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6

7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

9 _____)
)
10 CENTER FOR BIOLOGICAL DIVERSITY and,)
CENTER FOR ENVIRONMENTAL HEALTH,)
11) Case No.
)
12) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF**
13 Plaintiffs,)
) (Clean Air Act, 42 U.S.C. §§ 7401 *et. seq.*)
14 v.)
)
15 GINA McCARTHY,)
in her official capacity as Administrator of the)
16 United States Environmental Protection Agency,)
)
17 Defendant.)
_____)

18
19 **I. INTRODUCTION**

20
21 1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY and CENTER FOR
22 ENVIRONMENTAL HEALTH (Plaintiffs) challenge the failure of Defendant GINA
23 MCCARTHY, in her official capacity as Administrator of the United States Environmental

1 Protection Agency, to perform mandatory duties required by the Clean Air Act, 42 U.S.C. §§
2 7401-7671q. Specifically, the Clean Air Act establishes mandatory deadlines for Defendant to
3 complete a thorough review of the air quality criteria for Sulfur Oxides (SO_x) and the National
4 Ambient Air Quality Standards (NAAQS) for Nitrogen Dioxide (NO₂) and Sulfur Dioxide
5 (SO₂), to make such revisions to these air quality criteria and NAAQS as may be appropriate, to
6 promulgate such new NAAQS as may be appropriate, and to publish notice of such actions in the
7 Federal Register. Administrator McCarthy has failed to meet these deadlines. Plaintiffs thus
8 bring this action to ensure that they and their members and others who breathe harmful air
9 pollution in communities around the nation and appreciate ecosystems damaged by harmful air
10 pollution will enjoy the up-to-date scientific analysis and air quality standards that Congress
11 intended them to have. Accordingly, Plaintiffs THE CENTER FOR BIOLOGICAL
12 DIVERSITY and THE CENTER FOR ENVIRONMENTAL HEALTH bring this action against
13 Defendant GINA McCARTHY, in her official capacity as EPA Administrator, [hereinafter
14 “EPA”] to compel her to perform these mandatory duties.

16 II. JURISDICTION

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

21 3. An actual controversy exists between the parties. This case does not concern federal
22 taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146, and does not involve the Tariff Act of
23 1930. Thus, this Court has authority to order the declaratory relief requested under 28 U.S.C. §

1 2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue
2 injunctive relief.

3
4 **III. NOTICE**

5 4. On April 27, 2016, Plaintiffs mailed to EPA by certified mail, return receipt requested,
6 written notice of intent to sue regarding the violations alleged in this Complaint. EPA received
7 this notice of intent to sue letter no later than May 2, 2016. More than sixty days have passed
8 since EPA received this “notice of intent to sue” letter. EPA has not remedied the violations
9 alleged in this Complaint. Therefore, a present and actual controversy exists.

10
11 **IV. VENUE**

12 5. Defendant EPA resides in this judicial district. EPA Region 9 is headquartered in San
13 Francisco. This civil action is brought against an officer of the United States acting in her
14 official capacity. A substantial part of the events or omissions giving rise to the claims in this
15 case occurred in the Northern District of California. Plaintiff Center for Environmental Health
16 resides in this judicial district. Therefore, venue is proper in this Court pursuant to 28 U.S.C. §
17 1391(e).

18
19 **V. INTRADISTRICT ASSIGNMENT**

20 6. A substantial part of the events and omissions giving rise to the claims in this case
21 occurred in the County of San Francisco. EPA Region 9 is headquartered in San Francisco.
22 Accordingly, assignment to the San Francisco Division or the Oakland Division is proper
23 pursuant to Civil L.R. 3-2(c) and (d).

1 **VI. PARTIES**

2 7. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)
3 corporation incorporated in California. The Center for Biological Diversity has approximately
4 48,000 members throughout the United States and the world. The Center for Biological
5 Diversity's mission is to ensure the preservation, protection, and restoration of biodiversity,
6 native species, ecosystems, public lands and waters, and public health through science, policy,
7 and environmental law. Based on the understanding that the health and vigor of human societies
8 and the integrity and wildness of the natural environment are closely linked, the Center for
9 Biological Diversity is working to secure a future for animals and plants hovering on the brink of
10 extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us.

