IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB 85 Second Street, Second Floor San Francisco, CA 94105-3441 Plaintiff, v. MICHAEL O. LEAVITT Administrator, United States Environmental Protection Agency, Defendant.	)))))))))))))))	CASE NUMBER 1:04CV02163 JUDGE: James Robertson DECK TYPE: Administrative Agency Review DATE STAMP: 12/15/2004

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action to compel the Administrator of the United States Environmental Protection Agency ("Administrator" or "EPA") to take final approval/disapproval action on implementation plans required by the Clean Air Act to meet clean air health standards for ozone (smog) in the Washington, D.C. metropolitan area. EPA's failure to take such action violates explicit deadlines in the Clean Air Act ("the Act") that expired years ago, and threatens the health and welfare of millions of Washington area residents.

JURISDICTION AND VENUE

2. This action is brought pursuant to the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 7604 and

28 U.S.C. §§ 1331 and 1361. The relief requested is authorized pursuant to 42 U.S.C. § 7604 and 28 U.S.C. §§ 2201 and 2202.

3. Pursuant to 42 U.S.C. § 7604(b), plaintiff served timely prior notice on defendant of the violations alleged herein and plaintiff's intent to sue therefor. Said notice was accomplished by certified letter, posted on September 16, 2004, and addressed to the Administrator. More than 60 days have passed since notice was served, as required by 42 U.S.C. § 7604(b), and the violations complained of in the notice are continuing.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because defendant's official residence is in the District of Columbia.

PARTIES

5. Plaintiff Sierra Club ("the Club") is a not-for-profit corporation organized and existing under the laws of California, with its principal place of business in San Francisco, California. The Club is a national membership organization, with more than 625,000 members residing throughout the United States. Sierra Club's mission is to protect and enhance the quality of the natural and human environment, and its activities include public education, advocacy, and litigation to enforce environmental laws. The Club and its members are greatly concerned about the effects of air pollution on human health and the environment, and have a long history of involvement in activities related to air quality. Sierra Club is bringing this action on behalf of itself and its members.

6. Sierra Club members live, work, recreate and conduct other activities in the Washington, D.C., ozone (1-Hour Standard) nonattainment area ("Washington area") as identified at 40 C.F.R. §§ 81.309, .321, .347 (2004). Club members are adversely affected by exposure to air in that area that does not meet national ambient air quality standards for ozone ("NAAQS")

established under the Act for the protection of public health and welfare. Such adverse effects include, but are not limited to, actual or threatened harm to their health and aesthetic enjoyment of the environment in the Washington area. The acts and omissions of EPA alleged herein cause injury to Club members by prolonging air quality conditions that adversely affect their health and welfare, and nullifying or delaying measures mandated by the Act to protect their health and welfare from air pollution in the Washington area. The health, recreational, aesthetic, and environmental interests of Club members have been and continue to be adversely affected by the acts and omissions of EPA alleged herein. Granting the requested relief would redress the injuries described above.

7. The acts and omissions of EPA alleged herein further deprive Sierra Club and its members of procedural rights and protections to which they would otherwise be entitled, including, but not limited to, the right to seek judicial review of any EPA action to approve the ozone attainment plans for that area. Sierra Club contends that EPA must disapprove the ozone attainment plans for the Washington area and thereby induce and require the adoption of stronger air pollution controls in the area as required by the Act. EPA's failure to take timely approval/disapproval action thereby denies Sierra Club members the benefits of plan disapproval without providing the Club and its members the right they would otherwise have to seek judicial review of plan approval under § 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1). Granting the requested relief would redress the injuries described above.

8. The acts and omissions alleged herein further deprive Sierra Club and its members of information to which they would otherwise have access, specifically, a formal published decision by EPA on whether ozone plans for the area meet the requirements of the Act. If the Club and its members had access to such information, they would use it to educate the public about air pollution

in the Washington area, and to advocate for adoption of measures to attain and maintain compliance with the NAAQS. EPA's failure to produce such information deprives the Club and its members of these benefits and thus causes them injury. Granting the requested relief would redress the injuries described above.

9. Defendant Michael O. Leavitt is the Administrator of the United States Environmental Protection Agency ("EPA"), and is charged in that role with taking various actions to implement and enforce the Clean Air Act, including the actions sought herein. Defendant is sued in his official capacity.

