IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, Plaintiff, v. CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, Defendant.	)	Civil Action No. 02-2235

MOTION BY PLAINTIFF SIERRA CLUB FOR ENFORCEMENT OF INJUNCTION

Plaintiff Sierra Club further hereby asks the Court for an order directing the Administrator of the U.S. Environmental Protection Agency ("the Administrator" or "EPA") to comply with the Court's preliminary injunction of December 18, 2002 (injunction) in the above captioned matter. In that injunction, the Court directed EPA to take final approval/disapproval action by April 17, 2003 on smog control plans for the Washington, D.C. area. The plans were initially submitted in 1997 and 1998 by Maryland, Virginia, and the District of Columbia pursuant to the Clean Air Act (the Act), and EPA action thereon was already long overdue. In response to this Court's injunction, EPA did take action on April 17, 2003 conditionally approving the plans, but that conditional approval action was recently vacated by the D.C. Circuit in Sierra Club v. EPA, 356 F.3d 296 (2004), mandate issued April 30, 2004. The D.C. Circuit held that EPA's conditional approval action was unlawful because the plans lacked key pollution control measures required by the

Act, and that promises by the states to submit these measures later were not legally sufficient. Id. at 302-04.

The D.C. Circuit's vacatur of EPA's April 17, 2003 action leaves unfulfilled EPA's obligation under this Court's injunction to take final approval/disapproval action on the plans. EPA has not taken such action subsequent to the D.C. Circuit's remand order, which became final on issuance of the mandate on April 30, 2004. Nor has EPA given any indication of when, if ever, it will take final action on the plans. Accordingly, for reasons further set forth below, Sierra Club hereby asks this Court to order EPA to comply with this Court's original injunction by taking final approval/disapproval action on the plans within 45 days. Given the important public health interests at stake, Sierra Club further asks the Court to give this matter expedited consideration.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Court Should Order EPA to Comply with the Court's Original Injunction

A. Background

The metropolitan area of Washington, D.C., has violated federal health standards for ground-level ozone for more than 20 years. 40 C.F.R. §§ 81.309, .321, .347 (2002 & prior versions). Ozone, a principal component of urban smog, is a severe lung irritant even to healthy adults. 66 Fed. Reg. 5002, 5012/3 (2001). It can cause shortness of breath, chest pains, increased risk of infection, aggravation of asthma, and significant decreases in lung function. Id. Elevated ozone levels have been linked to increased hospital admissions and emergency room visits for respiratory causes. 65 Fed. Reg. 6698, 6707/1 (2000). Ozone presents a special health risk to small children, the elderly, persons with lung ailments, and adults who are active outdoors. Id. Populations particularly at risk from ozone in the Washington area include:

* 736,400 children under the age of 13

* 225,700 asthmatics, including 53,200 children with asthma

* 210,000 residents with other chronic or persistent respiratory diseases, such as chronic bronchitis and emphysema

* 336,000 residents over the age of 65; and

* 185,000 – 370,000 otherwise healthy individuals who are especially sensitive to ozone;

Exh. 7.[1]

Ozone is formed in the atmosphere when oxides of nitrogen (NOx) and volatile organic compounds (VOCs) are emitted into the air in the presence of sunlight. H.R. Rep. No. 101-490, pt.1 at 202 (1990) ("House Report"). Major sources of ozone forming emissions include industrial facilities, power plants, and motor vehicles. Id. at 202-03.

The 1970 Clean Air Act, as amended in 1977 and 1990, was enacted specifically to attack the kinds of health threats presented by ozone pollution. Pursuant to the Act, the United States Environmental Protection Agency (EPA) has adopted National Ambient Air Quality Standards (NAAQS) for ozone and other contaminants as pollution limits necessary to protect public health and welfare. 42 U.S.C. §7409; 40 C.F.R. Part 50. EPA designates communities as “attainment” or “nonattainment” areas based on whether they meet the standards for a particular pollutant. 42 U.S.C. §7407(d). Ozone nonattainment areas are further classified as marginal, moderate, serious, severe or extreme, depending on the severity and persistence of the ozone problem. Id. §7511(a), (b)(2).

