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CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ADR

COMITE CIVICO DEL VALLE, INC.,

Plaintiff,

v.

LISA JACKSON, in her official capacity as
Administrator of the United States Environmental
Protection Agency, and JARED BLUMENFELD, in
his official capacity as Regional Administrator for
Region IX of the United States Environmental
Protection Agency,

Defendants.

Case No:

C10-00946 *PJH*

**COMPLAINT AND CERTIFICATE OF
INTERESTED PARTIES**

WJ

INTRODUCTION

1. This citizen enforcement action is brought under the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et. seq.*, to compel the U.S. Environmental Protection Agency ("EPA") to undertake an overdue, non-discretionary duty to enforce national air quality requirements in California's Imperial Valley ("Valley").

2. Specifically, EPA has failed to fulfill its mandatory duty to take timely final action to approve, disapprove, or partially approve/disapprove the Imperial Valley Air Pollution Control District ("District") Rule 420 that pertains to control of particulate matter ("PM-10") in the Valley.

Complaint

1 The CAA requires EPA to have acted by deadlines now past due to approve or disapprove Rule 420
2 and this lawsuit seeks to compel EPA action.

3 JURISDICTION

4 3. This Court has jurisdiction over this action to compel the performance of non-
5 discretionary duties by EPA pursuant to 42 U.S.C. § 7604(a) (citizen suit provision of the CAA) and
6 28 U.S.C. § 1331 (federal question jurisdiction). The relief requested is authorized by 28 U.S.C. §
7 2201(a) and 2202, and 42 U.S.C. § 7604.

8 4. Plaintiff has provided EPA with written notice of the claims stated in this action at
9 least sixty days before commencing this action, as required by 42 U.S.C. § 7604(b)(2). *See Exhibit*
10 *A attached hereto* (Letter from Gideon Kracov, counsel for plaintiff, to Lisa Jackson, Administrator
11 of EPA, dated December 30, 2009).

12 VENUE AND INTRADISTRICT ASSIGNMENT

13 5. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) because (1) the
14 EPA Regional Administrator for Region IX is located in San Francisco County and (2) EPA's
15 alleged inactions relate to the duties of the EPA Regional Administrator in San Francisco. Similarly,
16 because the omissions alleged in this Complaint relate to the duties of the Regional Administrator,
17 assignment to the San Francisco Division of this Court is proper under Civil L.R. 3-2(c) and (d).

18 PARTIES

19 6. Plaintiff COMITE CIVICO del VALLE, Inc. ("COMITE") is a California non-profit
20 corporation located in Brawley in Imperial County, California, dedicated to serving the needs of the
21 Imperial Valley's unserved and underserved populations through health promotion and education.
22 COMITE has numerous members including members of protected classifications residing in the
23 Valley area who breathe PM-10 and are negatively affected by the violations identified herein.

24 7. Members of plaintiff organization live, raise their families, work (including assisting
25 patients suffering adverse health effects from air pollution), recreate, and conduct educational,
26 research, advocacy and other activities in the Valley. They are adversely affected by exposure to
27 levels of air pollution that exceed the national health-based ozone and particulate matter standards
28 established under the CAA. The adverse effects of such pollution include actual or threatened harm

1 to their health, their families' health, their professional, educational, and economic interests, and
2 their aesthetic and recreational enjoyment of the environment in the Valley.

3 8. The CAA violations alleged in this Complaint have injured and continue to injure the
4 interests of the plaintiff organization and its members. Granting the relief requested in this lawsuit
5 would redress these injuries by compelling EPA action that Congress determined to be an integral
6 part of the statutory scheme for improving air quality in areas such as the Valley.

7 9. Defendant LISA JACKSON is sued in her official capacity as the Administrator of
8 the EPA. She is responsible for taking various actions to implement and enforce the CAA, including
9 the actions sought in this Complaint.

10 10. Defendant JARED BLUMENFELD is sued in his official capacity as EPA Regional
11 Administrator for Region IX. He is responsible for implementing and enforcing the CAA in Region
12 IX, which includes the Valley.

13 STATUTORY FRAMEWORK

14 11. The CAA directs EPA to prescribe national ambient air quality standards ("NAAQS")
15 "the attainment and maintenance of which . . . are requisite to protect the public health" with "an
16 adequate margin of safety." 42 U.S.C. § 7409(a), (b).

