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ORIGINAL

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FILED

MAY - 6 2010

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

Full
paid
miss.

10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO/OAKLAND DIVISION

ADR

13 SIERRA CLUB and MEDICAL ADVOCATES
14 FOR HEALTHY AIR,

15 Plaintiffs,

16 v.

17 LISA P. JACKSON, in her official capacity as
18 Administrator of the United States Environmental
19 Protection Agency, and JARED BLUMENFELD, in
20 his official capacity as Regional Administrator for
21 Region IX of the United States Environmental
22 Protection Agency,

23 Defendants.

Case No:

C10-01954 B

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

(Clean Air Act, 42 U.S.C. §§ 7401 et seq.)

INTRODUCTION

1. This action is brought under the federal Clean Air Act, 42 U.S.C. §§ 7401 et seq., to compel the U.S. Environmental Protection Agency to take statutorily required, non-discretionary action on the 8-Hour Ozone State Implementation Plan for the San Joaquin Valley ("Valley"). This suit addresses yet another chapter in EPA's long history of neglecting its statutory duties to protect the Valley's breathing public.

2. The Valley has some of the worst air pollution in the nation with ambient air concentrations well in excess of federal standards for particulate matter and ozone.

3. EPA has allowed the Valley's air quality problems to persist by repeatedly failing to

COMPLAINT

GO 44 SEC. IN
NOTICE OF ASSIGNMENT
TO MAGISTRATE JUDGE

1 comply with the Clean Air Act's mandatory requirements governing air quality planning.

2 4. Now EPA has failed to take timely action on the air quality plan for meeting the
3 national 8-hour ozone standard in the Valley. EPA had a non-discretionary duty to take action on
4 the 8-hour ozone plan by May 16, 2009.

5 5. This lawsuit seeks to compel EPA action to ensure Valley residents are provided the
6 health protections promised by law.

7 **JURISDICTION**

8 6. This Court has jurisdiction over this action to compel the performance of non-
9 discretionary duties by EPA pursuant to 42 U.S.C. § 7604(a) (citizen suit provision of the CAA) and
10 28 U.S.C. § 1331 (federal question jurisdiction).

11 7. Plaintiffs have provided EPA with written notice of the claims stated in this action at
12 least sixty days before commencing this action as required by 42 U.S.C. § 7604(b)(2). *See* Exhibit A
13 (Letter from Paul Cort, counsel for plaintiffs, to Lisa P. Jackson, Administrator of EPA, dated July 1,
14 2009).

15 **VENUE**

16 8. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) because (1) the
17 EPA Regional Administrator for Region IX is located in San Francisco County and (2) EPA's
18 alleged inactions relate to the duties of the Regional Administrator in San Francisco. Similarly,
19 because the omissions alleged in this Complaint relate to the duties of the Regional Administrator,
20 assignment to the San Francisco Division or the Oakland Division of this Court is proper under Civil
21 Local Rule 3-2(c) and (d).

22 **PARTIES**

23 9. Plaintiff MEDICAL ADVOCATES FOR HEALTHY AIR is a California non-profit
24 organization based in Fresno. The organization consists of medical professionals living in the
25 Valley who regularly treat patients suffering from respiratory ailments that are caused or greatly
26 exacerbated by the Valley's unhealthy levels of air pollution. The organization's mission includes
27 advocating for the expeditious attainment of state and national health-based air quality standards in
28 the Valley through public education, litigation, and other means.

1 10. Plaintiff SIERRA CLUB is a national conservation organization incorporated under
2 the laws of California and headquartered in San Francisco. The Sierra Club has over 600,000
3 members nationwide, including more than 19,000 members in its Mother Lode, Tehipite, and Kern-
4 Kaweah Chapters covering the Modesto, Fresno, and Bakersfield areas. The Sierra Club's mission
5 includes the protection and restoration of the natural and human environment. Its activities include
6 public education, advocacy, and litigation to enforce environmental laws. For over three decades,
7 the Sierra Club has worked to enact, strengthen, and enforce the Clean Air Act and its regulations to
8 reduce air pollution in the United States, California, and the San Joaquin Valley.

