

FILED

JAN - 4 2012

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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)
SIERRA CLUB)
85 Second St. 2nd Floor)
San Francisco, CA 94105,)

Plaintiff,

vs.

Case: 1:12-cv-00013
Assigned To : Roberts, Richard W.
Assign. Date : 1/4/2012
Description: Admn. Agency Review

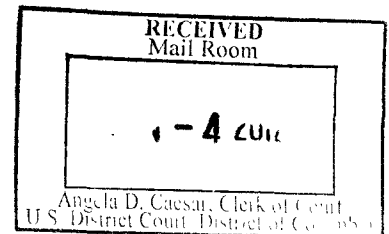
LISA P. JACKSON)
in her Official Capacity as)
Administrator)
United States Environmental Protection Agency)
Ariel Rios Building)
1200 Pennsylvania Avenue, N.W.)
Washington, DC 20460)

Defendant.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. INTRODUCTION

1. Ground-level ozone (“ozone”) pollution, commonly referred to as smog, represents a serious public health and ecosystem problem in the United States. Exposure to ozone pollution causes numerous respiratory problems, including asthma, pneumonia, bronchitis, and permanent scarring of lung tissue. Moreover, ozone’s detrimental effects extend beyond public health. Ozone pollution also interferes with vegetation’s ability to function properly. This interference results in injuries such as decreased crop yields and damage to native ecosystems.



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2. To protect against these and other adverse affects on human health and welfare, the Administrator of the United States Environmental Protection Agency [hereinafter “EPA”] promulgated an 8-hour National Ambient Air Quality Standard for ozone in 1997. EPA then designated those areas whose air quality at that time did not meet the standard as “nonattainment.” The Clean Air Act requires states to submit state implementation plans by specific dates on how they plan to clean up their air. If a state does submit a state implementation plan, EPA must take final action on administratively complete submittals by approving in full, disapproving in full or approving in part and disapproving in part within 12 months of the date of a submittal’s completeness finding.

3. The Administrator has also failed to take final action on certain State Implementation Plan submittals for the North Carolina and South Carolina portions of the Charlotte-Gastonia-Rock Hill 1997 8-hour ozone nonattainment area. Accordingly, Plaintiff SIERRA CLUB brings this action against Defendant LISA P. JACKSON, in her official capacity as Administrator of the Environmental Protection Agency, to compel her to perform her mandatory duties with respect to the Charlotte-Gastonia-Rock Hill 1997 8-hour ozone nonattainment area.

II. JURISDICTION

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

5. An actual controversy exists between the parties. This case does not concern federal taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146, and does not involve the Tariff Act of 1930. Thus, this Court has authority to order the declaratory relief requested under 28 U.S.C. §

2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive relief.

III. NOTICE

6. Sierra Club mailed to EPA by certified mail, return receipt requested, written notice of intent to sue regarding the failure to take final action on certain portions of State Implementation Plan submittals under 42 U.S.C. § 7410(k)(2) and (3) and failure to make a finding of failure to submit certain portions of State Implementation Plan submittals under 42 U.S.C. § 7410(k)(1)(B) for the Charlotte-Gastonia-Rock Hill 1997 8-hour ozone nonattainment area. EPA received this written notice by no later than September 8, 2011.

7. More than sixty days have passed since EPA received these “notice of intent to sue” letters. EPA has not remedied the violations alleged in this Complaint. Therefore, a present and actual controversy exists.

IV. VENUE

8. This civil action is brought against an officer of the United States acting in her official capacity. EPA is headquartered in this judicial district. Defendant Lisa P. Jackson officially resides in the District of Columbia. In addition, a substantial part of the events or omissions giving rise to the claims in this case occurred in the District of Columbia. Accordingly, venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

V. PARTIES

9. Plaintiff SIERRA CLUB is a national grassroots nonprofit conservation organization formed in 1892. Sierra Club's purpose includes practicing and promoting the responsible use of Earth's ecosystems and resources, and protecting and restoring the quality of the natural and human environment.

10. Sierra Club has over 600,000 members nationally. Members and staff of Sierra Club live, work, recreate, and travel throughout the areas at issue in this case and will continue to do so on a regular basis. Ozone in the affected areas threatens, and will continue to threaten, the health and welfare of the Sierra Club's staff and members. Sierra Club staff's and members' ability to enjoy the aesthetic qualities and recreational opportunities is diminished in the respective areas impacted by ozone pollution.

