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Attorneys for Plaintiff Sierra Club

## IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

SIERRA CLUB 85 Second Street, Second Floor San Francisco, CA 94105-3441

Plaintiff,

v.

REGINA MCCARTHY Administrator, United States Environmental Protection Agency

Defendant.

Case No. 14-3541

# COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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

## INTRODUCTION

1. This is an action to compel the Administrator of the United States Environmental

Protection Agency ("Administrator" or "EPA") to perform a nondiscretionary duty mandated by

the Clean Air Act ("CAA" or "the Act"). Effective April 2012, EPA disapproved (in part)

revisions to the State of Arkansas's state implementation plan ("SIP") for regional haze and interstate transport. The Act requires that EPA promulgate a federal implementation plan ("FIP") or approve a revised SIP within two years of partially or wholly disapproving a SIP. Arkansas has not corrected the deficient plan, the statutorily mandated two-year period has elapsed, and EPA has failed to act. Plaintiff Sierra Club seeks to compel EPA to promulgate this overdue FIP for Arkansas. EPA's failure to perform this duty deprives Plaintiff's members of health and welfare as protected under the Act.

#### JURISDICTION

2. This action arises under the Clean Air Act, 42 U.S.C. § 7401 *et seq*. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 7604 (CAA citizen suits), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1361 (mandamus action). The relief requested herein by Plaintiff is authorized pursuant to 42 U.S.C. § 7604 and 28 U.S.C. §§ 2201 (declaratory judgment), 2202, and 1361.

3. Sierra Club served notice on the Administrator of the violation alleged herein and its intent to initiate the present action. *See* 42 U.S.C. § 7604(b) (notice requirements for CAA citizen suits) and 40 C.F.R. Part 54 (same). This notice was provided via certified letter, posted April 21, 2014, and addressed to the Administrator. More than 60 days have passed since the notice was served and the violations complained of in the notice are continuing. *See* 42 U.S.C. § 7604(b)(2).

## VENUE AND INTRADISTRICT ASSIGNMENT

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (general venue statute) that governs venue for "all civil actions brought in district courts of the United States" unless otherwise provided by statute.

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5. Defendant Regina McCarthy is an officer of the United States being sued in her capacity as the Administrator of the EPA. There is no real property involved in this action.
Under 28 U.S.C. § 1391(e), this District is an appropriate venue as Plaintiff Sierra Club is incorporated and headquartered in San Francisco, California.

6.

Under Local Rule 3, venue is proper in the San Francisco Division of this Court.

#### PARTIES

7. Plaintiff Sierra Club is a not-for-profit corporation organized and existing under the laws of California, with its principal place of business located in San Francisco, California. Sierra Club has more than 626,000 members throughout the United States, including approximately 2,500 in Arkansas. Sierra Club's mission is to protect and enhance the quality of the natural and human environment. Its activities include public education, advocacy, and litigation to enforce environmental laws. Sierra Club and its members are greatly concerned about the diminished visibility caused by air pollution in areas with good air quality, and have a long history of involvement in activities related to air quality. For many years, Sierra Club has advocated for effective and timely implementation of Clean Air Act requirements in Arkansas, including by submitting public comments on proposed state and EPA actions relevant to implementation of clean air standards and regional haze rules in Arkansas. Sierra Club brings this action on behalf of itself and its members.

8. The Act requires regional haze plans to remedy and protect against human-caused visibility impairment in specified national parks, wilderness areas, wildlife refuges, and other areas (referred to as "Class I" federal areas and described further below). Sierra Club's members use such areas in Arkansas for recreation and aesthetic enjoyment, including enjoyment of scenic vistas. Such areas in Arkansas suffer from visibility impairment due to human-caused air pollution. Sierra Club's members' use and enjoyment of these areas in Arkansas is adversely 3

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affected by the visibility impairment that the Act requires regional haze plans to remedy and 2 protect against.