9 11. Plaintiffs' members live, raise their families, work (including treating patients
10 suffering adverse health effects from air pollution), recreate, and conduct educational, research,
11 advocacy and other activities in the Valley. They are adversely affected by exposure to levels of air
12 pollution that exceed the national health-based ozone standards established under the Clean Air Act.
13 The adverse effects of such pollution include actual or threatened harm to their health, their families'
14 health, their patients' health, their professional, educational, and economic interests, and their
15 aesthetic and recreational enjoyment of the environment in the Valley and the bordering Sierra
16 Nevada Mountains.

17 12. The Clean Air Act violations alleged in this Complaint have injured and continue to
18 injure the interests of Plaintiffs and their members. Granting the relief requested in this lawsuit
19 would redress these injuries by compelling EPA to take the action mandated by Congress in its
20 statutory scheme for improving air quality in areas violating national air quality standards, such as
21 the Valley.

22 13. Defendant LISA P. JACKSON is sued in her official capacity as the Administrator of
23 the EPA. She is responsible for taking various actions to implement and enforce the Clean Air Act,
24 including the actions sought in this Complaint.

25 14. Defendant JARED BLUMENFELD is sued in his official capacity as EPA Regional
26 Administrator for Region IX. He is responsible for implementing and enforcing the Clean Air Act in
27 Region IX, which includes the Valley.

STATUTORY FRAMEWORK

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

16. The Clean Air Act directs EPA to designate areas with ambient air concentrations that exceed a national standard as “nonattainment” areas. 42 U.S.C. § 7407(d)(1).

17. The Clean Air Act provides that each state with a nonattainment area must adopt a plan for improving air quality in that area in order to meet the national standards. 42 U.S.C. §§ 7407(a), 7410(a), 7502(b) and 7511a.

18. Under the Clean Air Act, such plans must be submitted to EPA for review. 42 U.S.C. §§ 7410(a) and 7502(b). EPA is responsible for ensuring that the plan complies with the requirements of the Clean Air Act and must approve or disapprove the plan accordingly. *Id.* §§ 7410(k) and (l).

19. Within 6 months after submission of a plan, EPA is required to determine whether the submittal meets EPA completeness criteria. 42 U.S.C. § 7410(k)(1)(B). If EPA makes no completeness finding before the six month deadline, the plan shall be determined to be complete as a matter of law six months after the date of submittal. *Id.*

20. EPA has a non-discretionary duty to act on a submitted plan within 12 months after the completeness determination. 42 U.S.C. § 7410(k)(2).

21. If EPA fails to take a non-discretionary action, such as acting on a state implementation plan submittal, citizens are empowered to seek a court order to compel prompt action. 42 U.S.C. § 7604(a)(2).

FACTUAL BACKGROUND

22. In 1997, EPA adopted a national ambient air quality standard on the daily maximum 8-hour average concentrations of ozone of 0.08 parts per million. 62 Fed. Reg. 38856 (July 18, 1997) (codified at 40 C.F.R. § 50.10).

23. Ozone is a colorless, odorless reactive gas comprised of three oxygen atoms. It is formed by the chemical reaction between nitrogen oxides and volatile organic compounds in the

1 presence of sunlight.

2 24. Breathing ozone can trigger a variety of health problems including chest pain,
3 coughing, throat irritation, and congestion. It can reduce lung function and inflame the linings of the
4 lungs. Repeated exposure to ozone may permanently scar lung tissue. Exposures can also worsen
5 bronchitis, emphysema, and asthma. Ozone concentrations above the national 8-hour standard result
6 in increases in school absenteeism, increases in respiratory hospital emergency department visits
7 among asthmatics and patients with other respiratory diseases, increases in hospitalizations for
8 respiratory illnesses, increases in symptoms associated with adverse health effects, including chest
9 tightness and medication usage, and increases in mortality due to non-accidental, cardio-respiratory
10 deaths.

11 25. Sources of the nitrogen oxides and volatile organic compounds that react to form
12 ozone include industrial facilities and electric utilities, motor vehicle exhaust, gasoline vapors, and
13 chemical solvents.

14 26. Though the San Joaquin Valley is not a densely populated area of California, 8-hour
15 ozone concentrations in the Valley frequently exceed 0.10 parts per million during the summer
16 months.

17 27. The San Joaquin Valley is designated as an “extreme” nonattainment area under the
18 1997 8-hour ozone standard. 40 C.F.R. § 81.305.

19 28. On November 16, 2007, California submitted the 8-hour ozone plan for the San
20 Joaquin Valley to EPA for review under 42 U.S.C. § 7410(k).

21 29. The Valley’s 8-hour ozone plan became complete as a matter of law on May 16,
22 2008.