[1] Exhibit numbers refer to exhibits to Plaintiff’s Application for Preliminary and Permanent Injunction (11/12/2002) previously filed in this matter.

For each nonattainment area, states must submit to EPA a state implementation plan ("SIP" or "plan") meeting requirements set forth in Part D of Subchapter I of the Act (hereinafter, "Part D"), 42 U.S.C. §§7501-7515. Among other things, this SIP must provide for attainment of the standards "as expeditiously as practicable," but no later than specific deadlines set forth in the Act. Id. §§ 7410 , 7502, 7511. If an ozone nonattainment area fails to meet its attainment deadline, it must be reclassified ("bumped up") to a higher classification. Id. §7511(b)(2). Areas with higher classifications are given more time to attain the standard, but must implement stronger anti-pollution measures specified in the Act. Id. §7511(a)(1), 7511a..

In addition to demonstrating timely attainment, all nonattainment area plans must provide for implementation of all "reasonably available control measures [RACM] as expeditiously as practicable." Id. §7502(c)(1). Plans for serious and above areas must also include "rate of progress" (ROP) plans with control measures adequate to ensure 3% annual reductions in ozone forming emissions, averaged over each three year period after 1996 until the attainment date. 42 U.S.C. §7511a(c)(2)(B). The Act further specifies pollution control requirements for new and expanded industrial plants (referred to as "new source review") – requirements that become increasingly stringent in areas with higher ozone classifications. Id. §§ 7503, 7511a. Implementation plans must further include "contingency" measures that will kick in automatically if the plan fails to produce required annual reductions or timely attainment. Id. §§7502(c)(9), 7511a(c)(9).

The Act further sets forth mandatory deadlines for EPA action on implementation plans and plan revisions submitted by states. Pursuant to §§110(k)(1) & (2) of the Act, 42 U.S.C.§7410(k)(1) & (2), EPA must take final action on such plans and revisions within a maximum of 18 months after submittal thereof by the state. Such action must consist of one of the following actions on such submittal (hereinafter, collectively referred to as

"approval/disapproval actions"): approve as a whole; disapprove as a whole; or approve in part and disapprove in part . 42 U.S.C. §7410(k)(2)&(3). Disapproval of a plan, in whole or in part, triggers clocks for the imposition of sanctions and for adoption of federally imposed clean air measures, as well as restrictions on the addition of new road projects to regional transportation plans. Id. §§7410(c), 7509(a)&(b) ; 40 C.F.R. §93.120(a) (2001). States can avoid sanctions by correcting their plan deficiencies before the sanction clocks run out. 42 U.S.C. §7509(a).

B. The Washington ozone SIP

Pursuant to the 1990 Amendments to the Act, the Washington metropolitan area was initially classified, effective November 15, 1990, as a "serious" ozone nonattainment area, with an outside attainment deadline of November 15, 1999. 40 C.F.R. §§ 81.309, .321, .347 (2002). The nonattainment area (herein, "Washington area") includes: the District of Columbia; Montgomery, Prince Georges, Charles, Calvert and Frederick counties in Maryland; and Fairfax, Arlington, Loudon, Prince William and Stafford counties in Virginia (as well as cities within the same region, such as Alexandria and Fairfax) . Id. The Act required the District of Columbia (District or D.C.), Maryland and Virginia (hereinafter, collectively "states") to submit the above-described plan provisions for the Washington area, including the attainment and rate-of-progress demonstrations, not later than November 15, 1994. 42 U.S.C. §7511a(b)(1)(A).

Neither the states nor EPA followed this legally mandated path. The states did not submit the rate of progress (ROP) plans (referred to by EPA as the "Phase I" plans) until November and December of 1997, and did not submit their attainment demonstration and other plan provisions (referred to by EPA as the "Phase II" plans) until April 1998. 66 Fed. Reg. 586 (2001). Exh. 8. As finally submitted, the plans (jointly prepared by the states through the Metropolitan Washington Council of Governments) did not provide for attainment of the ozone

standard by the statutory attainment deadline of November 15, 1999. Sierra Club v. EPA, 294 F.3d 155, 159 (D.C. Cir. 2002). Instead, the states asked EPA to extend the attainment deadline by six years, to November 15, 2005, but without reclassifying the area to "severe" – the only path provided by the Act for extending the attainment date. Id . The plans also did not provide for 3% annual reductions in emissions after 1999 as required by the Act's ROP provisions, did not provide for additional "reasonably available" control measures (RACM), and did not contain the contingency measures mandated by the Act. Id. at 159, 164.