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

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

13. Defendant LISA P. JACKSON is the Administrator of the United States Environmental Protection Agency. In that role Administrator Jackson has been charged by Congress with the duty to administer the Clean Air Act, including the mandatory duties at issue in this case.

VI. LEGAL BACKGROUND

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

15. National Ambient Air Quality Standards must be stringent enough to protect public health and welfare. Effects on welfare include, but are not limited to, effects on soils, water, vegetation, manmade materials, wildlife, visibility (*i.e.*, haze), climate, damage to property, economic impacts and effects on personal comfort and well-being.

16. Pursuant to 42 U.S.C. § 7407(d)(1)(A), areas that fail to meet the National Ambient Air Quality Standard for a pollutant are designated “nonattainment” for that pollutant, while those that meet the standard are designated “attainment.” *See e.g., Sierra Club v. EPA*, 129 F.3d 137, 138 (D.C. Cir. 1997).

17. For areas designated as nonattainment, the State must submit a state implementation plan showing how it plans to reduce the air pollution levels to below the National Ambient Air Quality Standard. *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882 887 (D.C. Cir. 2006) (discussing ozone nonattainment requirements found in 42 U.S.C. §§ 7511-7511f that apply to areas failing to reach attainment by the 1990 Clean Air Act Amendments); *see also Sierra Club v. EPA*, 129 F. 3d at 138 (“EPA must establish . . . a schedule by which the state must submit a state implementation plan revision that complies with the requirements for

nonattainment areas in order to attain the National Ambient Air Quality Standards. . .”) (citation omitted).

18. On July 18, 1997, EPA promulgated a new 8-hour ozone National Ambient Air Quality Standard. *See* 62 Fed. Reg. 38856 (July 18, 1997).

19. To implement the 1997 8-hour standard, EPA originally divided nonattainment areas into two separate categories: “subpart 1” for areas designated nonattainment under Title I, Part D, subpart 1 of the Clean Air Act, 42 U.S.C. §§ 7501-7509a, and “subpart 2” for areas designated nonattainment under Title I, Part D, subpart 2 of the Clean Air Act, 42 U.S.C §§ 7511-7511f. *See* 69 Fed. Reg. 23858 (April 30, 2004).

20. Nonattainment areas designated under subpart 2 were classified according to their design value at the time of the nonattainment designation. 42 U.S.C. § 7511(a)(1); *see also* 40 C.F.R. § 51.903(a) (2009).

21. EPA classified the North Carolina portion of the Charlotte-Gastonia-Rock Hill area as a moderate nonattainment area under subpart 2 for the 1997 8-hour ozone National Ambient Air Quality Standard. 69 Fed. Reg. 23858, 23923 (April 30, 2004).

22. EPA classified the South Carolina portion of the Charlotte-Gastonia-Rock Hill area as a moderate nonattainment area under subpart 2 for the 1997 8-hour ozone National Ambient Air Quality Standard. 69 Fed. Reg. 23858, 23932 (April 30, 2004).

23. The effective date of these nonattainment designations for the 1997 8-hour ozone standard is June 15, 2004. *Id.*

24. The Clean Air Act requires a state in which a moderate nonattainment area designated under subpart 2 is located to submit a state implementation plan meeting certain requirements. *See* 42 U.S.C. § 7511a(b).

25. Under one such requirement states are required to submit a demonstration of attainment no later than three years after their date of designation for nonattainment areas designated under subpart 2 that are classified as moderate or higher. *See* 40 C.F.R. § 51.908(a) (2009).
26. Under the Clean Air Act, EPA is required to determine whether a state implementation plan submittal is administratively complete. 42 U.S.C. § 7410(k)(1)(B).
27. If six months after a state submits a state implementation plan submittal 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.*
28. EPA has a mandatory duty to take final action on an administratively complete submittal by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of the completeness finding. 42 U.S.C. § 7410(k)(2) and (3).