23 30. EPA was required to act on the Valley’s 8-hour ozone plan by May 16, 2009. 42
24 U.S.C. § 7410(k)(2).

25 31. To date, EPA has failed to take any action pursuant to 42 U.S.C. § 7410(k) to approve
26 or disapprove the Valley’s 8-hour ozone plan.

FIRST CLAIM FOR RELIEF

EPA’s Failure to Act on a Submitted State Implementation Plan

32. Plaintiffs reallege each and every allegation set forth above, as if fully set forth herein.

33. Since the Valley’s 8-hour ozone plan submitted on November 16, 2007 became complete as a matter of law on May 16, 2008, EPA was obligated to act on the plan submittal no later than May 16, 2009. 42 U.S.C. § 7410(k)(2).

34. EPA has taken no action to approve or disapprove the Valley’s 8-hour ozone plan submitted on November 16, 2007.

35. Accordingly, EPA has been in continuous violation of 42 U.S.C. § 7410(k)(2) since May 16, 2009.

36. This Clean Air Act 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 Clean Air Act’s citizen suit provision. 42 U.S.C. § 7604(a)(2). This violation is ongoing and will continue unless remedied by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to grant the following relief:

1. DECLARE that EPA is in violation of the Clean Air Act for failing to act on the Valley’s 8-hour ozone plan submitted May 16, 2007;
2. ISSUE an injunction directing EPA to take action on the Valley’s 8-hour ozone plan, as required by law;
3. RETAIN jurisdiction over this matter until such time as EPA has complied with its non-discretionary duties under the Clean Air Act;
4. AWARD to plaintiffs their costs of litigation, including reasonable attorney and expert witness fees; and/or
5. GRANT such additional relief as the Court may deem just and proper.

1 DATED: May 6, 2010

Respectfully submitted,

2 *Paul Cort*

3 PAUL R. CORT
4 DEBORAH S. REAMES

5 Attorneys for Plaintiffs
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EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

July 1, 2009

Via Certified and Electronic Mail

Ms. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: 60-Day Notice of Intent to File Clean Air Act Citizen Suit

Dear Administrator Jackson:

This letter is submitted on behalf of Medical Advocates for Healthy Air¹ and Sierra Club² to notify you, pursuant to section 304(b) of the Clean Air Act ("CAA" or "Act"), that they intend to sue the U.S. Environmental Protection Agency ("EPA") for its failure to perform its non-discretionary duty to review and act upon the 8-hour ozone nonattainment state implementation plan for the San Joaquin Valley in California. This latest failure to meet the statutory deadlines follows a distressing pattern in the EPA region responsible for several of the most polluted areas in the country. For too long Region 9 has been content to bend the rule of law to allow the state and local air districts to avoid the tough decisions that are needed to achieve healthy air. Whether the severity of these problems is responsible for these administrative failures or these failures are responsible for the severity of the problems in California, it is time to break this cycle. Medical Advocates and Sierra Club ask that you direct Region 9 to take the immediate action required under the Act and move quickly to prepare a plan that will truly address the air quality problem in the San Joaquin Valley.

Ozone Pollution in the San Joaquin Valley: A History of Failure

The San Joaquin Valley is located in the southern half of the Central Valley in California. It is a largely rural area with 8.6 million acres of farmland and only 300,000 acres classified as "built-up" or urban. Even though the eight county area is many times the size of Los Angeles, it has only one third of the population. It is not the kind of area one would expect to suffer from extreme air pollution. The Valley's topography, which results in pollutants being trapped at its

¹ Medical Advocates for Healthy Air, 5919 E. Robinson Avenue, Fresno, CA 93727

² This notice is submitted on behalf of the Sierra Club (85 Second Street, San Francisco, CA 94105), including its Tehipite Chapter (P.O. Box 5396, Fresno, CA 93755-5396), Kern-Kaweah Chapter (P.O. Box 3357, Bakersfield, CA 93385-3357) and Mother Lode Chapter (801 K Street, Suite 2700, Sacramento, CA 95814).

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southern end, and meteorology, combined with major transportation corridors and boom and bust sprawl, have contributed to the Valley being one of the most polluted places in the U.S. These disadvantages, however, have been largely used as an excuse for the problem rather than as a justification for being that much more aggressive in pollution control. For the families of the one in five children that suffer from asthma in the southern portions of the Valley – a rate that is more than double the national average – the unfavorable conditions that contribute to their suffering do not matter. Their concern is over what is being done to address it. Repeatedly, however, the story has been one of missed deadlines, rules that do not live up to the guarantees of the Act, and state implementation plans that fail to achieve clean air.