11 8. The Center for Biological Diversity and its members include individuals with varying
12 interests in public health, wildlife species and their habitat ranging from scientific, professional,
13 and educational to recreational, aesthetic, moral, and spiritual. Further, the Center for Biological
14 Diversity's members enjoy, on an ongoing basis, the biological, scientific, research, educational,
15 conservation, recreational, and aesthetic values of the regions inhabited by these species,
16 including the regions at issue in this action. The Center for Biological Diversity's members
17 observe and study native species and their habitat, and derive professional, scientific,
18 educational, recreational, aesthetic, inspirational, and other benefits from these activities and
19 have an interest in preserving the possibility of such activities in the future. The Center for
20 Biological Diversity and its members have participated in efforts to protect and preserve public
21 health and natural areas, including the habitat essential to the continued survival of native
22 species, and to address threats to the continued existence of these species, including the threats
23 posed by air pollution and other contaminants.

1 9. Plaintiff the CENTER FOR ENVIRONMENTAL HEALTH is an Oakland, California
2 based nonprofit organization that helps protect the public from toxic chemicals and promotes
3 business products and practices that are safe for public health and the environment. The Center
4 for Environmental Health works in pursuit of a world in which all people live, work, learn, and
5 play in healthy environments.

6 10. Plaintiffs' members live, work, recreate, travel and engage in other activities throughout
7 the areas at issue in this complaint and will continue to do so on a regular basis. Pollution in the
8 affected areas threatens and damages, and will continue to threaten and damage, the health and
9 welfare of Plaintiffs' members as well as their ability to engage in and enjoy their other
10 activities. Pollution diminishes Plaintiff's members' ability to enjoy the aesthetic qualities and
11 recreational opportunities of the affected area.

12 11. EPA's failure to timely perform the mandatory duties described herein also adversely
13 affects Plaintiffs, as well as their members, by depriving them of procedural protection and
14 opportunities, as well as information that they are entitled to under the Clean Air Act. The
15 failure of EPA to perform the mandatory duties also creates uncertainty for Plaintiffs' members
16 as to whether they are exposed to excess air pollution.

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

18 13. Defendant GINA McCARTHY is the Administrator of the EPA. In that role
19 Administrator McCarthy has been charged by Congress with the duty to administer the Clean Air
20 Act, including the mandatory duties at issue in this case. Administrator McCarthy is also
21 charged with overseeing all EPA regional offices including EPA Region 9, which is
22 headquartered in San Francisco.

23

1 **VII. LEGAL BACKGROUND**

2 14. Congress enacted the Clean Air Act to “speed up, expand, and intensify the war against
3 air pollution in the United States with a view to assuring that the air we breathe throughout the
4 Nation is wholesome once again.” H.R. Rep. No. 1146, 91st Cong., 2d Sess. 1,1, 1970 U.S.
5 Code Cong. & Admin. News 5356, 5356. To promote this, the Act requires EPA to set National
6 Ambient Air Quality Standards for certain pollutants. 42 U.S.C. § 7409(a). National Ambient
7 Air Quality Standards establish maximum allowable concentrations in the air of such pollutants.

8 15. Specifically, Section 108 of the CAA requires EPA to identify pollutants that “may
9 reasonably be anticipated to endanger public health and welfare” and to issue air quality criteria
10 for those pollutants. 42 U.S.C. § 7408. Section 109 requires EPA to promulgate primary
11 NAAQS for the pollutants identified under section 108. 42 U.S.C. § 7409. Primary standards
12 must be sufficient to protect the public health, while secondary standards must safeguard the
13 public welfare. 42 U.S.C. § 7409(b).

