

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

WILDEARTH GUARDIANS,

Plaintiff,

v.

LISA P. JACKSON, in her official capacity as
ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Defendant.

**COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. The Clean Air Act is a model of cooperative federalism, whereby the Administrator of the Environmental Protection Agency (“EPA”) sets National Ambient Air Quality Standards (“NAAQS”) and the states develop specific plans to achieve these standards. States submit these State Implementation Plans (“SIPs”) to EPA, which reviews the plans to ensure they meet the requirements of the Clean Air Act. The Clean Air Act mandates that EPA approve or disapprove, or partially approve and disapprove, SIPs submitted by states within 12 months of determination that the SIP submittal is administratively complete. EPA has violated this mandatory 12-month deadline, for both the Colorado Regional Haze SIP and the North Dakota SIP regulating excess emissions from polluters during startup, shutdown, malfunction,

and maintenance. Plaintiff WildEarth Guardians (“Guardians”) brings this Clean Air Act citizen suit to compel Defendant, Lisa Jackson, Administrator of the EPA, to perform her non-discretionary duty to review the Colorado and North Dakota SIP submissions at issue. The timely review of these SIPs is necessary to ensure adequate protection of air quality and public health.

JURISDICTION, NOTICE AND VENUE

2. This is an action against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under the Clean Air Act which is not discretionary with the Administrator. Thus, this Court has jurisdiction pursuant to 42 U.S.C. § 7604(a)(2) (citizen suit provision of the Clean Air Act) and 28 U.S.C. § 1331 (federal question).

3. The requested declaratory relief is authorized by 28 U.S.C. § 2201(a) and 42 U.S.C. § 7604(a). The requested injunctive relief is authorized by 28 U.S.C. § 2202 and 42 U.S.C. § 7604(a).

4. By separate letters, both dated October 13, 2010, Guardians provided EPA with written notice of the claims concerning the Colorado and North Dakota SIP submissions stated in this action. EPA received both letters on October 18, 2010. Guardians provided this notice pursuant to 42 U.S.C. § 7604(b)(2), and 40 C.F.R. §§ 54.2 and 54.3. Although more than 60 days have elapsed since Guardians gave notice, EPA remains in violation of the law.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(e)(1), (2) & (3). EPA resides in this judicial district and maintains a major regional office, responsible for the SIP submissions at issue, in Denver, Colorado. A substantial part of the events or omissions giving rise to Guardians’ claims occur in EPA’s Denver office. Additionally, one of the SIP

submissions at issue is from the State of Colorado. Guardians maintains a major office in Denver, Colorado.

PARTIES

6. Plaintiff WILDEARTH GUARDIANS (“Guardians”) is a non-profit conservation organization. Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in the American West, and to safeguarding the Earth’s climate and air quality. WildEarth Guardians and its members work to reduce harmful air pollution in order to safeguard public health, welfare, and the environment. WildEarth Guardians has approximately 4,500 members, many of whom live, work, or recreate in the States at issue in this case.

7. Guardians is a corporation. Therefore, Guardians is a “person” within the meaning of 42 U.S.C. § 7602(e). As such, Guardians may commence a civil action under 42 U.S.C. § 7604(a).

8. Guardians’ members live, work, recreate, and conduct educational, research, advocacy, and other activities in Colorado and North Dakota in areas where air pollution, the emission of which should be regulated under the SIP submittals at issue in this case, harms these activities. This air pollution adversely impacts Guardians’ and its members’ interests. EPA’s failure to act on the SIP submittals at issue also creates doubt for Guardians’ members as to whether they are exposed to illegal levels of air pollution. Guardians’ and its members’ interests have been, are being, and will continue to be irreparably harmed by EPA’s failure to act on the SIP submissions at issue in this case.

9. The violations alleged in this Complaint deprive Guardians and its members of certain procedural rights associated with EPA’s required action on the SIP submissions, including

notice and opportunity to comment. The violations alleged in this Complaint also deprive Guardians and its members of certain information associated with EPA's required action on the SIP submissions.

