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2011 MAY - E- filing  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

1 James J. Tutchton (CA Bar No. 150908)  
2 WildEarth Guardians  
3 6439 E Maplewood Ave  
4 Centennial, CO 80110  
5 Phone: (303) 993-6744  
6 Email: jtutchton@wildearthguardians.org

7 Attorney for Plaintiffs WildEarth Guardians and Elizabeth Crowe

8 UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

LB

10  
11 EV 11 2205 Case No.

12 WILDEARTH GUARDIANS and  
13 ELIZABETH CROWE,

)  
)  
) COMPLAINT FOR DECLARATORY  
) AND INJUNCTIVE RELIEF

14 Plaintiffs,

15 v.

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

16 LISA P. JACKSON,  
17 in her official capacity as Administrator of the  
18 United States Environmental Protection Agency,

19 Defendant.  
20

21 INTRODUCTION

22 1. Ground-level ozone ("ozone") pollution, commonly referred to as smog, represents a  
23 serious public health and welfare problem in many parts of the United States. Exposure to ozone  
24 pollution causes and/or aggravates numerous respiratory problems, including asthma, pneumonia  
25 and bronchitis. Moreover, the detrimental effects are not limited to public health, as ozone  
26 pollution also interferes with vegetation's ability to function properly. This results in decreased  
27 crop yields and damage to native ecosystems.  
28

1 2. To protect against these and other adverse affects on human health and welfare, the  
2 United States Environmental Protection Agency promulgated a revised National Ambient Air  
3 Quality Standard for ozone in 1997. Areas whose air quality at that time was not meeting the  
4 standard were deemed "nonattainment" and required to submit state implementation plans on  
5 how to clean-up their air. The Environmental Protection Agency is required to take final action  
6 by approving or disapproving these state implementation plans, in full or in part, within 12  
7 months of the date a submittal is deemed administratively complete. EPA has failed to take final  
8 action on Arizona's submittal addressing the 1997 ozone nonattainment area of Phoenix.  
9 Accordingly, Plaintiffs WILDEARTH GUARDIANS and ELIZABETH CROWE (collectively  
10 "Plaintiffs") file this lawsuit against Defendant LISA P. JACKSON, in her official capacity as  
11 Administrator of the Environmental Protection Agency (hereinafter Ms. Jackson may be referred  
12 to as "EPA"), to challenge her failure to perform this mandatory duty for the Phoenix area.

#### 13 JURISDICTION

14 3. This case is a Clean Air Act citizen suit. Therefore, the Court has jurisdiction over this  
15 action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 42 U.S.C. § 7604(a)(2)  
16 (citizen suits for failure to perform a non-discretionary duty required by the Clean Air Act).

#### 17 NOTICE

18 4. WildEarth Guardians and Ms. Crowe mailed to EPA by certified mail, return receipt  
19 requested, written notice of intent to sue regarding the violation alleged in this Complaint.  
20 Plaintiffs mailed their notice of intent to sue letter on January 4, 2011. EPA received the notice  
21 letter on January 10, 2011. More than sixty days have passed since EPA received this notice of  
22 intent to sue letter. EPA has not remedied the violations alleged in this Complaint. Therefore, a  
23 present and actual controversy exists between the parties.

#### 24 VENUE

25 5. Defendant EPA resides in this judicial district. This civil action is brought against an  
26 officer of the United States acting in her official capacity and a substantial part of the events or  
27 omissions giving rise to the claims in this case occurred in the Northern District of California.  
28 The issue in this action involves EPA's failure to perform mandatory duties related to air quality

1 in Arizona. EPA Region 9, whose jurisdiction includes Arizona, is headquartered in San  
2 Francisco. Thus the events and omissions at issue in this action occurred at EPA's Region 9  
3 headquarters in San Francisco. Therefore, venue is proper in this Court pursuant to 28 U.S.C. §  
4 1391(e).

#### 5 INTRADISTRICT ASSIGNMENT

6 6. A substantial part of the events and omissions giving rise to the claim in this case  
7 occurred in the County of San Francisco. Accordingly, assignment to the San Francisco  
8 Division or the Oakland Division is proper pursuant to Civil L.R. 3-2(c) and (d).