14 16. Section 109(d)(1) further requires that “at five year intervals” EPA “shall complete a
15 thorough review of the criteria published under [section 108] and the national ambient air quality
16 standards promulgated under this section and shall make such revisions in such criteria and
17 standards and promulgate such new standards as may be appropriate.” 42 U.S.C. § 7409(d)(1).
18 Each time it goes through this review process, EPA must publish in the Federal Register its
19 revision decision concerning the air quality criteria and NAAQS for the pollutant at issue
20 (including any new or revised NAAQS resulting from that review), as well as notice of the
21 issuance of any revised air quality criteria for that pollutant. See 42 U.S.C. §§ 7408(d), 7607(d).

22 17. Courts have held that the duties prescribed by § 109(d)(1) are nondiscretionary. For
23 example, the Second Circuit rejected an argument that § 109(d)(1) merely imposed a duty to

1 avoid unreasonable delay, finding that the provision instead established a nondiscretionary duty:
2 “when, as here, a statute sets forth a bright-line rule for agency action, . . . there is no room for
3 debate -- Congress has prescribed a categorical mandate that deprives EPA of all discretion over
4 the timing of its work.” *American Lung Association v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992)
5 (emphasis added). The D.C. Circuit subsequently “agree[d]” with this Second Circuit ruling.
6 *American Trucking Assns. v. United States EPA*, 175 F.3d 1027, 1047 (D.C. Cir. 1999),
7 *rehearing granted in part on other grounds, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd in*
8 *part on other grounds, aff'd in part sub nom. Whitman v. American Trucking Assns.*, 531 U.S.
9 457 (2001).

10 18. Moreover, EPA’s own interpretation of § 109(d)(1) acknowledges the nondiscretionary
11 nature of the deadline. For example, with respect to the NAAQS for NO₂, EPA long ago
12 recognized that section 109(d)(1) “requires EPA to review the scientific basis of existing
13 National Ambient Air Quality Standards (NAAQS) every 5 years.” 45 Fed. Reg. 77,768 (Nov.
14 24, 1980). More recently, EPA reaffirmed this straightforward reading with respect to the
15 NAAQS for ozone: “Under section 109(d)(1) of the Act, EPA is required to perform a review of
16 the ozone NAAQS every five years.” 61 Fed. Reg. 19,195 (May 1, 1996). Thus, EPA has
17 interpreted 42 U.S.C. § 7409(d)(1) to impose a mandatory duty.

18 19 20 **VIII. FACTS**

21 **A. NITROGEN OXIDES**

22 19. Nitrogen oxides (NO_x) such as nitrogen dioxide (NO₂) are highly reactive gases emitted
23 primarily through the combustion of fossil fuels in mobile and stationary sources.

1 20. NO_x emissions contribute to a variety of public health problems. NO_x emissions are a
2 precursor of ground-level ozone and particulate matter pollution. NO_x emissions also play a role
3 in the accumulation of excess nitrates in drinking water, the eutrophication of aquatic ecosystems
4 and nitrification of soils, global climate change, increases in toxic pollutant levels, and the
5 depletion of the ozone layer. 70 Fed. Reg. 8888-89 (Feb. 23, 2005).

6 21. EPA claims that NO₂ accounts for the vast majority of NO_x in the atmosphere, and has
7 used this claim as a justification to use NO₂ as a surrogate for NO_x since first promulgating the
8 NAAQS for NO₂ in 1971. See 36 Fed. Reg. 8186.

9 22. EPA last reviewed and revised the primary NO_x NAAQS no later than February 9, 2010.
10 75 Fed. Reg. 6,474 (Feb. 9, 2010). EPA last reviewed the air quality criteria document, which
11 EPA now calls an integrated science assessment (ISA), for NO_x no later than January 28, 2016.
12 81 Fed. Reg. 4,910 (Jan. 28, 2016).

13 23. The 2016 ISA demonstrates that the health impacts from NO₂ are worse than was known
14 when EPA set the 2010 NAAQS.

15 24. For example, for setting the 2010 NAAQS, the science was sufficient to infer a likely
16 causal relationship between short-term exposure NO₂ and respiratory effects. Integrated Science
17 Assessment for Oxides of Nitrogen – Health Criteria, January 2016 (2016 ISA) at lxxxii.
18 However, the 2016 ISA solidifies this finding such that EPA can definitively say there is a causal
19 relationship between short term NO₂ exposure and respiratory effects. There are now controlled
20 human exposure studies showing NO₂ can trigger asthma attacks. 2016 ISA at lxxxiii. There is
21 also now consistent evidence showing long-term exposure can cause the development of asthma.
22 2016 ISA at lxxxiv.