As you know, ozone is a secondary pollutant formed by the chemical reaction between oxides of nitrogen (“NO_x”) and volatile organic compounds (“VOCs”) in the presence of sunlight. Ozone reacts with internal body tissues causing damage to lungs, exacerbation of asthma, reduction of lung capacity, increased respiratory-related hospital admissions, and even premature death. The health impacts are disproportionately felt by the most vulnerable – children, the elderly, and persons already suffering from respiratory ailments. In 2006, EPA’s Clean Air Scientific Advisory Committee unanimously concluded that the 1997 8-hour ozone standard of 85 parts per billion (“ppb”) was inadequate to protect public health and that EPA should revise the standard in the range of 60 and 70 ppb. Eight-hour ozone concentrations in the San Joaquin Valley frequently exceed 120 ppb during the summer months with the 1997 standard of 85 ppb exceeded on average 80 days of each of the previous three summers (i.e., virtually every day of the summer).

Despite the magnitude of the problem, Region 9, the State, and the local air district have consistently refused to take the aggressive action required under the Clean Air Act. The San Joaquin Valley was originally designated as a serious nonattainment area under the 1-hour ozone standard of the 1990 Clean Air Act Amendments. Under the Act, the Valley was to prepare and submit by November 1994, a state implementation plan for attaining the 1-hour standard by 1999. Even though the plan included a blanket exemption for most oil and gas production sources in the Valley, Region 9 approved this plan in January 1997. 62 Fed. Reg. 1150 (Jan. 8, 1997). This would be the only deadline Region 9 would meet for state implementation plans in the Valley.

In 2000, Region 9 determined that the local air district had not in fact implemented its 1994 plan because it refused to adopt six of the controls measures it had committed to under the plan. 56 Fed. Reg. 37926 (June 19, 2000). As a result of this failure and the blanket exemption for industrial sources along the west side of the Valley, air quality, not surprisingly, failed to improve and Region 9 was forced to reclassify the Valley from serious to severe nonattainment. 66 Fed. Reg. 56476 (Nov. 8, 2001). A revised severe area nonattainment plan was due by May 31, 2002 to demonstrate how the area would attain by November 2005. *Id.* at 56481. The State and local air district submitted another legally defective ozone plan by the May 31, 2002 deadline, but decided to withdraw the plan rather than have EPA disapprove it. As a result, Region 9 issued a finding of failure to submit the plan and effectively extended the plan submittal deadline by 18 months. 67 Fed. Reg. 61784 (Oct. 2, 2002).

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The State and local air district failed to meet the extended deadline for the severe area plan and instead asked for a voluntary reclassification to become an extreme 1-hour ozone area. 69 Fed. Reg. 20550 (April 16, 2004). Region 9 granted this reclassification request and once again extended the deadline for submitting a plan and attaining the 1-hour ozone standard. *Id.* The extreme plan was due November 2004 and attainment was deferred to November 2010. *Id.* at 20552. Region 9, however, never intended to take action on whatever plan the local air district prepared because it knew that only a week later the Administrator would sign a notice revoking the 1-hour ozone standard. The State and local air district submitted the revised extreme ozone plan in November 2004 purporting to demonstrate attainment by November 2010. Region 9 took no action on this 2004 ozone plan until 2008, following another citizens' deadline challenge in the wake of the D.C. Circuit's decision in *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), which held that EPA could not completely waive the control measure obligations with respect to the revoked 1-hour ozone standard.

In October 2008 and again yesterday, Region 9 proposed to approve the 2004 extreme area 1-hour ozone plan despite numerous shortcomings, including reliance on inventories that all parties recognize are no longer valid and the Region's own determination that the District had not demonstrated compliance with the reasonably available control measure requirement. Yet more stunning is Region 9's decision to approve the District's demonstration that the Valley will attain the 1-hour standard in the face of air quality data from the summer of 2008 showing that in that one summer alone, the Valley exceeded the 1-hour ozone standard on more than three days at four different monitoring sites (the worst location recorded 14 exceedances of the 1-hour standard). In other words, there is no possibility that the Valley will attain the 1-hour standard by 2010 and the attainment demonstration is clearly flawed.