The November 15, 1999 attainment deadline for the Washington area came and went with the area still violating the ozone standard and still lacking approved attainment or progress plans. EPA did not publish a notice by May 15, 2000 as required by the Act determining that the area had missed the attainment deadline and reclassifying the area to severe. Instead, on January 3, 2001, EPA published a Federal Register notice granting the states' request to extend the attainment date to 2005, without reclassifying the area to severe. 66 Fed. Reg. 586 (2001). In the same notice, EPA fully approved the states' ROP ("Phase I") and attainment ("Phase II") plans for the Washington area. EPA took these actions despite strenuous objections by Sierra Club and others that EPA had no authority to extend the attainment date without reclassifying the area to severe, that the states' plans failed to assure the legally required 3% annual reductions in pollutant emissions after 1999, failed to provide for adoption of all reasonably available control measures (RACM) as mandated by the Act, and failed to include contingency measures as required by the Act. Id. 66 Fed. Reg. 591-603, 607-13, 615-16. EPA brushed aside all of these objections. Id.

Sierra Club filed a timely petition for review in the D.C. Circuit challenging EPA's extension of the attainment date and approval of the states' Phase I and II plans. On July 2, 2002,

the D.C. Circuit granted the petition, holding that EPA acted illegally in extending the ozone attainment date for the Washington area, and in approving the plans. Sierra Club v. EPA, 294 F.3d 155 (D.C. Cir. 2002). The Court held that EPA could not extend the attainment date without reclassifying the area to severe. Id. at 160-62. It further agreed with Sierra Club that: 1) the Phase I (ROP) plans were deficient because they failed to provide for emission reductions after 1999; 2) the attainment plans were deficient because the states had failed to adequately consider additional RACMs; and 3) both the ROP and the attainment plans were deficient because they lacked contingency measures as required by the Act. Id.163-64. The Court vacated EPA's approval of the plans, and remanded the matter to EPA. Id. at 164.

When EPA failed to take action on remand, Sierra Club filed the instant case on November 11, 2002, asking this Court to issue a preliminary and permanent injunction setting deadlines for EPA to: a) determine whether the Washington area attained by the applicable attainment date, and announcing the appropriate reclassification of the area if the area had not timely attained (nonattainment/reclassification determination); and b) take final approval/disapproval action on the previously submitted ozone plans for the area. On December 18, 2002, this Court granted Sierra Club's request, ordering EPA to make a nonattainment/ reclassification determination by January 27, 2003, and to take approval/disapproval action on the plans[2] by April 17, 2003. A copy of the Court's December 18, 2002 injunction is attached hereto as Attachment '1'. In response, EPA on January 24, 2003 published a formal finding that the Washington area had failed to attain the ozone standard by the "serious" area attainment date, and announced reclassification of the area to "severe". 68 Fed. Reg. 3410 (2003).

[2] The injunction specifically identified the plan submittals on which EPA was required to act, citing those listed at 66 Fed. Reg. 586, 586 (January 3, 2001).

On April 17, 2003, EPA took final action conditionally approving the previously submitted ozone plans for the Washington area, even though the states had not corrected any of the deficiencies previously identified by the D.C. Circuit. 68 Fed. Reg. 19106 (2003). EPA stated that it could conditionally approve these plans because the states had made commitments to correct the deficiencies within one year. Id. at 19106-08. EPA further announced that it was conditionally approving these plans as meeting the requirements for "severe" areas, even though the plans contained none of the more stringent programs required by the Act for severe area. Id. Again, EPA stated that it could grant such conditional approval because the states had committed to supply the missing severe area programs within one year. Id. EPA took these actions over strenuous objections by Sierra Club that the Act and D.C. Circuit precedent clearly prohibited conditional approval of such deficient plans.