10. The violations alleged in this Complaint have injured and continue to injure the interests of Guardians and its members. This injury is traceable to Defendant's failure to act. Granting the requested relief would redress these injuries by compelling EPA action that Congress determined to be an integral part of the regulatory scheme for attaining and maintaining the NAAQS.

11. Defendant LISA P. JACKSON is Administrator of the United States Environmental Protection Agency. Ms. Jackson is sued in her official capacity. The Administrator is charged with implementation and enforcement of the Clean Air Act. As described below, the Clean Air Act assigns EPA certain non-discretionary duties.

LEGAL FRAMEWORK

12. The Clean Air Act establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals. See 42 U.S.C. §§ 7401-7515. This system is intended 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. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356. Towards this end, EPA has set NAAQS for seven pollutants. See 40 C.F.R. Part 50.4-50.13.

13. States, or regions within a state, must adopt a pollution control plan that contains enforceable emissions limitations necessary to attain the NAAQS and meet applicable requirements of the Clean Air Act, including ensuring attainment, maintenance, and enforcement

of the NAAQS. See e.g. 42 U.S.C. §§ 7410(a)(1), (a)(2)(A), 7502(c)(6). All such plans must be submitted to and approved by EPA. See 42 U.S.C. § 7410(a)(1), (k).

14. Section 169A of the Clean Air Act regulates regional haze. The goal of this Section is the “prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairments results from manmade air pollution.” 42 U.S.C. § 7491(a)(1). This Section requires states to limit pollutants that cause or contribute to the degradation of visibility in pristine landscapes such as National Parks. The Clean Air Act requires that these limits be established through a SIP approved by EPA. See 42 U.S.C. § 7491(b)(2).

15. Within 60 days of EPA's receipt of a proposed SIP or SIP revision, the Clean Air Act requires EPA to determine whether the submission is sufficient to meet the minimum criteria established by EPA for such proposals. See 42 U.S.C. § 7410(k)(1)(B). If EPA fails to make such a “completeness” finding, the proposed SIP or SIP revision is deemed complete by operation of law six months after submission. Id. If EPA determines that the proposed SIP or SIP revision does not meet the minimum criteria, the state is considered not to have made the submission. See 42 U.S.C. § 7410(k)(1)(C).

16. Within 12 months of finding that a proposed SIP or SIP revision is complete (or deemed complete by operation of law), EPA must act to approve, disapprove, or approve in part and disapprove in part, the submission. See 42 U.S.C. § 7410(k)(2).

17. Once EPA approves a SIP or SIP revision, polluters must comply with all emission standards and limitations contained in the SIP, and all such standards and limitations become federal law and are enforceable by EPA and citizens in federal courts. See 42 U.S.C. §

7413 and 42 U.S.C. § 7604(a).

18. If EPA fails to comply with a non-discretionary duty, such as acting on a proposed SIP revision within the Clean Air Act deadlines, the Clean Air Act allows any person to bring suit to compel EPA to perform its duty. See 42 U.S.C. § 7604(a)(2).

FACTUAL ALLEGATIONS

19. On June 11, 2008, Colorado submitted a regional haze SIP revision to EPA.

20. On April 6, 2009, North Dakota submitted a SIP revision to EPA containing, among other provisions, regulations relating to excess emissions from polluting sources during startup, shutdown, malfunction, and maintenance.

21. As of date of filing this complaint, EPA not has granted final full or partial approval or disapproval to either the Colorado or North Dakota SIP Submittals referenced in paragraphs 19 and 20, respectively.

FIRST CLAIM FOR RELIEF Colorado SIP Submittal Failure to Perform a Non-Discretionary Duty to Act on SIP Submittal

22. Plaintiff incorporates by reference all the preceding allegations in this Complaint.

23. On June 11, 2008, EPA received a regional haze SIP submittal from the State of Colorado.

24. EPA determined by no later than December 11, 2008, either in fact or by operation of law, that the Colorado SIP submittal met the minimum criteria for a SIP submittal and was administratively complete. See 42 U.S.C. § 7410(k)(1)(A).