Thus, nearly 20 years after the 1990 Clean Air Act Amendments established rigorous new deadlines and requirements in response to the history of ineffectiveness and delay in state planning efforts to meet the national standards, Region 9 is only now taking action as a result of litigation on a plan that undeniably will not achieve timely attainment of a 1-hour standard that EPA acknowledges does not adequately protect public health. This is a disgraceful story that Valley residents do not want to have repeated with respect to the 1997 8-hour ozone standard.

New Chapter: The 8-Hour Ozone Plan

Region 9 is off to an inauspicious start with implementation of the 8-hour ozone planning requirements for the San Joaquin Valley. The Valley was designated a serious nonattainment area in 2004, seven years after EPA promulgated the 8-hour ozone standard. 69 Fed. Reg. 23858 (April 30, 2004). A demonstration that the area has adopted all reasonably available control technology was due by September 2006 and a demonstration that the area has made reasonable further progress by reducing VOC and/or NO_x emissions by 3 percent a year from 2003 through 2008 was due June 15, 2007. The State and local air district have failed to meet either of these demonstration requirements. Region 9 appears to be pushing the local air district for a better analysis of control requirements, but has decided that the failure to demonstrate reasonable further progress through 2008 is of no consequence.

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The State, on behalf of the local air district, has requested that the Valley be reclassified to extreme nonattainment so that the state implementation plan can rely on the "black box" flexibility of Clean Air Act section 182(e)(5). The 8-hour ozone plan submitted to EPA on November 16, 2007 does not provide a strategy for achieving the 1997 8-hour standard. The plan takes credit for the various local, state, and federal measures adopted to date, includes limited, unenforceable commitments for future controls, and relies on a massive "black box" (a gap of over 80 tons of NO_x emission per day) to provide more than half of the remaining emission reductions deemed necessary for attainment. The plan shows that reasonable further progress will not be met and fails to include any demonstration that all reasonable controls have been or will be adopted by the State and local air district. In short, the plan currently before Region 9 for review is not an approvable plan.

Given these defects in the plan, it is not surprising that Region 9 has not approved it. Region 9, however, appears unwilling to disapprove the plan for fear of damaging relations with the State and local air district, and, even worse, being required to develop a federal 8-hour ozone plan as a substitute. To be sure, the State and local air district have put Region 9 in this difficult position by repeatedly submitting weak and legally defective plans, but Region 9 has enabled this behavior by ignoring statutory deadlines and torturing its interpretations of the law. Lost in these political and legal games is any leadership, strategy, or vision on how to achieve the old ozone standards let alone the new standards necessary to protect public health. Because Medical Advocates for Healthy Air and the Sierra Club have seen Region 9, the State, and the local air district waste decades in trying to avoid their responsibilities under the Act, these organizations believe it is up to citizens to demand enforcement of the Act and force EPA to make the tough decisions required under the law.

EPA has Violated the Clean Air Act by Failing to Act on the District's 8-Hour Ozone Plan by May 16, 2009

Under section 110(k)(2) of the Act, EPA has a non-discretionary duty to approve a state implementation within 12 months after EPA makes a completeness finding under section 110(k)(1). Under section 110(k)(1)(B) of the Act, if EPA has not made a completeness finding on a plan within six months of submission by a state, the plan is automatically deemed complete.

On November 16, 2007, the State of California submitted the 8-hour ozone state implementation plan for the San Joaquin Valley. Since EPA failed to make a completeness finding within six months of the submission of the plan, the plan was deemed complete as a matter of law on May 16, 2008, triggering EPA's 12-month deadline to approve or reject the revised plan by May 16, 2009. EPA has declined to take any action on the 8-hour ozone plan for the San Joaquin Valley. As a result, EPA has been in violation of section 110(k)(2) of the Act since May 16, 2009.

Unless this identified deficiency is promptly mitigated, Medical Advocates for Healthy Air and the Sierra Club anticipate filing suit in the U.S. District Court of the Northern District of California sixty days after your receipt of this letter. Please feel free to contact Paul Cort at the

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address and telephone number provided above to further discuss the basis for this claim, or to explore possible options for resolving this claim short of litigation.

Sincerely,

A handwritten signature in black ink that reads "Paul Cort". The signature is written in a cursive, flowing style.

Paul Cort
Staff Attorney

Cc: Laura Yoshii, Acting Regional Administrator, Region IX