9. EPA's failure to promulgate the overdue federal haze plan for Arkansas causes injury to Sierra Club and its members by prolonging existing, and allowing future, visibility impairment. The recreational, aesthetic, and environmental interests of Sierra Club's members have been and continue to be adversely affected by EPA's failure to promulgate the required plan.

10. Defendant Regina McCarthy is the Administrator of the United States Environmental Protection Agency and is charged with implementing and enforcing the Clean Air Act. The Administrator's Clean Air Act responsibilities include promulgating a federal plan within two years of disapproving a state plan. See 42 U.S.C. § 7410(c)(1). Defendant is sued in her official capacity.

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## FACTS AND REGULATORY BACKGROUND

11. Haze is caused by air pollution that absorbs light and reduces visibility. Air pollution that causes haze comes from a variety of sources such as power plants and factories. In addition to inhibiting the visual enjoyment of the natural environment, haze exposure causes respiratory health problems.

12. In 1977, Congress declared as a national goal "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491. Mandatory Class I federal areas include 156 national parks and wilderness areas for which the Secretary of the Interior has determined visibility is an important value. In Arkansas, Upper Buffalo and Caney Creek Wilderness Areas have been designated as Class I areas.

13. Congress directed EPA to promulgate regulations requiring states to make progress toward attaining the national visibility goal, including requiring amended SIPs with Δ

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emissions limits on certain sources of air pollutants that cause or contribute to visibility impairments in Class I areas. 42 U.S.C. § 7491(b). The Act requires that some of these sources implement Best Available Retrofit Technology ("BART") to control visibility impacts.

14. Further, the "interstate transport" provision of the Act, also known as the "good neighbor" provision, requires that states control their in-state emissions that may result in visibility impairment in neighboring states' Class I areas. 42 U.S.C. § 7410(a)(2)(D)(i)(II).

15. The Act provides that if EPA disapproves a state's proposed implementation plan in whole or in part, it has a mandatory duty to promulgate a FIP within two years of its disapproval decision unless the state corrects the proposed SIP to EPA's satisfaction before the promulgation of the FIP. 42 U.S.C. § 7410(c)(1).

16. Between 2008 and 2011, Arkansas submitted SIP revisions intended to address the Act's regional haze requirements and interstate transport requirements for visibility. *See* 77 Fed. Reg. 14,603, 14,604 (Mar. 12, 2012) (describing history of Arkansas haze submissions).

17. On March 12, 2012, EPA issued a final rule approving in part and disapproving in part Arkansas's regional haze and interstate transport SIP revisions. 77 Fed. Reg. 14,603 (Mar. 12, 2012). EPA disapproved parts of Arkansas's proposed regional haze SIP because it found, among other reasons, that Arkansas "did not satisfy all the regulatory and statutory requirements in making BART determinations" for certain sources. *Id.* at 14,605. EPA also disapproved parts of Arkansas's proposed interstate transport SIP due to the same inadequate BART determinations, finding that "Arkansas's emissions will interfere with other states' SIPs to protect visibility." *Id.* at 14,607.

18. EPA's disapproval decision took effect on April 11, 2012. The Act therefore required EPA to issue a FIP by April 11, 2014 in the absence of a revised plan from the state. *See* 77 Fed. Reg. at 14,604, 14,606; 42 U.S.C. § 7410(c)(1).

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19. EPA has failed to issue a FIP by the two-year deadline. Nor has EPA approved a revised plan submitted by Arkansas that corrects the deficiencies EPA identified. In fact,
Arkansas has not submitted a revised regional haze plan since EPA's disapproval decision.

## **CLAIM FOR RELIEF** Failure to promulgate Federal Implementation Plan

20. Plaintiff hereby incorporates all previous paragraphs by reference.

21. Under the Clean Air Act, any person may commence a civil action against the EPA Administrator "where there is alleged a failure of the Administrator to perform any act or duty under [the Clean Air Act] which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

22. EPA's partial disapproval of Arkansas's regional haze and interstate transport SIPs took effect on April 11, 2012. *See* 77 Fed. Reg. at 12,604, 14,606 (Mar. 12, 2012).

