sonoma, Mendocino and North Coast Air Districts), (D)(i)(II)(Prong 3 “PSD” only)(with respect to the Northern Sonoma, Mendocino and North Coast Air Districts) & (J)(with respect to consultation with government officials, public notification, prevention of significant deterioration and visibility project for the Northern Sonoma, Mendocino and North Coast Air Districts).

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

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

1 43. The Clean Air Act requires EPA to promulgate a Federal Implementation Plan by
2 no later than June 2, 2016 satisfying the above requirement. 42 U.S.C. § 7410(c)(1)(B).

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

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7 **REQUEST FOR RELIEF**

8 WHEREFORE, Sierra Club respectfully requests that the Court:

- 9 A. Declare that the Administrator is in violation of the Clean Air Act with regard to
10 her failure to perform each mandatory duty listed above;
- 11 B. Issue a mandatory injunction requiring the Administrator to perform her
12 mandatory duties by certain dates;
- 13 C. Retain jurisdiction of this matter for purposes of enforcing and effectuating the
14 Court's order;
- 15 D. Grant Sierra Club its reasonable costs of litigation, including attorneys' and
16 experts' fees; and
- 17 E. Grant such further relief as the Court deems just and proper.

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Respectfully submitted,

19

/s Robert Ukeiley

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Dated: August 29, 2016