17 12. EPA has established a 24-hour NAAQS for PM-10. 40 C.F.R. § 50.6(a), (b). PM-10
18 is defined as particulate matter having a diameter of less than or equal to ten microns. 42 U.S.C. §
19 7602(t).

20 13. The CAA directs EPA to designate areas with ambient air concentrations that exceed
21 the PM-10 standards as "nonattainment" areas. *Id.* § 7407(d)(4)(B). The CAA further classifies
22 these nonattainment areas as either "moderate" or "serious" based on the severity of the PM-10
23 pollution problem in each. *Id.* § 7513.

24 14. The Valley on numerous days and in numerous locations suffers from ambient air
25 concentrations well in excess of federal standards for PM-10. PM-10 is comprised of fine particles
26 such as dust, soot, smoke, and fumes that can be suspended in the air for extended periods of time.
27 "[W]hen inhaled, PM-10 particles can penetrate deep into the respiratory tract where they can lodge
28 in the lung tissue and lead to a variety of respiratory problems." Sierra Club v. United States

1 Environmental Protection Agency, 346 F.3d 955, 957 n.2 (9th Cir. 2003). In 2003, the Ninth Circuit
2 Court of Appeals confirmed the Valley's exceedances and ordered that EPA reclassify the area to be
3 in "serious nonattainment" for PM-10. *Id.* EPA did so in 2004.

4 15. Each state, or region of a state, must adopt a pollution control plan containing
5 measures and rules to ensure attainment or maintenance of the national standards. 42 U.S.C. §
6 7410(a)(1). All such plans and rules must be submitted to and approved by EPA. *Id.* § 7410(a)(1),
7 (k). Collectively, the full set of state air quality rules approved by EPA for each state is known as a
8 State Implementation Plan ("SIP"). Once a SIP or rule revision is approved by EPA, its
9 requirements become federal law. *Id.* § 7604.

10 16. Pursuant to these laws, EPA shall act on a state's SIP submissions and revisions,
11 including the District's Rule 420 at issue here, by full or partial approval or disapproval, within
12 twelve months of a completeness finding. 42 U.S.C. § 7410(k)(2). Section 110(k)(1)(B) of the Act,
13 42 U.S.C. § 7410(k)(1)(B), requires that EPA shall make a completeness finding within 60 days of
14 the date that EPA receives a plan or plan revision. A Plan or Plan revision shall be deemed complete
15 by operation of law if EPA fails to make a completeness finding within 6 months of the date that
16 EPA receives a plan or plan revision. 42 U.S.C. § 7410(k)(1)(B).

17 17. If EPA disapproves the revision, then the CAA requires EPA to impose sanctions
18 against the offending state or region, including increased offsets for new and modified major
19 stationary sources or a prohibition on the use of federal highway funds, unless the State submits
20 revisions within 18 months. *Id.* §§ 7509(a), (b).

21 18. Once EPA approves a SIP or SIP revision, the region must comply with any and all
22 emission standards and limitations contained in the SIP, and all such standards and limitations
23 become federal law and are enforceable by EPA and citizens in federal courts. 42 U.S.C. § 7413; 42
24 U.S.C. § 7604(a), (f).

25 19. If EPA fails to comply with a non-discretionary duty, such as acting on a proposed
26 SIP revision within the CAA deadlines, the CAA allows citizens to bring suit to compel EPA to
27 perform its duty. *Id.* § 7604(a)(2).
28

FACTUAL BACKGROUND

1
2 20. As required by Sierra Club, 346 F.2d at 957, EPA reclassified the Imperial Valley to
3 be a “serious” nonattainment area for PM-10 on August 11, 2004. 69 Fed. Reg. 48792.

4 21. The primary sources of PM-10 pollution in the Valley are unpaved roads, farming
5 operations, re-suspended dust on paved roads, windblown dust, waste burning and disposal,
6 construction and demolition, industrial processes, fuel combustion and mobile sources, including on-
7 road motor vehicles.

8 22. In response to the Sierra Club decision and the “serious” non-attainment designation,
9 on or about October 10, 2006, the District adopted Rule 420 to implement the requirements of the
10 “serious” PM-10 reclassification of Imperial County pursuant to the Act. The Rules, an important
11 part of the Valley’s PM-10 control strategy, include measures to address emissions from beef feedlot
12 operations. The District thereafter transmitted the Rules to the California Air Resources Board
13 (“ARB”) for approval and submission to EPA.

