

2. To protect against these and other adverse affects on human health and welfare, the United States Environmental Protection Agency promulgated an annual National Ambient Air Quality Standard for PM_{2.5} in 1997. Areas whose air quality do not meet the standard are deemed “nonattainment” and required to submit state implementation plans that provide controls to clean up their air. The Administrator of the Environmental Protection Agency must take final action on a state implementation plan submittal no later than 12 months after such submittal is deemed administratively complete. The Administrator has failed to do so for Kentucky’s portion of three areas: Cincinnati-Hamilton, Louisville and Huntington-Ashland. Accordingly, Plaintiff KENTUCKY ENVIRONMENTAL FOUNDATION files this lawsuit against Defendant LISA P. JACKSON, in her capacity as Administrator of the Environmental Protection Agency (“EPA”), to compel her failure to perform her mandatory duty with respect to these three areas.

II. JURISDICTION

3. 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)(2) (citizen suits for failure to perform a non-discretionary duty required by the Clean Air Act).

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

5. Kentucky Environmental Foundation mailed to EPA by certified mail, return receipt requested, written notice of intent to sue regarding the violations alleged in this Complaint. EPA received this notice on April 8, 2011. More than sixty days have passed since EPA received the

notice of intent to sue letter. EPA has not remedied the violations alleged in this Complaint. Therefore, a present and actual controversy exists.

IV. VENUE

6. This civil action is brought against an officer of the United States acting in her official capacity. EPA is headquartered in this judicial district. Furthermore, Defendant Lisa P. Jackson officially resides in the District of Columbia. 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

7. Plaintiff KENTUCKY ENVIRONMENTAL FOUNDATION (“KEF”) is a non-profit corporation organized under the laws of Kentucky and maintains its offices in Berea, Kentucky. KEF has worked for over 18 years to ensure the safe disposal of the Army’s stockpile of outdated chemical weapons which are stored in Richmond, Kentucky and seven other sites throughout the nation. KEF also works to ensure that Kentucky has clean energy and that Kentuckians’ exposure to toxic chemicals is minimized.

8. KEF staff and members live, work, recreate, and travel throughout the areas impacted by emission sources in the Kentucky portions of the Cincinnati-Hamilton, Louisville and Huntington-Ashland area at issue in this case, and will continue to do so on a regular basis. PM2.5 in the affected area threatens, and will continue to threaten, the health and welfare of the KEF staff and members. The KEF staff’s and members’, as well as the public’s, ability to enjoy the aesthetic qualities and recreational opportunities is diminished in the affected areas impacted by PM2.5.

9. EPA's failure to timely perform the mandatory duties described herein also adversely affects KEF's 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 KEF staff and members as to whether they are exposed to excess air pollution.

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

11. 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 duty at issue in this case.

VI. GENERAL ALLEGATIONS

12. 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 PM_{2.5}. National Ambient Air Quality Standards establish maximum allowable concentrations in the air of these pollutants.

13. Each National Ambient Air Quality Standard 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.

14. 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; those that meet the standard are designated as "attainment." *See e.g., Sierra Club v. E.P.A.*, 129 F.3d 137,

138 (D.C. Cir. 1997). States with areas designated as “nonattainment” must then submit state implementation plan revisions that prescribe mandatory controls on the state. *See Sierra Club v. E.P.A.*, 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 Standard]...”) (citation omitted).

15. 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).

16. 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.*

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

18. On June 5, 2009, either EPA or operation of law deemed Kentucky’s submittal addressing the 1997 PM_{2.5} nonattainment area requirements for its portion of the Cincinnati-Hamilton area, including the attainment demonstration, contingency measures, emission inventory and reasonably available control measures/reasonably available control technology (“RACM/RACT”) requirements, administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Kentucky: PM_{2.5} (1997)/Cincinnati-Hamilton (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_lembypoll.html#pm-2.5_1997_754) (last viewed July 6, 2011).

19. EPA has proposed to find that the Cincinnati-Hamilton area has attained the 1997 PM_{2.5} annual standard, *see* 76 Fed. Reg. 12861 (March 9, 2011), but such proposals do not have any legal effect. Moreover, the regulations permitting a determination of “has attained” do not suspend EPA’s obligation to take final action, by approving in full, disapproving in full, or approving in part and disapproving in part, on state implementation plans or revisions already submitted. *See* 42 U.S.C. § 7410(k)(2) and (3); 40 C.F.R. §§ 51.918 and 51.1004(c) (2010). *See also* 76 Fed. Reg. 6590, 6592 (Feb. 7, 2011) (Although 40 C.F.R. § 51.918, which uses the same language as 40 C.F.R. § 51.1004(c), suspends a state’s requirements to submit an attainment demonstration, RACM, RFP plan, contingency measures and any other planning requirements related to attainment of the NAAQS for as long as the area continues to attain the National Ambient Air Quality Standard, “EPA is not precluded from acting upon these elements, if [the state] submits them for EPA review and approval.”).

20. On June 5, 2009, either EPA or operation of law deemed Kentucky’s submittal addressing the 1997 PM_{2.5} nonattainment area requirements for its portion of the Louisville area, including the attainment demonstration, contingency measures, emission inventory and RACM/RACT requirements, administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Kentucky: PM_{2.5} (1997)/Louisville (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elebypoll.html#pm-2.5_1997_775) (last viewed July 6, 2011).