#### 9 PARTIES

10 7. Plaintiff WILDEARTH GUARDIANS is a non-profit conservation organization with  
11 offices in Arizona, Colorado, and New Mexico. WildEarth Guardians protects and restores wild  
12 rivers, wildlife and wild places in the American West. A critical component of this work is  
13 helping to foster an ethic of appreciation by allowing people to enjoy such wildlife, wild rivers  
14 and wild places.

15 8. Members of WildEarth Guardians live, work, study, recreate, engage in other economic  
16 activities and obtain spiritual benefits, and will continue to do so regularly, in and around areas  
17 impacted by air pollution from the Phoenix nonattainment area in Arizona.

18 9. Plaintiff ELIZABETH CROWE regularly travels for work and recreation to and through  
19 areas impacted by air pollution from the Phoenix nonattainment area and will continue to do so  
20 on a regular basis.

21 10. Ms. Crowe and WildEarth Guardians' members have a diminished ability to enjoy  
22 recreational opportunities in the respective areas impacted by ozone pollution. Ozone pollution  
23 in the impacted areas threatens, and will continue to threaten, the health, welfare and economic  
24 interests of Ms. Crowe and WildEarth Guardians' members.

25 11. EPA's failure to timely perform the mandatory duty described herein also adversely  
26 affects Ms. Crowe and WildEarth Guardians' staff and members, depriving them of procedural  
27 protection and opportunities as well as information to which they are entitled to under the Act.

28

1 The failure of EPA to perform its mandatory duty also creates uncertainty for Ms. Crowe and  
2 WildEarth Guardians' staff and members as to whether they are exposed to excess air pollution.

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

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

7 **GENERAL ALLEGATIONS**

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

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

19 16. Pursuant to 42 U.S.C. § 7407(d)(1)(A), areas that fail to meet the National Ambient Air  
20 Quality Standard for a pollutant are designated "nonattainment" for that pollutant, while those  
21 that meet the standard are designated "attainment." See, e.g., Sierra Club v. E.P.A., 129 F.3d  
22 137, 138 (D.C. Cir. 1997).

23 17. States must submit state implementation plans to maintain pollution levels below the  
24 National Ambient Air Quality Standard in attainment areas and to bring down pollution levels to  
25 below the National Ambient Air Quality Standard in nonattainment areas. See South Coast Air  
26 Quality Management Dist. v. E.P.A., 472 F.3d 882, 887 (D.C. Cir. 2006) (discussing ozone  
27 nonattainment requirements found in 42 U.S.C. §§ 7511-7511f that apply to areas failing to  
28 reach attainment by the 1990 Clean Air Act Amendments); see also Sierra Club v. E.P.A., 129

1 F.3d at 138 (“EPA must establish...a schedule by which the state must submit a [State  
2 Implementation Plan] revision that complies with the requirements for nonattainment areas in  
3 order to attain the [National Ambient Air Quality Standard]....”) (citation omitted).

4 18. The Clean Air Act requires EPA to determine whether any state implementation plan  
5 submittal is administratively complete. See 42 U.S.C. § 7410(k)(1)(B). If, six months after a  
6 state submits a state implementation plan, EPA has not made a completeness finding and has not  
7 found the submittal to be incomplete, the submittal is deemed administratively complete by  
8 operation of law. Id.

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

12 20. EPA revised the ozone National Ambient Air Quality Standard in 1997, replacing the 1-  
13 hour standard with an 8-hour standard. 62 Fed. Reg. 38856 (July 18, 1997).

14 21. In implementing the 1997 ozone standard, EPA originally created two categories of  
15 nonattainment areas: “subpart 1” for areas designated nonattainment under Title I, Part D subpart  
16 1 of the Clean Air Act, 42 U.S.C. §§ 7501-7509a, and “subpart 2” for areas designated  
17 nonattainment under Title I, Part D, subpart 2 of the Clean Air Act, 42 U.S.C. §§ 7511-7511f.  
18 See 69 Fed. Reg. 23858 (April 30, 2004).