14 23. The ARB then submitted the District’s Rule 420 to EPA on or about August 24, 2007,
15 but EPA since then has not taken action to approve or disapprove the Rules.

16 24. EPA had a mandatory duty to act on Rule 420 no later than on or about March 24,
17 2009. Thus, for nearly one year, EPA has violated and continues to violate its non-discretionary
18 duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rules.

19 25. EPA has not only failed to adhere to the Act’s timelines, but its lack of action has
20 failed the duty to ensure that the District’s rules comport with the Act and the applicable PM-10
21 requirements.

22 26. Had EPA approved these Rules on time, EPA and citizens would already be able to
23 enforce them. Had EPA disapproved the Rules as inconsistent with the CAA, California and the
24 District would have already made changes to ensure that the Rules meet the minimum requirements
25 of the CAA.

26 27. Instead, EPA has failed to act on these Rules, ignoring EPA’s role to ensure timely
27 that California’s and the Valley’s rules and plans comply with the CAA.
28

FIRST CLAIM FOR RELIEF

FAILURE TO PERFORM A NON-DISCRETIONARY DUTY TO ACT ON

DISTRICT RULE 420

(42 U.S.C. § 7604(a)(2))

28. Plaintiff realleges each and every allegation set forth above, as if fully set forth herein.

29. The ARB submitted the District’s Rule 420 to EPA on or about August 24, 2007. EPA was therefore obligated to act on the District’s rules, by full or partial approval or disapproval, within twelve months of a completeness finding. 42 U.S.C. § 7410(k)(2). A revision shall be deemed complete by operation of law if EPA fails to make a completeness finding within 6 months of the date that EPA receives it. *Id.* § 7410(k)(1)(B).

30. However, to this day, EPA has not taken action with regard to the District’s Rule 420 pursuant to 42 U.S.C. § 7410(k)(2). Accordingly, EPA has been in continuous violation of 42 U.S.C. § 7410(k)(2) since on or about March 24, 2009.

31. This CAA violation constitutes a “failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator,” within the meaning of the CAA citizen suit provision. *Id.* § 7604(a)(2). This violation is ongoing and will continue unless remedied by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- 1. DECLARE:
 - A. EPA is in violation of the CAA for failing to act on the District’s Rule 420;
- 2. ISSUE a preliminary and/or permanent injunction directing EPA to:
 - A. act on the District’s Rule 420;
- 3. RETAIN jurisdiction over this matter until such time as EPA has complied with its non-discretionary duties under the CAA;
- 4. AWARD to plaintiff its costs of litigation, including reasonable attorney and expert witness fees; and

1 5. GRANT such additional relief as the Court may deem just and proper.
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3 DATED: March 10, 2010

Respectfully submitted,

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GIDEON KRACOV

6 Attorney for Plaintiff
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1 Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed government
2 agencies have a non-financial interest in the subject matter of this case that could be substantially
3 affected by the outcome of this proceeding: 1) the California Air Resources Board is responsible for
4 submitting air quality plans and rules to defendant United States EPA and 2) the Imperial County Air
5 Pollution Control District is responsible for submitting air quality plans and rules to defendant
6 United States EPA.

7 DATED: March 2, 2010

Respectfully submitted,

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GIDEON KRACOV

10 Attorney for Plaintiff
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EXHIBIT A

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December 30, 2009

By Certified Mail, Return Receipt Requested

Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Laura Yoshii, Acting Regional Administrator
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

**Re: Notice of Intent to Sue for Failure to Take Action on Imperial County Air
Pollution Control District Rules 207.1, 213-215, 217, 407, 419-420**

Dear Ms. Jackson and Ms. Yoshii:

Desert Citizens Against Pollution ("DCAP") and Comite Civico del Valle, Inc. ("Comite") hereby give notice to you of their intent to sue the United States EPA ("EPA") for its failure to fulfill its mandatory duty to take final action to approve, disapprove, or partially approve/disapprove Imperial Valley Air Pollution Control District ("District") Rules **207.1, 213, 214, 215, 217, 407, 419 and 420**. We send this notice pursuant to § 304 (b) of the Clean Air Act ("Act"), 42 U.S.C. § 7604(b), and 40 C.F.R. §§ 54.2 and §§ 54.3. At the conclusion of the 60-day notice period, we intend to file suit under section 304 of the Act, 42 U.S.C. § 7604, to prosecute EPA's failure to perform a non-discretionary duty.