On July 11, 2003, EPA asked this Court to terminate and close the instant case on the ground that EPA had complied with the final action deadlines set in the Court's December 18, 2002 injunction. Sierra Club consented to this request, and on July 14, 2003, the Court entered an order "terminating and closing this case." Attachment 2. The Court did not, however, withdraw its order of December 18, 2002 or dismiss the case.

Sierra Club timely petitioned the D.C. Circuit for review of EPA's April 17, 2003 conditional approval action. The Club argued that the conditional approval was illegal because the states had failed to submit any substantive provisions at all to correct the deficiencies previously identified by the D.C. Circuit (e.g., lack of RACM demonstration, post 1999 progress plans, and contingency measures) or to adopt the additional measures required for "severe" areas. The D.C. Circuit agreed, holding that EPA's action illegally allowed the states to delay adoption of pollution controls required by the Act. 356 F.3d at 303 (EPA could not

conditionally approve plans based "on nothing more than the States' promise to do next year what the Clean Air Act requires them to have already done"). The court vacated EPA's conditional approval action and remanded to the agency. Attachment 3. The D.C. Circuit's mandate issued April 30, 2004 (Attachment 4), but EPA has yet to take final action on the plans for which its conditional approval was vacated. Thus, the directive of this Court's injunction requiring final action on those plans remains unfulfilled.

Meanwhile, the Washington area continues to experience unhealthful ozone levels. In 2003, the area exceeded the 1-hour ozone standard on three separate days, and the new, more protective 8-hour standard on seven days – including two "code purple" days with smog levels deemed "very unhealthy." http://www.mwcog.org/environment/air/downloads/calendar_2003.pdf ("2003 Ozone Report).[3] In 2004, the area has already exceeded the 1-hour standard on two days, and the 8-hour standard on four days – and the ozone season (i.e., the period when weather patterns are conductive to ozone formation) will continue to run until mid-September. http://www.mwcog.org/environment/air/downloads/ozone_calendar_04.pdf ; 2003 Ozone Report.

Plaintiff Sierra Club has more than 15,000 members in the Washington area whose health and welfare are threatened by unhealthful ozone levels in their community. Exhs. 2-6. The Club contends that the EPA delays at issue here violate requirements of the Act designed to protect Club

[3] This suit seeks to enforce deadlines for EPA action on plans for the 1-hour standard, but evidence of 8-hour exceedances is plainly relevant to the health threat presented and the urgency of the problem. According to EPA, the 1-hour standard is not sufficiently protective of human health. See American Trucking Assns. v. USEPA, 283 F.3d 355, 378-79 (D.C. Cir. 2002). Thus, the public health urgency of reducing ozone pollution in the Washington area is even greater than indicated solely by violations of the 1-hour standard.

members from such pollution, and deprives them of health, welfare and procedural protections guaranteed under the Act. Among other things, Sierra Club contends that if EPA were required to take final approval/disapproval action on the states' plans, the agency would have no choice but to disapprove the plans because the D.C. Circuit has specifically ruled – **twice** now - that the plans do not meet all the requirements of the Act. By delaying these actions, EPA is therefore delaying the stronger pollution controls, sanctions, and other measures specified in the Act to promote cleaner air in areas that fail to timely attain and fail to adopt adequate plans. Sierra Club accordingly asks this Court to enforce its injunction by directing EPA to take final approval/disapproval action on the states' ozone plans for the Washington area within 45 days.