23. Under 42 U.S.C. § 7410(c)(1), EPA is required to issue a FIP within two years of disapproving a SIP in whole or in part. The two-year period ended on April 11, 2014.

24. Because EPA has failed to timely promulgate an Arkansas FIP to address regional haze and interstate transport, it has failed to meet its mandatory duty to establish a FIP within two years of disapproving a SIP.

25. EPA's failure to promulgate a FIP constitutes a failure to perform acts or duties that are not discretionary with the Administrator within the meaning of 42 U.S.C. § 7604(a)(2). Such failure is ongoing and, on information and belief, will continue absent the relief sought herein.

26. Accordingly, Plaintiff is entitled to an order from this Court directing EPA to promulgate a FIP for regional haze in Arkansas by a date certain.

27. THEREFORE, Plaintiff asks that this Court:

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1	(1) Declare that EPA's failure to promulgate a regional haze and interstate					
2	transport Federal Implementation Plan for Arkansas as complained of herein constitutes a					
3	failure to perform a nondiscretionary duty;					
4	(2) Order the Administrator to issue a regional haze and interstate transport					
5	Federal Implementation Plan for Arkansas by a date certain;					
6	(3) Award Plaintiff its reasonable costs of litigation, including attorneys' fees,					
7						
8	under 42 U.S.C. § 7604(d);					
9	(4) Retain jurisdiction over this action to ensure compliance with the Court's					
10	orders; and					
11 12	(5) Grant such other relief as the Court deems just and proper.					
12	DATED: this 6th day of August, 2014.					
13	Respectfully submitted,					
15	/s/ Casey A. Roberts					
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21	Filed) SIERRA CLUB					
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24	tony.mendoza@sierraclub.org Attorneys for Plaintiff Sierra Club					
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	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – Case No. 14-3541					