25. Therefore, EPA had, and continues to have a mandatory duty to fully or partially approve or disapprove the Colorado regional haze SIP submittal by no later than December 11,

2009. See 42 U.S.C. § 7410(k)(2) & (3).

26. EPA has not fully or partially approved or disapproved the Colorado regional haze SIP submittal.

27. Accordingly, EPA has violated and continues to violate its mandatory duty in 42 U.S.C. § 7410(k)(2).

28. This 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). EPA’s violation is ongoing and will continue unless remedied by this Court.

SECOND CLAIM FOR RELIEF
North Dakota SIP Submittal
Failure to Perform a Non-Discretionary Duty to Act on SIP Submittal

29. Plaintiff incorporates by reference all the preceding allegations in this Complaint.

30. On April 6, 2009 EPA received a SIP submittal from the State of North Dakota containing, among other provisions, regulations relating to excess emissions from polluting sources during startup, shutdown, malfunction, and maintenance.

31. EPA determined by no later than October 6, 2009, either in fact or by operation of law, that North Dakota’s SIP submission met the minimum criteria for a SIP submittal and was administratively complete. See 42 U.S.C. § 7410(k)(1)(A).

32. Therefore, EPA had, and continues to have a mandatory duty to fully or partially approve or disapprove North Dakota’s SIP submittal by no later than October 6, 2010. See 42 U.S.C. § 7410(k)(2) & (3).

33. EPA has not fully or partially approved or disapproved North Dakota’s SIP

submittal.

34. Accordingly, EPA has violated and continues to violate its mandatory duty in 42 U.S.C. § 7410(k)(2).

35. This 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). EPA’s violation is ongoing and will continue unless remedied by this Court.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff WildEarth Guardians requests that this Court enter judgment providing the following relief:

- A. A declaration that EPA has violated and continues to violate the Clean Air Act by failing to take final action on the Colorado and North Dakota SIP submittals detailed above;
- B. An injunction compelling EPA to take final action on the Colorado and North Dakota SIP submittals detailed above by a date certain;
- C. An order retaining jurisdiction over this matter until such time as EPA has complied with its non-discretionary duties under the Clean Air Act;
- D. An order awarding Guardians its costs of litigation, including reasonable attorneys’ fees; and
- E. Such other and further relief as the court deems just and proper.

Respectfully submitted,

Dated: January 2, 2011

S/ James J. Tuchton
WildEarth Guardians
6439 E. Maplewood Ave.
Centennial, CO 80111
Phone: 720-301-3843
E-mail: jtuchton@wildearthguardians.org

Counsel for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS <i>Wild Earth Guardians</i> (b) County of Residence of First Listed Plaintiff <i>Denver</i> <small>(EXCEPT IN U.S. PLAINTIFF CASES)</small> <i>James J. Tutchton</i> <i>6439 E. Maplewood Ave.</i>		DEFENDANTS <i>Lisa Jackson, Administrator</i> <i>U.S. Environmental Protection Agency</i> County of Residence of First Listed Defendant <small>(IN U.S. PLAINTIFF CASES ONLY)</small> NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED. Attorneys (If Known) <i>U.S. Department of Justice</i>																										
(c) Attorney's (Firm Name, Address, and Telephone Number) <i>Centennial, CO 80111</i> <i>720-301-3843</i>																												
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VI. CAUSE OF ACTION		Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): <i>Clean Air Act, 42 U.S.C. § 7410(k)(2)</i> Brief description of cause: <i>EPA has missed a mandatory deadline under the Clean Air Act</i>																										
VII. REQUESTED IN COMPLAINT:		<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23		DEMAND \$ <i>Declaratory & Injunctive Relief</i>	CHECK YES only if demanded in complaint: JURY DEMAND: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No																							
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Court Name: U.S. District Court, Colorado
Division: 1
Receipt Number: COX034081
Cashier ID: sg
Transaction Date: 01/03/2011
Payer Name: JAMES TUTCHTON

CIVIL FILING FEE
For: JAMES TUTCHTON
Amount: \$350.00

CREDIT CARD
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

11-CV-0001

A fee of \$45.00 will be assessed on
any returned check.