FACTS

Statutory and Regulatory Background

10. The Clean Air Act, 42 U.S.C. §§ 7401 to 7671q, establishes a comprehensive scheme "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b).

11. As one of its central features, the Act requires the Administrator to set National Ambient Air Quality Standards ("NAAQS" or "standards") for certain air pollutants. 42 U.S.C. § 7409(a). The Administrator must set primary NAAQS for such pollutants at levels that will protect the public health with an adequate margin of safety, id. § 7409(b)(1), and secondary NAAQS at levels that will protect the public welfare from any known or anticipated adverse effects associated with the presence of those pollutants in the ambient air, id. § 7409(b)(2).

12. Ozone is one of the pollutants for which the Administrator has established NAAQS. Ozone is a severe lung irritant that has been linked to increased hospital admissions due to respiratory ailments such as asthma.[1] Children and the elderly are especially susceptible to adverse health effects from ozone, but even healthy individuals can be adversely affected.

13. Under the Act, an area that meets the NAAQS for a given pollutant is designated as "attainment" for that pollutant, while an area that does not meet the NAAQS is designated "nonattainment." 42 U.S.C. § 7407(d). Each area designated as nonattainment for ozone must be classified as "marginal," "moderate," "serious," "severe," or "extreme." Id. § 7511(a).

14. The Act requires a state in which a nonattainment area is located to take specified steps to bring such area into attainment by outside deadlines ("attainment dates") set forth in the Act. Among other things, the state must submit a State Implementation Plan ("SIP") containing emissions limits, permit programs, and other control measures adequate to attain the relevant standard as expeditiously as practicable, but not later than the attainment date. 42 U.S.C. § 7502(c). 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.

15. 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 ozone nonattainment areas must also

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[1] EPA has adopted two ozone NAAQS – a 1-hour standard and an 8-hour standard. 40 C.F.R. §§ 50.9, 50.10. The ozone-related claims for relief in this complaint pertain only to the 1-hour NAAQS.

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).

16. The Act further sets forth mandatory deadlines for EPA action on SIPs and SIP revisions submitted by states. Pursuant to § 110(k)(1) of the Act, 42 U.S.C. § 7410(k)(1), the Administrator must determine within specified time frames whether a submitted SIP revision is "complete" – i.e., whether the submission meets the minimum criteria promulgated under, § 110(k)(1)(A) of the Act, 42 U.S.C. § 7410(k)(1)(A). If the Administrator does not make this completeness determination within 6 months of receipt of the submission, then the plan or plan revision is deemed complete by operation of law. 42 U.S.C. § 7410(k)(1)(B). Within twelve months after a SIP submission is found or deemed to be complete pursuant to § 110(k)(1)(B) of the Act, 42 U.S.C. § 7410(k)(1)(B) (or, if the completeness criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator must act on the submission in accordance with § 110(k)(2) & (3) of the Act, 42 U.S.C. § 7410(k)(2) & (3). Such action must include 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).

17. 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).

Washington Area Ozone Plans

18. Pursuant to §§ 107(d) and 181(a) of the Act, 42 U.S.C. §§ 7407(d) and 7511(a)(1), the Washington metropolitan area was designated and classified, effective November 15, 1990, as a "serious" ozone nonattainment area. 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). The attainment date set forth in the Act for serious ozone nonattainment areas was as expeditiously as practicable, but not later than November 15, 1999.

19. The Act required the District of Columbia (District or D.C.), Maryland and Virginia (hereinafter, collectively "states") to submit the above-described ozone SIP provisions for the Washington area, including the attainment and rate of progress (ROP) demonstrations, reasonably available control measures, and contingency measures, not later than November 15, 1994. 42 U.S.C. § 7511a(b)(1)(A).

20. The states did not submit the rate of progress 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). 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. 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. 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, and did not contain the contingency measures mandated by the Act.

21. 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 and 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.

22. Sierra Club filed a timely petition for review in the D.C. Circuit challenging EPA's January 3, 2001 action extending the attainment date and approving 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.

23. When EPA failed to take action on remand, Sierra Club filed a citizen suit in this Court on November 11, 2002, asking for 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. Sierra Club v. Whitman, No. 02-CV-2235 (JR). 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. 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).

24. 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

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

the plans contained none of the more stringent programs required by the Act for a 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.