19 22. Several parties challenged provisions of the Phase 1 Rule in South Coast, 472 F.3d 882  
20 (D.C. Cir. 2006), reh’g denied 489 F.3d 1245 (clarifying the vacatur is limited to issues on which  
21 the Court granted petitions for review). Finding that EPA’s Phase 1 Rule “trespassed into areas  
22 where Subpart 2 unquestionably applies” by separately regulating the subpart 1 areas, the Court  
23 held that the provisions of the Phase 1 Rule placing 1997 ozone 8-hour nonattainment areas  
24 under subpart 1 instead of subpart 2 violates the Clean Air Act. South Coast, 472 F.3d at 895.

25 23. Though EPA cannot ignore subpart 2 and the additional requirements it imposes on  
26 nonattainment areas, the nonattainment designations made under subpart 1 continue to apply.

27 24. There is a proposed rule in which EPA proposes to reclassify the subpart 1 areas that  
28 continue to be in nonattainment for the 1997 ozone 8-hour National Ambient Air Quality

1 Standard under subpart 2. 74 Fed. Reg. 2936, 2939-40 (January 16, 2009). However, this rule  
2 has not been finalized and thus has no legal effect.

3 25. EPA designated the Phoenix-Mesa area nonattainment for the 1997 ozone 8-hour  
4 National Ambient Air Quality Standard under subpart 1 in 2004. 69 Fed. Reg. 23858, 23878-79  
5 (April 30, 2004).

6 26. EPA has not redesignated the Phoenix-Mesa area to attainment or unclassifiable for the  
7 1997 ozone 8-hour National Ambient Air Quality Standard.

8 **CLAIM FOR RELIEF**

9 **CLAIM ONE**

10 (EPA's Failure to Take Final Action on Arizona's State Implementation Plan Submittal

11 Addressing the 1997 8-hour Ozone Nonattainment Area of Phoenix-Mesa)

12 27. Plaintiffs incorporate by reference paragraphs 1 through 26.

13 28. Arizona submitted a state implementation plan addressing certain requirements for the  
14 1997 8-hour ozone nonattainment area of Phoenix-Mesa, which was administratively complete

15 by no later than December 13, 2007. See EPA, Status of SIP Requirements

16 for Designated Areas – Arizona SIP Requirements by Pollutant/Area (available at

17 [http://www.epa.gov/air/urbanair/sipstatus/reports/az\\_lembypoll.html#ozone-8hr\\_\\_1997\\_\\_703](http://www.epa.gov/air/urbanair/sipstatus/reports/az_lembypoll.html#ozone-8hr__1997__703))

18 (last viewed February 24, 2011).

19 29. Pursuant to 42 U.S.C. § 7410(k)(2), EPA is required to take final action on Arizona's  
20 state implementation plan submittal addressing the 1997 8-hour ozone nonattainment area of  
21 Phoenix-Mesa by approving in full, disapproving in full, or approving in part and disapproving  
22 in part by no later than December 13, 2008.

23 30. EPA has failed to perform this mandatory duty by not approving in full, disapproving in  
24 full, or approving in part and disapproving in part Arizona's submittal for the 1997 8-hour ozone  
25 nonattainment area of Phoenix-Mesa.

26 31. Accordingly, EPA is in violation of its mandatory duty under 42 U.S.C. § 7410(k)(2) to  
27 take final action on Arizona's submittal addressing the 1997 8-hour ozone nonattainment area of  
28 Phoenix-Mesa.

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**REQUEST FOR RELIEF**

WHEREFORE, WildEarth Guardians and Elizabeth Crowe respectfully request that the

Court:

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

Respectfully submitted,



James J. Tutchton  
WildEarth Guardians  
6439 E Maplewood Ave  
Centennial, CO 80110  
Phone: (303) 993-6744  
Email: jtutchton@wildearthguardians.org

Dated: May 1, 2011

OF COUNSEL:

Robert Ukeiley  
Law Office of Robert Ukeiley  
435R Chestnut Street, Suite 1  
Berea, KY 40403  
Tel: (859) 986-5402  
Fax: (866) 618-1017  
E-mail: rukeiley@igc.org