C. Argument

1. EPA has failed to perform its mandatory duty to take final approval/ disapproval action on the implementation plans for the Washington area

This Court issued its December 18, 2002, order after Sierra Club demonstrated that EPA was in violation of its nondiscretionary duty to take timely approval/disapproval action on ozone SIPs previously submitted by the states. These SIPs included ROP (Phase I) plans submitted by the states in November and December of 1997 (and amended in 1999), attainment (Phase II) plans submitted in April 1998 (and amended/supplemented in 1998 and 2000), and plan revisions seeking extension of the attainment date submitted in July and September 1999. 66 Fed. Reg. at 586. Attachment 5. As noted above, the Act requires EPA to take final approval/disapproval action on SIP submittals no later than 18 months after submittal, at the absolute outside. 42 U.S.C. §7410(k)(1),(2). See also 64 Fed. Reg. 70460, 70462 (1999)("Under the CAA, EPA is required to approve or disapprove a State's submission no later than 18 months following submission"); NRDC v. EPA, 22 F.3d 1125, 1131, 1134, 1136 n.13 (D.C. Cir. 1994)(EPA has 14-18 months after

plan submittal deadline to act on the submittal). Thus, at the time of this Court's injunction, EPA action on the above-referenced SIP submittals was already years overdue. This Court necessarily so concluded when it ordered EPA to take final approval/disapproval action on the plans by April 17, 2003.

EPA's unlawful conditional approval of the ROP and attainment plans on April 17, 2003 did not discharge the agency's approval/disapproval duty because that action has been vacated by the D.C. Circuit. Sierra Club 356 F.3d at 310 ("we vacate and remand EPA's conditional approval action"). A vacated agency action is a nullity that has no force and effect. Alabama Power Co. v. EPA, 40 F.3d 450, 456 (D.C. Cir. 1994)(to vacate means to annul, render void, defeat, and deprive of force). Once vacated, an action loses the ability to "spawn[] any legal consequences" United States v. Munsignwear, 340 U.S. 36, 41 (1950). See also Kelso v. United States Dep't of State, 13 F. Supp. 2d 12, 17-18, 24 (D.D.C. 1998)(CKK)(vacatur deprives agency action of any validity). Vacatur of the rules returned the situation to the *status quo ante* before the rules took effect, thereby leaving EPA's rulemaking duty unfulfilled. Independent U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 854-55 (D.C. Cir. 1987)(upon vacatur of rule by D.C. Circuit, conditions are "returned to the *status quo ante*, before the …rule took effect").

Sierra Club is informed that, after the D.C. Circuit issued its opinion rejecting EPA's conditional approval of the states' plans, the states sent letters to EPA purporting to "withdraw" most of the plan submittals at issue in this case, with the withdrawals to be effective as of the date of the D.C. Circuit's mandate. This rather transparent attempt to evade disapproval of the plans does not, in fact, relieve EPA of its statutory duty to act on the plans. As discussed above, once plans or plan revision are submitted to EPA, the agency has a mandatory duty to approve or disapprove them within 18 months. The Act contains no provision whatsoever for stopping that

clock once triggered. Moreover, to read such a provision into the statute would allow states to eviscerate the Act's deadline and sanctions provisions by repeatedly submitting deficient plans and then withdrawing them on the eve of EPA disapproval.

The states have also made SIP submittals subsequent to those at issue here. For the same reasons discussed above, however, those submittals do not restart the 18-month clock for EPA action on the previously submitted plans at issue in this case. The states are certainly free to submit additional plans, and indeed the Act sometimes requires them to do so, but the Act does not give states the power to stop the statutory clocks for EPA action on plans that have already been submitted.

2. EPA's continued failure to take final approval/disapproval action flouts this Court's injunction

This Court's December 18, 2002 injunction came after years of EPA delay and evasion of statutory duties. The agency had already been expressly told by the D.C. Circuit that its prior attempt to approve the Washington area ozone plans was illegal in a number of major respects. Nonetheless, EPA on April 17, 2003 proceeded to conditionally approve the very same plans that the D.C. Circuit had already ruled deficient. The agency used the artifice of conditional approval for the sole purpose of avoiding disapproval of the plans – knowing full well that the D.C. Circuit had previously held conditional approval to be flatly unlawful under very similar circumstances in NRDC v. EPA, 22 F.3d 1125 (D.C. Cir. 1994). EPA's action therefore was not a good faith attempt to comply with this Court's injunction, but rather a transparent attempt to evade the import of that order and avoid compliance with the Act. Now that the D.C. Circuit has again invalidated the agency's illegal conduct, this Court should put an end to further EPA delay and evasion, by directing the agency to take final action on these plans forthwith.