VII. FACTS

29. On December 15, 2007, either EPA or operation of law deemed North Carolina's submittal(s) addressing the emission inventory and Reasonable Further Progress (RFP) for VOC and NO_x requirements administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *See* EPA, Status of State SIP Requirements for Designated Areas— North Carolina: Ozone-8Hr (1997)/ Charlotte-Gastonia-Rock Hill, (http://www.epa.gov/air/urbanair/sipstatus/reports/nc_elembypoll.html#ozone-8hr_1997_615) (last viewed November 15, 2011).
30. On June 30, 2008, either EPA or operation of law deemed North Carolina's submittal addressing the RACT NO_x for major sources requirement administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *Id.*

31. On May 27, 2010, either EPA or operation of law deemed North Carolina's submittal addressing the contingency measures (VOC and NO_x), emission statement requirements, and the attainment demonstration administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *See* EPA, Status of State SIP Requirements for Designated Areas— North Carolina: Ozone-8Hr (1997)/ Charlotte-Gastonia-Rock Hill, (http://www.epa.gov/air/urbanair/sipstatus/reports/nc_elebypoll.html#ozone-8hr_1997_615) (last viewed November 15, 2011).

32. EPA has not yet taken final action by approving or disapproving in whole or part these State Implementation Plan submittals or revisions from North Carolina.

33. On March 2, 2008, either EPA or operation of law deemed South Carolina's submittal addressing the emission inventory, RACT non-CTG VOC for major sources and RACT NO_x for major sources requirements administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *See* EPA, Status of State SIP Requirements for Designated Areas— South Carolina: Ozone-8Hr (1997)/ Charlotte-Gastonia-Rock Hill, (http://www.epa.gov/air/urbanair/sipstatus/reports/sc_elebypoll.html#ozone-8hr_1997_616) (last viewed November 15, 2011).

34. EPA has published proposed and direct final rules approving South Carolina's submissions establishing reasonably available control technology for three major source of NO_x and VOC pollution. *See* 76 Fed. Reg. 72844, 72847 (Nov. 28, 2011) and 76 Fed. Reg. 72885 (Nov. 28, 2011). Proposed rules have no legal effect and provide no environmental benefit unless and until the proposed rules becomes final.

35. On March 3, 2008, either EPA or operation of law deemed South Carolina's submittal addressing the RFP (VOC and NO_x) requirement administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *Id.*

36. On May 27, 2010, either EPA or operation of law deemed South Carolina's submittal addressing the contingency measures (VOC and NO_x), emission statement requirements and the attainment demonstration administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *See* EPA, Status of State SIP Requirements for Designated Areas— South Carolina: Ozone-8Hr (1997)/ Charlotte-Gastonia-Rock Hill, (http://www.epa.gov/air/urbanair/sipstatus/reports/sc_lembypoll.html#ozone-8hr_1997_616) (last viewed November 15, 2011).

37. EPA has not yet taken final action by approving or disapproving in whole or part these State Implementation Plan submittals or revisions from South Carolina.

VIII. CLAIM FOR RELIEF

CLAIM ONE

(EPA's Failure to Take Final Action Pursuant to 42 U.S.C. 7410(k)(2) and (3))

38. Plaintiffs incorporate by reference paragraphs 1 through 37.

39. EPA must take final action on an administratively complete submittal by approving in full, disapproving in full, or approving in part and disapproving in part within 12 months of the date of the submittal's completeness finding. 42 U.S.C. § 7410(k)(2) and (3).

40. On December 15, 2007, either EPA or operation of law deemed North Carolina's submittal(s) addressing the emission inventory and RFP (VOC and NO_x) requirements administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *See* EPA,

Status of State SIP Requirements for Designated Areas— North Carolina: Ozone-8Hr (1997)/
Charlotte-Gastonia-Rock Hill,

(http://www.epa.gov/air/urbanair/sipstatus/reports/nc_lembypoll.html#ozone-8hr_1997_615)

(last viewed November 15, 2011).

41. Thus, the Clean Air Act requires EPA to take final action, by approving in full, disapproving in full, or approving in part, on North Carolina's State Implementation Plan addressing the emission inventory and RFP (VOC and NO_x) requirements by no later than December 15, 2008.

42. EPA has failed to take such final action on North Carolina's State Implementation Plan addressing the emission inventory and RFP (VOC and NO_x) requirements by no later than December 15, 2008.