25. 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. Sierra Club v. EPA, 356 F.3d 296, 303 (D.C. Cir. 2004), *mandate issued* April 30, 2004 ("Sierra Club II")(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.

26. The D.C. Circuit's mandate in Sierra Club II issued April 30, 2004, but EPA has yet to take final action on the plans for which its conditional approval was vacated in Sierra Club II.

CLAIM FOR RELIEF

27. Paragraphs 1-26 are incorporated herein by reference.

28. The District of Columbia ("DC"), Maryland ("MD"), and Virginia ("VA"), have submitted the following SIP revisions to EPA for approval and disapproval action under the Act, on or about the following dates:

Phase I Ozone Attainment Plans for the Washington Area[3]

	DC	MD	VA
Initial submittal dates	11/10/97	12/24/97	12/19/97
Amendment dates	5/25/99	5/20/99	5/25/99

Phase II Ozone Attainment Plans for the Washington Area[4]

	DC	MD	VA
Initial Submittal dates	4/24/98	4/29/98	4/29/98
Amendment dates	10/27/98	8/17/98	8/18/98
Supplemental dates	2/16/00	2/14/00	2/9/00
Supplemental dates	3/22/00	3/31/00	3/31/00

Attainment Date Extension Request

	DC	MD	VA
Initial submittal dates	9/20/99	7/16/99	9/3/99
Supplemental dates	2/16/00	2/14/00	2/9/00

29. The above-referenced SIP revisions are identified at 66 Fed. Reg. 586 (2001). The SIP revisions were submitted by the states to satisfy requirements under §§ 110, 172, and 182 of the Act with respect to the Washington ozone nonattainment area.

30. The Administrator has failed and is failing to perform his nondiscretionary duty under 42 U.S.C. § 7410(k)(2) & (3) to take timely final approval/disapproval action with respect to the above-referenced SIP revisions. In each case, the plan revisions were submitted and found or deemed to be complete more than twelve months ago, but the Administrator has failed to act on the revisions as required by 42 U.S.C. § 7410(k)(2) & (3).

31. The Administrator attempted to take final approval/disapproval action with respect to the above-referenced SIP revisions on January 3, 2001, 66 Fed. Reg. 586, but that action was

[3] Also referred to as "Post-1996 ROP Plans" or "ROP plans"
[4] Also referred to as "Attainment Demonstration" plans.

vacated by the U.S. Court of Appeals for the District of Columbia Circuit in Sierra Club v. EPA, 294 F.3d 155 (D.C. Cir. 2002). The Administrator further attempted to take conditional approval action with respect to the above-referenced SIP revisions on April 17, 2003, 68 Fed. Reg. 19106 (2003), but that action was vacated by the U.S. Court of Appeals for the District of Columbia Circuit in Sierra Club v. EPA, 356 F.3d 296 (D.C. Cir. 2004). Accordingly, the Administrator's duty to act on the above-referenced SIP submissions as required by 42 U.S.C. § 7410(k)(2) & (3) remains unfulfilled. The deadlines prescribed by 42 U.S.C. § 7410(k)(2) for the Administrator to act on the submissions have expired, but the Administrator has failed to act on any of those submissions as required by 42 U.S.C. § 7410(k)(2) & (3).

32. The Administrator's failure to act as described above constitutes failure of the Administrator to perform acts or duties under this chapter which are not discretionary with the Administrator, within the meaning of the Act's citizen suit provision, 42 U.S.C. § 7604(a)(2). Plaintiff is informed and believes that such failure to act will continue unless enjoined by order of this Court.

RELIEF REQUESTED

33. WHEREFORE, plaintiff prays that this Court:

(1) Declare that the Administrator is in violation of his nondiscretionary duties under 42 U.S.C. § 7410(k) for the reasons set forth above;

(2) Preliminarily and permanently enjoin the Administrator from continuing to violate the above-described nondiscretionary duties;

(3) Order the Administrator to complete all the actions required by 42 U.S.C. § 7410(k) forthwith;

(4) Award plaintiff its reasonable costs of litigation, including its attorney's and expert witness fees;

(5) Retain jurisdiction over this action to ensure compliance with the Court's orders; and

(6) Grant such other relief as the Court deems just and proper.

DATED: December 15, 2004.

Respectfully submitted,

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