21. EPA has proposed to find that the Louisville area has attained the 1997 PM_{2.5} annual standard, *see* 76 Fed. Reg. 34935 (June 15, 2011), but such proposals do not have any legal effect. Moreover, the regulations permitting a determination of “has attained” do not suspend EPA’s obligation to take final action, by approving in full, disapproving in full, or approving in

part and disapproving in part, on state implementation plans or revisions already submitted. *See* 42 U.S.C. § 7410(k)(2) and (3); 40 C.F.R. §§ 51.918 and 51.1004(c) (2010). *See also* 76 Fed. Reg. 6590, 6592 (Feb. 7, 2011) (Although 40 C.F.R. § 51.918, which uses the same language as 40 C.F.R. § 51.1004(c), suspends a state's requirements to submit an attainment demonstration, RACM, RFP plan, contingency measures and any other planning requirements related to attainment of the NAAQS for as long as the area continues to attain the National Ambient Air Quality Standard, "EPA is not precluded from acting upon these elements, if [the state] submits them for EPA review and approval.").

22. On June 5, 2009, either EPA or operation of law deemed Kentucky's submittal addressing the 1997 PM_{2.5} nonattainment area requirements for its portion of the Huntington-Ashland area, including the contingency measures, emission inventory and RACM/RACT requirements, administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Kentucky: PM_{2.5} (1997)/Huntington-Ashland (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elebypoll.html#pm-2.5_1997_764) (last viewed July 6, 2011).

V. CLAIMS FOR RELIEF

CLAIM ONE

(EPA's Failure to Take Final Action Pursuant to 42 U.S.C. § 7410(k)(2) on Kentucky's Submittals Addressing the 1997 PM_{2.5} Nonattainment Areas of Cincinnati-Hamilton, Louisville and Huntington-Ashland)

23. KEF incorporates paragraphs 1 through 22 as though fully set forth herein.
24. 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 the submittal is deemed administratively complete. 42 U.S.C. § 7410(k)(2) and (3).

25. On June 5, 2009, either EPA or operation of law deemed Kentucky's submittal addressing the 1997 PM_{2.5} nonattainment area requirements for its portion of the Cincinnati-Hamilton area, including the attainment demonstration, contingency measures, emission inventory and RACM/RACT requirements, administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Kentucky: PM_{2.5} (1997)/Cincinnati-Hamilton (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elembypoll.html#pm-2.5_1997_754) (last viewed July 6, 2011).

26. Thus, pursuant to 42 U.S.C. § 7410(k)(2) and (3), EPA has a mandatory duty to take final action on Kentucky's 1997 PM_{2.5} state implementation plan submittal addressing the Cincinnati-Hamilton area, including the attainment demonstration, contingency measures, emission inventory and RACM/RACT requirements, by no later than June 5, 2010.

27. EPA has failed to perform this duty by not approving in full, disapproving in full, or approving in part and disapproving in part, Kentucky's 1997 PM_{2.5} state implementation plan submittal addressing the Cincinnati-Hamilton area.

28. On June 5, 2009, either EPA or operation of law deemed Kentucky's submittal addressing the 1997 PM_{2.5} nonattainment area requirements for its portion of the Louisville area, including the attainment demonstration, contingency measures, emission inventory and RACM/RACT requirements, administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Kentucky: PM_{2.5} (1997)/Louisville (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elembypoll.html#pm-2.5_1997_775) (last viewed July 6, 2011).

29. Thus, pursuant to 42 U.S.C. § 7410(k)(2) and (3), EPA has a mandatory duty to take final action on Kentucky's 1997 PM_{2.5} state implementation plan submittal addressing the Louisville

area, including the attainment demonstration, contingency measures, emission inventory and RACM/RACT requirements, by no later than June 5, 2010.

30. EPA has failed to perform this duty by not approving in full, disapproving in full, or approving in part and disapproving in part, Kentucky's 1997 PM_{2.5} state implementation plan submittal addressing the Louisville area.

31. On June 5, 2009, either EPA or operation of law deemed Kentucky's submittal addressing the 1997 PM_{2.5} nonattainment area requirements for its portion of the Huntington-Ashland area, including the contingency measures, emission inventory and RACM/RACT requirements, administratively complete. *See* EPA, Status of State SIP Infrastructure Requirements—Kentucky: PM_{2.5} (1997)/Huntington-Ashland (available at http://www.epa.gov/air/urbanair/sipstatus/reports/ky_elembypoll.html#pm-2.5_1997_764) (last viewed July 6, 2011).

32. Thus, pursuant to 42 U.S.C. § 7410(k)(2) and (3), EPA has a mandatory duty to take final action on Kentucky's 1997 PM_{2.5} state implementation plan submittal addressing the contingency measures, emission inventory and RACM/RACT requirements for the Huntington-Ashland area, by no later than June 5, 2010.

33. EPA has failed to perform this duty by not approving in full, disapproving in full, or approving in part and disapproving in part, Kentucky's 1997 PM_{2.5} state implementation plan submittal addressing the contingency measures, emission inventory and RACM/RACT requirements for the Huntington-Ashland area.

34. Accordingly, EPA is in violation of its mandatory duty under 42 U.S.C. § 7410(k)(2) and (3) to take final action on Kentucky state implementation plan submittals addressing the 1997

PM2.5 nonattainment areas of Cincinnati-Hamilton, Louisville and Huntington-Ashland. This violation of a mandatory duty is ongoing.

REQUEST FOR RELIEF

WHEREFORE, KEF 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 KEF its reasonable costs of litigation, including attorneys' and expert witness fees; and
- E. Grant such further relief as the Court deems proper.

Respectfully submitted,



Robert Ukeiley
DDC Bar No. MD 14062
Email: rukeiley@igc.org



Darin Schroeder
DDC Bar No. WI 0019
Law Office of Robert Ukeiley
435R Chestnut Street, Ste. 1
Berea, KY 40403
Tel: (859) 986-5402
Fax: (866) 618-1017
Email: darin@airadvocates.net

Counsel for KEF

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