1 25. Moreover, for the setting of the 2010 NAAQS, the science was inadequate to infer a
2 relationship between short-term NO₂ exposure and cardiovascular effects. In the 2016 ISA,
3 however, the science now suggests that there is a causal relationship between NO₂ and
4 cardiovascular effects. Integrated Science Assessment for Oxides of Nitrogen – Health Criteria,
5 January 2016 (2016 ISA) at lxxxii. The same is true for long-term exposure and cardiovascular
6 effects, diabetes, birth outcomes, total mortality and cancer. *Id.* These suggestions of a causal
7 relationship are very important. NAAQS setting is not like a tort case where EPA must prove
8 causation by a preponderance of the evidence. Rather, Congress' directive that EPA provide an
9 adequate margin of safety is meant to address uncertainties associated with inconclusive
10 scientific and technical information. 2016 ISA at lxxi. This new science, however, provides no
11 protection to the American public until EPA uses the science to revise the NAAQS.

12 26. More than five years has passed since EPA completed its last review and revision of the
13 NO_x NAAQS but EPA has not fulfilled its mandatory duty to review thoroughly and update as
14 necessary this NAAQS. According to the clear statutory deadlines, such a review should have
15 been completed by no later than February 9, 2015. Thus, EPA's ongoing failure to complete this
16 review and to make the necessary revisions to the NAAQS is contrary to Section 109(d)(1) of the
17 Clean Air Act. See 42 U.S.C. § 7409(d)(1).

18
19 **B. SULFUR DIOXIDE**

20 27. Sulfur Oxides (SO_x) such as sulfur dioxide (SO₂) are a group of gases formed primarily
21 from the combustion of fuel containing sulfur, such as coal. SO_x are also released during the
22 manufacture of metals and in some oil refining processes.

1 28. SO_x emissions have a variety of negative effects on human health. SO_x pollution
2 contributes to respiratory problems, particularly for children and the elderly, and aggravates
3 existing heart and lung diseases. High levels of SO_x emitted over a short period can be harmful
4 to asthmatics. SO_x also contribute to the formation of acid rain, which damages trees, crops,
5 historic buildings, and monuments and alters the acidity of both soils and water bodies. In
6 addition, because SO_x emissions may be transmitted long distances, they contribute to visibility
7 impairment problems in many national parks. See EPA, Office of Air Quality Planning and
8 Standards, “SO₂ – How Sulfur Dioxide Affects the Way We Live & Breathe” (Nov. 2000),
9 available at <http://www.epa.gov/air/urbanair/so2/index.html>.

10 29. SO₂ is the sulfur oxide that EPA has used as a surrogate parameter for regulation of all
11 SO_x emissions since first promulgating NAAQS for SO₂ in 1971. See 36 Fed. Reg. 8186.

12 30. The current primary NAAQS for SO₂ is 75 parts per billion based on a 1-hour average
13 time and a form of the three year average of the 99th percentile of each year’s 1-hour daily
14 maximum concentration.

15 31. Despite the clear statutory language requiring EPA to review and update the air quality
16 criteria and NAAQS for all regulated pollutants every five years, it has been nearly six years
17 since EPA last completed such a review to update the air quality criteria for SO_x and NAAQS for
18 SO₂. During this time, no review of the SO_x criteria or SO₂ NAAQS has been completed.

19 32. EPA’s last review of the air quality criteria document, which EPA now calls an integrated
20 science assessment, for SO_x was completed no later than September 12, 2008. 73 Fed. Reg. 53,002
21 (Sept. 12, 2008). Following the issuance of the SO_x air quality criteria document, EPA revised the
22 primary SO_x NAAQS no later than June 22, 2010. 75 Fed. Reg. 35,520 (June 22, 2010). More than
23 five years have passed since EPA completed its last review and revision of the SO_x criteria document

1 and NAAQS but EPA has not fulfilled its mandatory duty to review thoroughly and update as
2 necessary this air quality criteria and NAAQS. According to the clear statutory deadlines, such a
3 review should have been completed by no later than June 22, 2015.