The Court's order of July 14, 2003 closing this case does not deprive the Court's December 18, 2002 injunction of its force. No judgment has been entered dismissing this case or vacating the Court's injunction. Rather, the Court's July 14, 2003 order merely had the effect of closing the case for administrative purposes. In this regard, this case is substantially similar to GTE Sylvania v. Consumers Union of the United States, 445 U.S. 375 (1980). There, the Supreme Court held that a federal agency remained subject to a District Court injunction even after the District Court had entered a minute entry ordering the clerk to close the case for statistical purposes. Id. at 380 n.4. The Court relied on the "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction **are expected to obey that decree until it is modified or reversed**." Id. at 386 (emphasis added). Under such circumstances, the agency "was required to obey the injunction[s] out of 'respect for judicial process.'" Id. at 387 (citation omitted). The same principle applies here.[4]

3. An enforcement order is necessary to effectuate the Act and protect public health

If the purpose of legislation is thwarted by failure to comply, and the legislation specifically authorizes injunctive relief, then an injunction must issue. United States v. Microsoft, 147 F.3d 935, 943-44 (D.C. Cir. 1998). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the courts to enforce them when enforcement is sought.

[4] In directing the clerk to close the case, the district court in GTE Sylvania noted that "[n]othing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered." 445 U.S at 380 n.4. This statement simply reaffirmed the point that an order closing a case does not have the same effect as a dismissal, and does not preclude further proceedings. Thus, it is immaterial that this court's order closing the instant case did not contain a similar statement.

Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001). Here, Congress unquestionably commanded EPA to take final action on these plans years ago. Further, the Administrator's failure to act clearly thwarts the statutory purpose. Congress laid out a precise schedule for implementation of the Clean Air Act to ensure that public health would be protected. It required that EPA act promptly to disapprove clean air plans that fail to meet the Act's requirements, so as to set in motion the sanction clocks and other measures to induce corrective plans. These purposes are plainly defeated when EPA repeatedly refuses to take timely action on plan submittals, allowing areas that missed attainment deadlines and failed to adopt adequate plans to delay or avoid the additional pollution controls mandated by Congress.

Moreover, both the plaintiff's members and the public are irreparably harmed by the Administrator's noncompliance. Their health and welfare is profoundly threatened by EPA's failure to take steps mandated by the Act to control ozone pollution in the air they breathe. As noted above, the Washington area suffers from dangerous levels of ozone pollution, presenting an immediate and substantial public health risk. The air is so polluted that Sierra Club members limit their outdoor activity and that of their children. Exhs. 3, 4, 5. Ozone pollution at these levels increases the risk to Club members and others of asthma attacks, lung damage, and emergency room visits. Exh. 6. EPA's failure to take the actions sought herein unlawfully delays measures required by the Act to remedy such dangerous levels of pollution.

Given that ozone pollution repeatedly reaches unhealthful code red levels, and the air is so dirty that children are repeatedly warned to limit outdoor play, the public interest strongly favors enforcement of federal clean air mandates. Moreover, the Act sets forth public policy on this matter in clear and explicit terms, by requiring the Administrator to take approval/disapproval

actions by specific deadlines, all of which passed long ago. The purpose of these requirements - to protect human health - is of the highest possible public importance.

In contrast, the Administrator cannot possibly claim any harm from being ordered to comply with this Court's injunction. The approval/disapproval actions here are dictated by the D.C. Circuit's decisions vacating EPA's prior approval actions. That court specifically held that the ozone plans for the Washington area did not meet all the applicable requirements of the Act – specifically, the requirements for a demonstration of timely attainment, for meeting rate of progress requirements in years after 1999, for adoption of all reasonably available control measures, and for adoption of contingency measures. 294 F.3d at 160-64. The same court subsequently held that EPA acted illegally in conditionally approving these very same deficient plans. Pursuant to §110(k)(3) of the Act, EPA must therefore disapprove these plans. 42 U.S.C. §7410(k)(3)("If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part"). This is not a matter for further delay, debate or deliberation.