# JS 44 (Rev. 12/12) cand rev (1/15/13) Case 3:14-cv-03541-JD Document Cover Sheet Page 1 of 1

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

I. (a) PLAINTIFFS	· · · · · · · · · · · · · · · · · · ·		DEFENDANTS         County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)         NOTE:       IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.		
( <b>b</b> ) County of Residence of (E.	f First Listed Plaintiff XCEPT IN U.S. PLAINTIFF CA	ISES)			
(c) Attorneys (Firm Name, A	Address, and Telephone Numbe	r)	Attorneys (If Known)		
II. BASIS OF JURISDI	CTION (Place an "X" in O	tne Box Only)		RINCIPAL PARTIES	(Place an "X" in One Box for Plaintif
1 U.S. Government Plaintiff	*			<b>IF DEF</b> 1 □ 1 Incorporated <i>or</i> Pr of Business In T	
2 U.S. Government Defendant	☐ 4 Diversity (Indicate Citizensh)	ip of Parties in Item III)		<ul> <li>2 □ 2 Incorporated and I of Business In A</li> <li>3 □ 3 Foreign Nation</li> </ul>	
W NATURE OF SUIT			Foreign Country	C	
IV. NATURE OF SUIT		aly) DRTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<ul> <li>110 Insurance</li> <li>120 Marine</li> <li>130 Miller Act</li> <li>140 Negotiable Instrument</li> <li>150 Recovery of Overpayment &amp; Enforcement of Judgment</li> <li>151 Medicare Act</li> <li>152 Recovery of Defaulted Student Loans</li> </ul>	PERSONAL INJURY       310 Airplane       365 Personal Injury -         315 Airplane Product       365 Personal Injury -       Product Liability         320 Assault, Libel &       367 Health Care/         320 Assault, Libel &       Personal Injury         330 Federal Employers'       Product Liability         340 Marine       10 Afrong         345 Marine Product       10 Afrong         355 Motor Vehicle       370 Other Fraud         355 Motor Vehicle       371 Truth in Lending         Product Liability       380 Other Personal         1360 Other Personal       Property Damage         1362 Personal Injury -       Medical Malpractice	Pharmaceutical Personal Injury Product Liability 368 Asbestos Personal	<ul> <li>625 Drug Related Seizure of Property 21 USC 881</li> <li>690 Other</li> </ul>	<ul> <li>422 Appeal 28 USC 158</li> <li>423 Withdrawal 28 USC 157</li> <li>PROPERTY RIGHTS</li> <li>820 Copyrights</li> <li>830 Patent</li> <li>840 Trademark</li> </ul>	<ul> <li>375 False Claims Act</li> <li>400 State Reapportionment</li> <li>410 Antitrust</li> <li>430 Banks and Banking</li> <li>450 Commerce</li> <li>460 Deportation</li> <li>470 Racketeer Influenced and Corrupt Organizations</li> <li>480 Consumer Credit</li> </ul>
<ul> <li>(Excludes Veterans)</li> <li>153 Recovery of Overpayment of Veteran's Benefits</li> <li>160 Stockholders' Suits</li> <li>190 Other Contract</li> <li>195 Contract Product Liability</li> <li>196 Franchise</li> </ul>		Liability <b>PERSONAL PROPERTY</b> 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability	Act 720 Labor/Management Relations 740 Railway Labor Act 751 Family and Medical Leave Act 790 Other Labor Litigation	□       861 HIA (1395ff)       □       85         □       862 Black Lung (923)       □       86         □       863 DIWC/DIWW (405(g))       □       88         □       864 SSID Title XVI       □       88         □       865 RSI (405(g))       □       88         □       865 RSI (405(g))       □       88	<ul> <li>490 Cable/Sat TV</li> <li>850 Securities/Commodities/ Exchange</li> <li>890 Other Statutory Actions</li> <li>891 Agricultural Acts</li> <li>893 Environmental Matters</li> <li>895 Freedom of Information Act</li> <li>896 Arbitration</li> </ul>
REAL PROPERTY         210 Land Condemnation         220 Foreclosure         230 Rent Lease & Ejectment         240 Torts to Land         245 Tort Product Liability         290 All Other Real Property	CIVIL RIGHTS  440 Other Civil Rights  441 Voting  442 Employment  443 Housing/ Accommodations  445 Amer. w/Disabilities - Employment  446 Amer. w/Disabilities - Other  448 Education	PRISONER PETITIONS         Habeas Corpus:         ↓ 463 Alien Detainee         □ 510 Motions to Vacate         Sentence         □ 530 General         □ 535 Death Penalty         Other:         □ 550 Civil Rights         □ 550 Civil Rights         □ 550 Civil Detainee - Conditions of Confinement	<ul> <li>791 Employee Retirement Income Security Act</li> <li>IMMIGRATION</li> <li>462 Naturalization Application</li> <li>465 Other Immigration Actions</li> </ul>	<ul> <li>FEDERAL TAX SUITS</li> <li>□ 870 Taxes (U.S. Plaintiff or Defendant)</li> <li>□ 871 IRS—Third Party 26 USC 7609</li> </ul>	<ul> <li>\$99 Administrative Procedure Act/Review or Appeal of Agency Decision</li> <li>950 Constitutionality of State Statutes</li> </ul>
V. ORIGIN (Place an "X" is	n One Box Only)				
	te Court	Appellate Court	(specify	er District Litigation	
VI. CAUSE OF ACTION		-	ñling (Do not cite jurisdictional stat	tutes unless diversity):	
VII. REQUESTED IN COMPLAINT:	CHECK IF THIS UNDER RULE 2	IS A <b>CLASS ACTION</b> 3, F.R.Cv.P.	DEMAND \$	CHECK YES only JURY DEMAND:	if demanded in complaint:
VIII. RELATED CASI IF ANY	E(S) (See instructions):	JUDGE		DOCKET NUMBER	
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