The pollutant-specific requirements for moderate and serious nonattainment areas are found in section 189 of the Act, and the general planning and control requirements for nonattainment plans are found in Act sections 110 and 172. In violation of these standards, Imperial County continues to have significant exceedances of the relevant standards on numerous

days in numerous locations.

Pursuant to these laws, EPA shall act on the District's rules, by full or partial approval or disapproval, within twelve months of a completeness finding. 42 U.S.C. § 7410(k)(2). Section 110(k)(1)(B) of the Act, 42 U.S.C. § 7410(k)(1)(B), requires that EPA shall make a completeness finding within 60 days of the date that EPA receives a plan or plan revision. A Plan or plan revision shall be deemed complete by operation of law if EPA fails to make a completeness finding within 6 months of the date that EPA receives a plan or plan revision. 42 U.S.C. § 7410(k)(1)(B).

On or about October 10, 2006, the District adopted Rule 207.1 to implement its emission reduction credit banking scheme pursuant to the Act. The Air Resources Board ("ARB") submitted the District's Rule 207.1 to EPA on or about August 24, 2007, but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 207.1 no later than on or about March 24, 2009. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 207.1.

On or about September 14, 1999, the District adopted Rule 213 to implement its temporary permit to operate program pursuant to the Act. The ARB submitted the District's Rule 213 to EPA on or about May 26, 2000 but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 213 no later than on or about November 26, 2001. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 213.

On or about September 14, 1999, the District adopted Rule 214 to implement its emission reduction credit banking scheme pursuant to the Act. The ARB submitted the District's Rule 214 to EPA on or about May 26, 2000 but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 214 no later than on or about November 26, 2001. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 214.

On or about September 14, 1999, the District adopted Rule 215 to implement its community bank and priority banking scheme pursuant to the Act. The ARB submitted the District's Rule 215 to EPA on or about May 26, 2000 but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 215 no later than on or about November 26, 2001. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 215.

On or about October 10, 2006, the District adopted Rule 217 to implement its large confined animal facility permit program pursuant to the Act. The ARB submitted the District's Rule 217 to EPA on or about August 24, 2007 but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 217 no later than on or about March 24, 2009. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 217.

On or about September 14, 1999, the District adopted Rule 407 to implement its nuisance abatement program pursuant to the Act. The ARB submitted the District's Rule 407 to EPA on or about May 26, 2000 but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 407 no later than on or about November 26, 2001. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 407.

On or about September 14, 1999, the District adopted Rule 419 to implement its reduction of animal matter program pursuant to the Act. The ARB submitted the District's Rule 419 to EPA on or about May 26, 2000 but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 419 no later than on or about November 26, 2001. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 419.

On or about October 10, 2006, the District adopted Rule 420 to implement its beef feedlot emission program pursuant to the Act. The ARB submitted the District's Rule 420 to EPA on or about August 24, 2007 but EPA has not taken action to approve or disapprove the Rule. EPA had a mandatory duty to act on Rule 420 no later than on or about March 24, 2009. Thus, EPA has violated and continues to violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take action on the Rule 420.

The Noticing Parties DCAP and Comite intend to seek injunctive relief from the court to require EPA to act on Rules 207.1, 213, 214, 215, 217, 407, 419 and 420. Had EPA approved these Rules on time, EPA and citizens would already be able to enforce them. Had EPA disapproved the Rules as inconsistent with the CAA, California and the District would have already made changes to ensure that the Rules meet the minimum requirements of the CAA.

DCAP and Comite have numerous members including members of protected classifications residing in the Imperial Valley area who breathe PM and are negatively affected by the violations identified herein. The Noticing Parties also intend to ask the court to impose civil penalties for each individual violation of the Act and will seek all other appropriate relief.

Desert Citizens Against Pollution

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Comite Civico del Valle, Inc.

Luis Olmedo, Executive Director

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At the conclusion of the 60-day period, DCAP and Comite will file suit in U.S. District Court to compel EPA to perform its nondiscretionary duty under the Act. We very much wish to discuss this matter before litigating and please direct all future correspondence to DCAP and Comite's attorney.

Sincerely,



Gideon Kracov

cc: (By Certified Mail, Return Receipt Requested)

Mary D. Nichols, Chair of the Board
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Sacramento, CA 95812

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