Judicial relief is urgently needed in light of EPA's long history of illegal delay and inaction in this matter. The Act required the states to submit their serious area attainment and rate of progress plans to EPA by November 15, 1994, and required EPA to approve or disapprove them within 18 months thereafter – i.e., by May 15, 1996. Contrary to these explicit statutory deadlines, EPA allowed the states to delay submittal of their plans until years later, and did not act on those submittals until January 2001 – nearly **five years** past the timeframe required by Congress and almost two years **after** the date by which the plans were to be fully implemented. EPA acted at that late date only after being sued by Sierra Club and others in a separate case that sought to compel promulgation of a federal clean air plan because of the lack of approved state plans. NRDC v.

Whitman, No. 99-2976 (CKK) (D.D.C.).[5] Further, EPA knew full well that its approval of the state plans in January 2001 and its conditional approval of the *very same* plans in April 2003 were legally flawed. EPA cannot and should not be allowed to compound that illegality by delaying any further the action that was required by the Act in the first place – namely lawful, final approval/disapproval action on the state's plans.

4. The Court should direct EPA to publish final approval/disapproval action within 45 days of the Court's order

When Congress "categorically mandate[s]" that EPA meet explicit deadlines, EPA is "deprive[d] of all discretion over the timing of its work." Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987). Violations of such statutory deadlines should be corrected at the "earliest possible date," using all available means. Delaney v. EPA, 898 F.2d 687, 691 (9th Cir. 1990)(citation omitted). The Supreme Court has ruled that Congress intended the Clean Air Act's nonattainment provisions to strictly limit EPA's discretion. Whitman v. American Trucking Assns., 531 U.S. 457, 484-85 (2001).

Here, Sierra Club proposes that the Court direct EPA to take final approval/disapproval action on the above-referenced plans within 45 days of the Court's order. This time frame matches the time allowed in the Court's injunction for EPA to take final action on its proposed nonattainment/reclassification determination. The same schedule is warranted here because EPA

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[5] The U.S. District Court for the District of Columbia entered a consent decree in that case that, among other things, required EPA to propose a federal implementation plan for the Washington ozone nonattainment area unless the Administrator signed a notice fully approving state plans for the area by December 15, 2000. NRDC v. Whitman, No. 99-2976, Consent Decree entered 6-12-00, as amended 11-6-00. EPA's January 3, 2001, Federal Register Notice approving the Washington area ozone plans was signed on December 15, 2000. 66 Fed. Reg. at 631.

has already been told *twice* by the D.C. Circuit in no uncertain terms that these plans are not legally approvable. There is no need for EPA to go through yet another round of notice and comment rulemaking to reach the conclusion that it cannot approve these plans. Moreover, when EPA proposed to conditionally approve the plans on February 3, 2003, the agency also proposed in the alternative to disapprove them. 68 Fed. Reg. 5246, 5260-61 (2003). Thus, the agency has already provided an opportunity for public comment on a proposal to disapprove these plans, and does not need to provide another one. See Sierra Club v. Browner, 130 F. Supp.2d 78, 95-6 (D.D.C. 2001)(where public comment on proposal had already been completed, EPA was ordered to publish final attainment/reclassification determination for St. Louis within 45 days).

As a result of EPA's delays and illegal plan approvals, we are now nearly a decade past the original plan submittal deadline for the Washington area, but the region *still* does not have an approved plan to attain the ozone standard. EPA delays and inaction have completely eviscerated the precise schedule set out by Congress. Meanwhile, children, asthmatics and others in the Washington face another summer of ozone pollution that will put them at risk of asthma attacks, emergency room visits, lung damage, and other serious health impacts. The time has come to put an end to EPA delays.