43. On June 30, 2008, either EPA or operation of law deemed North Carolina's submittal addressing the RACT NO_x for major sources requirement administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *Id.*

44. Thus, the Clean Air Act requires EPA to take final action, by approving in full, disapproving in full, or approving in part, on North Carolina's State Implementation Plan addressing the RACT NO_x for major sources requirement by no later than June 30, 2009.

45. EPA has failed to take such final action, by approving in full, disapproving in full, or approving in part, on North Carolina's submittal addressing the RACT NO_x for major sources requirement by no later than June 30, 2009.

46. On May 27, 2010, either EPA or operation of law deemed North Carolina's submittal addressing the contingency measures (VOC and NO_x), emission statement, and ozone attainment

demonstration requirements administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *Id.*

47. Thus, the Clean Air Act requires EPA to take final action, by approving in full, disapproving in full, or approving in part, on North Carolina's State Implementation Plan addressing the contingency measures (VOC and NO_x), emission statement, and ozone attainment demonstration requirements by no later than May 27, 2011.

48. EPA has failed to take final action, by approving in full, disapproving in full, or approving in part, on North Carolina's submittal addressing the contingency measures (VOC and NO_x), emission statement, and ozone attainment demonstration requirements by no later than May 27, 2011.

49. On March 2, 2008, either EPA or operation of law deemed South Carolina's submittal(s) addressing the emission inventory, RACT non-CTG VOC for major sources and RACT NO_x for major sources requirements administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *See* EPA, Status of State SIP Requirements for Designated Areas— South Carolina: Ozone-8Hr (1997)/ Charlotte-Gastonia-Rock Hill, (http://www.epa.gov/air/urbanair/sipstatus/reports/sc_lembypoll.html#ozone-8hr_1997_616) (last viewed November 15, 2011).

50. Thus, the Clean Air Act requires EPA to take final action, by approving in full, disapproving in full, or approving in part, on South Carolina's State Implementation Plan addressing the emission inventory, RACT non-CTG VOC for major sources and RACT NO_x for major sources requirements by no later than March 2, 2009.

51. EPA has failed to take final action, by approving in full, disapproving in full, or approving in part, on South Carolina's submittal addressing the emission inventory, RACT non-

CTG VOC for major sources and RACT NO_x for major sources requirements by no later than March 2, 2009.

52. On March 3, 2008, either EPA or operation of law deemed South Carolina's submittal(s) addressing the RFP (VOC and NO_x) requirement administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *Id.*

53. Thus, the Clean Air Act requires EPA to take final action, by approving in full, disapproving in full, or approving in part, on South Carolina's State Implementation Plan addressing the RFP (VOC and NO_x) requirement by no later than March 3, 2009.

54. EPA has failed to take final action, by approving in full, disapproving in full, or approving in part, on South Carolina's submittal addressing the RFP (VOC and NO_x) requirement by no later than March 3, 2009.

55. On May 27, 2010, either EPA or operation of law deemed South Carolina's submittal(s) addressing the contingency measures (VOC and NO_x), emission statement, and ozone attainment demonstration requirements administratively complete for its portion of the Charlotte-Gastonia-Rock Hill area. *Id.*

56. Thus, the Clean Air Act requires EPA to take final action, by approving in full, disapproving in full, or approving in part, on South Carolina's State Implementation Plan addressing the contingency measures (VOC and NO_x), emission statement, and ozone attainment demonstration requirements by no later than May 27, 2011.

57. EPA has failed to take final action, by approving in full, disapproving in full, or approving in part, on South Carolina's submittal addressing the contingency measures (VOC and NO_x), emission statement, and ozone attainment demonstration requirements by no later than May 27, 2011.

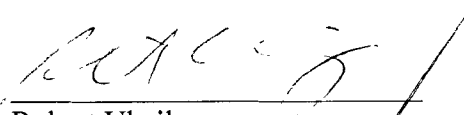
58. Accordingly, EPA is in violation of its mandatory duty to take final action on State Implementation Plan submittals addressing the North Carolina and South Carolina portions of the Charlotte-Gastonia-Rock Hill nonattainment area. This violation of a mandatory duty is ongoing.

REQUEST FOR RELIEF

WHEREFORE, Sierra Club respectfully requests that the Court:

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

Respectfully submitted,



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Dated: January 3, 2012