4 33. According to EPA's external review draft of the Integrated Science Assessment for Sulfur
5 Oxides – Health Criteria, which EPA released in November 2015 (SOx ISA ERD), the science
6 behind the adverse health impacts of SOx has become more certain since EPA's last review. For the
7 adverse public health impacts of Respiratory effects– Long-term exposure, Cardiovascular effects–
8 Short-term exposure, Reproductive and developmental effects, Total mortality– Long-term exposure,
9 and Cancer– Long-term exposure, EPA has changed the rating from “Inadequate to infer the
10 presence or absence of a causal relationship” to “Suggestive but not sufficient to infer a causal
11 relationship.” SOx ISA ERD at xlv.

12 13 **IX. CLAIM FOR RELIEF**

14 CLAIM ONE

15 **(CAA Sections 304(a)(2); 109(d)(1); & 307(d) for NOx)**

16
17 34. Each allegation set forth in the complaint is incorporated herein by reference.

18 35. The deadline under § 109(d)(1) for Defendant to complete another cycle of review,
19 revision, and promulgation actions with respect to NO₂ and NO_x expired a year and a half ago.
20 Nonetheless, Defendant has failed to perform those actions.

21 36. Specifically, EPA last reviewed and revised the primary NO_x NAAQS no later than
22 February 9, 2010. 75 Fed. Reg. 6,474 (Feb. 9, 2010).
23

1 37. Thus, EPA has a mandatory duty to complete a thorough review and revise the existing
2 NAAQS and promulgate new NAAQS as appropriate and publish notice of such actions by no
3 later than February 9, 2015. 42 U.S.C. §§ 7409(d), 7607(d).

4 38. Defendant has failed to do so.

5 39. Defendant's failure to perform each of the above actions constitutes a failure to perform
6 an act or duty (or acts or duties) that are not discretionary with Defendant within the meaning of
7 Clean Air Act § 304(a)(2). 42 U.S.C. § 7604(a)(2).

8
9 CLAIM TWO

10 **(CAA Sections 304(a)(2); 109(d)(1); & 307(d) for SOx)**

11
12 40. Each allegation set forth in the complaint is incorporated herein by reference.

13 41. The deadline under § 109(d)(1) for Defendant to complete another cycle of review,
14 revision, and promulgation actions with respect to SOx expired approximately a year ago.

15 Nonetheless, Defendant has failed to perform those actions.

16 42. Specifically, EPA last reviewed and revised the primary SOx NAAQS no later than June
17 22, 2010. 75 Fed. Reg. 35,520 (June 22, 2010).

18 43. Thus, EPA has a mandatory duty to complete a thorough review of the criteria document
19 and NAAQS and revise the criteria document and NAAQS and promulgate new NAAQS for
20 SOx as appropriate and publish notice of such actions by no later than June 22, 2015. 42 U.S.C.
21 §§ 7409(d), 7607(d).

22 44. Defendant has failed to do so.
23

1 45. Defendant's failure to perform each of the above actions constitutes a failure to perform
2 an act or duty (or acts or duties) that are not discretionary with Defendant within the meaning of
3 Clean Air Act § 304(a)(2). 42 U.S.C. § 7604(a)(2).

4
5 **REQUEST FOR RELIEF**

6 WHEREFORE, Plaintiffs respectfully request that the Court:

- 7 A. Declare that the Administrator is in violation of the Clean Air Act with regard to her
8 failure to perform the mandatory duties listed above;
- 9 B. Issue a mandatory injunction requiring the Administrator to perform her mandatory
10 duties listed above by certain dates;
- 11 C. Retain jurisdiction of this matter for purposes of enforcing the Court's order;
- 12 D. Grant Plaintiffs their reasonable costs of litigation, including attorneys' and experts' fees;
13 and;
- 14 E. Grant such further relief as the Court deems just and proper.

15 Respectfully submitted,

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