**I. (a) PLAINTIFFS**  
 WildEarth Guardians and Elizabeth Crowe

**(b) County of Residence of First Listed Plaintiff** Santa Fe, New Mexico  
 (EXCEPT IN U.S. PLAINTIFF CASES)

**(c) Attorney's (Firm Name, Address, and Telephone Number)**  
 James Jay Tutchton, WildEarth Guardians  
 6439 E. Maplewood Ave.  
 Centennial, CO 80111  
 720-301-3843

**DEFENDANTS**  
 Lisa Jackson, Administrator of the Environmental Protection Agency, in her official capacity

County of Residence of First Listed Defendant  
 (IN U.S. PLAINTIFF CASES ONLY)  
 NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)  
 U.S. Department of Justice

99  
 11-2205LB

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

| CONTRACT   | TORTS  | FORFEITURE/PENALTY   | BANKRUPTCY   | OTHER STATUTES  |  |
|--|--|--|--|---|--|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability<br><input type="checkbox"/> 196 Franchise | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury | <input type="checkbox"/> 362 Personal Injury—Med. Malpractice<br><input type="checkbox"/> 365 Personal Injury—Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 610 Agriculture<br><input type="checkbox"/> 620 Other Food & Drug<br><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 630 Liquor Laws<br><input type="checkbox"/> 640 R.R. & Truck<br><input type="checkbox"/> 650 Airline Regs.<br><input type="checkbox"/> 660 Occupational Safety/Health<br><input type="checkbox"/> 690 Other | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark          | <input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 480 Consumer Credit<br><input type="checkbox"/> 490 Cable/Sat TV<br><input type="checkbox"/> 810 Selective Service<br><input type="checkbox"/> 850 Securities/Commodities/Exchange<br><input type="checkbox"/> 875 Consumer Challenge 12 USC 3410<br><input type="checkbox"/> 890 Other Statutory Actions<br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 892 Economic Stabilization Act<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 894 Energy Allocation Act<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice<br><input type="checkbox"/> 950 Constitutionality of State Statutes |
| <b>REAL PROPERTY</b><br><input type="checkbox"/> 210 Land Condemnation<br><input type="checkbox"/> 220 Foreclosure<br><input type="checkbox"/> 230 Rent Lease & Ejectment<br><input type="checkbox"/> 240 Torts to Land<br><input type="checkbox"/> 245 Tort Product Liability<br><input type="checkbox"/> 290 All Other Real Property   | <b>CIVIL RIGHTS</b><br><input type="checkbox"/> 441 Voting<br><input type="checkbox"/> 442 Employment<br><input type="checkbox"/> 443 Housing/Accommodations<br><input type="checkbox"/> 444 Welfare<br><input type="checkbox"/> 445 Amer. w/Disabilities - Employment<br><input type="checkbox"/> 446 Amer. w/Disabilities - Other<br><input type="checkbox"/> 440 Other Civil Rights   | <b>PRISONER PETITIONS</b><br><input type="checkbox"/> 510 MOTIONS to Vacate Sentence<br><b>Habeas Corpus:</b><br><input type="checkbox"/> 530 General<br><input type="checkbox"/> 535 Death Penalty<br><input type="checkbox"/> 540 Mandamus & Other<br><input type="checkbox"/> 550 Civil Rights<br><input type="checkbox"/> 555 Prison Condition   | <b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Mgmt. Relations<br><input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Empl. Ret. Inc. Security Act                                       | <b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1395ff)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DIWC/DJWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g)) |  |
|  |  | <b>IMMIGRATION</b><br><input type="checkbox"/> 462 Naturalization Application<br><input type="checkbox"/> 463 Habeas Corpus - Alien Detainee<br><input type="checkbox"/> 465 Other Immigration Actions   | <b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)<br><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609   |   |  |

**V. ORIGIN** (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 42 U.S.C. Section 7401 et seq.

Brief description of cause:  
 Defendant is violating a mandatory duty under the Clean Air Act

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ Injunctive Relief

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

**IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)**

SAN FRANCISCO/OAKLAND

SAN JOSE

EUREKA

DATE: May 4, 2011

SIGNATURE OF ATTORNEY OF RECORD:  
 James Jay Tutchton