II. Motion in Alternative for Relief from Order

As noted above, Sierra Club believes that the Court's July 14, 2003 order merely closed this case for administrative purposes, and did not withdraw the Court's December 18, 2002 injunction or dismiss the case. If the Court disagrees, however, then Sierra Club moves in the alternative for relief from the July 14, 2003 order pursuant to Fed. R. Civ. P. 60(b). That rule authorizes relief from an order for various specified reasons, and for "any other reason justifying relief from the

operation of the judgment.." Fed. R. Civ. P. 60(b)(6). The Supreme Court has stated that Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just.'" Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863 (1988). The rule "provides courts with authority 'adequate to accomplish justice,'" although it should only be applied in 'extraordinary circumstances.'" Id. at 864 (citations omitted).

The facts here present the kind of extraordinary circumstances warranting Rule 60(b)(6) relief.[6] This Court premised its July 14, 2003 order terminating the case on the fact that EPA had taken final approval/disapproval action on the Washington area SIPs by the deadline set in the Court's December 18, 2002 injunction. Likewise, Sierra Club consented to EPA's motion to terminate the case because at that time there was in place a final EPA approval/disapproval action. Although Sierra Club believed EPA action to be unlawful on the merits, the proper forum for challenging the substance of final EPA action is ordinarily the court of appeals, not the district court. 42 U.S.C. §7607(b)(1)("A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit."). Accordingly, further proceedings were not required in this Court at that time.

However, the final approval/disapproval action relied on by the Court as the basis for terminating the case has now been vacated by the D.C. Circuit.. As noted above, such vacatur returns the situation to status quo that existed prior to EPA's final action, leaving the agency's duty to take such action unfulfilled. To allow that situation to continue without enforcing the Court's

[6] A Rule 60(b) motion must be made "within a reasonable time." Sierra Club's motion plainly meets this requirements, as it comes only 2 ½ months after issuance of the D.C. Circuit's mandate. See, e.g., Werner v. Carbo, 731 F.2d 204, 207 (4th Cir. 1984)(Rule 60(b) motion timely where filed within 11 weeks of denial of certiorari on decision that was basis for motion).

original injunction would effectively nullify that injunction as well as the provisions of the Act it was designed to enforce.[7] It would also further eviscerate the Act's precise schedules for protection of the public from dangerous levels of ozone pollution. The situation is all the more intolerable given EPA's *repeated* and deliberate refusal to implement the Act as expressly directed by the D.C. Circuit.

In deciding whether to grant relief under Rule 60(b)(6), courts consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." Liljeberg, 486 U.S. at 864. All of these factors strongly support Rule 60(b)(6) relief here. Both the plaintiff and the public would suffer a serious injustice without enforcement of the Court's original order. In contrast, enforcement of that order would work no injustice whatsoever on EPA, but rather merely require the agency to take action that is already years overdue and that the agency as previously been ordered to take. Denial of relief here would create a great risk injustice in other cases by encouraging EPA to engage in the same kind of delay and evasion that it has employed here. And denial of relief would unquestionably undermine the public's confidence in the judicial process, by allowing a scofflaw federal agency to use illegal action to evade compliance with a federal court order. Other courts have granted Rule 60(b)(6) relief in comparable circumstances. E.g., Aro Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir. 1976)(relief from prior dismissal order properly

[7] Thus, this motion is analogous to one under Rule 60(b)(5), which authorizes relief from judgment where "a prior judgment upon which it is based has been reversed or otherwise vacated."

granted under Rule 60(b)(6) where defendant had violated settlement agreement that was the basis for the stipulated dismissal); Kelly v. Greer, 334 F.2d 434 (3d Cir. 1964)(district court directed to vacate prior dismissal order where plaintiff alleged that defendant had breached settlement agreement on which dismissal was based).[8]

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully ask the Court to enter an order enforcing its injunction of December 18, 2002, and directing EPA to publish final approval/disapproval action as directed in that injunction within 45 days. A proposed form of order is provided herewith.

DATED: July 14, 2004.

Respectfully submitted,

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[8] This is not a situation like that in Empresa Electrica Del Ecuador v. Republic of Ecuador, 191 F.R.D. 323 (D.D.C. 2000) where the plaintiff could obtain an adequate remedy without Rule 60(b)(6) relief. Here, a new lawsuit by the plaintiff would entail yet further delay, undermining the very deadlines that plaintiff seeks to enforce.