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10 *Alaska Community Action on Toxics, and Sierra Club*

11 UNITED STATES DISTRICT COURT
12 FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

13 CITIZENS FOR CLEAN AIR, a project of)
ALASKA COMMUNITY ACTION ON TOXICS,)
14 and SIERRA CLUB ,)

15 Plaintiffs,)

16 v.)

17 GINA MCCARTHY, in her official capacity as)
Administrator of the United States Environmental)
18 Protection Agency, and DENNIS MCLERRAN, in)
his official capacity as Regional Administrator of)
19 the United States Environmental Protection Agency)
Region 10,)

20 Defendants.)
21 _____)

Case No.

) COMPLAINT FOR
) DECLARATORY AND
) INJUNCTIVE RELIEF

22
23
24
25 COMPLAINT
(Case No.)

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INTRODUCTION

1
2 1. This action is brought under the federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*,
3 to compel the U.S. Environmental Protection Agency (EPA) to take the statutorily required
4 action of making a finding under 42 U.S.C. § 7410(k)(1)(B), and publishing notice of that
5 finding in the *Federal Register*, that the State of Alaska failed to submit—prior to the statutory
6 deadline—a nonattainment state implementation plan to combat persistent violations of air
7 quality standards for fine particulate matter (PM-2.5) in the Fairbanks North Star Borough,
8 Alaska.

9 2. The Fairbanks North Star Borough has some of the worst PM-2.5 pollution in the
10 nation, with ambient air concentrations frequently in excess of the 24-hour National Ambient Air
11 Quality Standards for PM-2.5. PM-2.5 pollution causes a range of significant, adverse health
12 effects.

13 3. Under the Clean Air Act, the State of Alaska was required to develop and submit
14 to EPA a state implementation plan to improve air quality in the Fairbanks North Star Borough
15 no later than December 14, 2012. The State of Alaska has not submitted a plan. The Clean Air
16 Act also imposed upon EPA a non-discretionary duty to issue a finding, no later than June 14,
17 2013, that the State of Alaska failed to submit a PM-2.5 nonattainment state implementation
18 plan. This finding is an important milestone under the Act: to incentivize submission of a plan,
19 it triggers a subsequent, two-year deadline for penalties and imposition of a federally-developed
20 plan if inaction by the State of Alaska persists.

21 4. This action seeks to compel Defendant GINA MCCARTHY, in her official
22 capacity as EPA Administrator, and Defendant DENNIS MCLARREN, in his official capacity as
23 Regional Administrator of EPA Region 10, to perform their mandatory duties to ensure that the
24

1 residents of the Fairbanks North Star Borough are provided the health protections promised by
2 law.

3 **JURISDICTION**

4 5. This Court has jurisdiction over this action to compel the performance of EPA’s
5 non-discretionary duties pursuant to 42 U.S.C. §7604(a) (citizen suit provision of the Clean Air
6 Act) and 28 U.S.C. § 1331 (federal question jurisdiction). The Court also has authority to order
7 declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

8 **NOTICE**

9 6. Plaintiffs provided EPA with written notice of the claim stated in this action at
10 least sixty days before commencing this action as required by 42 U.S.C. § 7604(b)(2). *See*
11 Exhibit A (Letter from Colin C. O’Brien, counsel for Plaintiffs, to Gina McCarthy,
12 Administrator of EPA, dated Feb. 4, 2014).

13 **VENUE**

14 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Defendant EPA
15 resides in this judicial district. EPA Region 10, which has authority over Alaska and is charged
16 with reviewing state implementation plans for Alaska, is headquartered in Seattle. This civil
17 action is brought against officers of the United States acting in their official capacities and a
18 substantial part of the events or omissions giving rise to the claims in this case occurred in the
19 Western District of Washington. Further, because EPA Region 10 is located within King
20 County, assignment to the Seattle Division is proper under Civil Local Rule 3(d)(1).

21 **PARTIES**

22 8. Plaintiff CITIZENS FOR CLEAN AIR, a project of ALASKA COMMUNITY
23 ACTION ON TOXICS, is a coalition of local community members and citizens’ groups based in
24 Fairbanks, Alaska who are committed to cleaning up the air while keeping everyone warm in the

1 winter. Alaska Community Action on Toxics is a non-profit environmental health research and
2 advocacy organization whose mission is to assure justice by advocating for environmental and
3 community health.

4 9. Plaintiff SIERRA CLUB is a national conservation organization of approximately
5 650,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to
6 practicing and promoting the responsible use of the earth’s ecosystems and resources; to
7 educating and enlisting humanity to protect and restore the quality of the natural and human
8 environment; and to using all lawful means to carry out these objectives. For over three decades,
9 the Sierra Club has worked to enact, strengthen, and enforce the Clean Air Act and its
10 regulations to reduce air pollution in the United States—including efforts to improve air quality
11 in the Fairbanks North Star Borough. The Alaska Chapter of the Sierra Club has approximately
12 1,400 members.

13 10. Plaintiffs’ members live, raise their families, work, recreate, and conduct
14 educational, advocacy, and other activities in the Fairbanks North Star Borough. They are
15 adversely affected by exposure to levels of PM-2.5 pollution that exceed the national, health-
16 based standards for 24-hour concentrations of PM-2.5 established under the Clean Air Act. The
17 adverse effects of such pollution include actual or threatened harm to their health, their families’
18 health, their professional, educational, and economic interests, and their aesthetic and
19 recreational enjoyment of the environment in the Fairbanks North Star Borough.

20 11. The Clean Air Act violation alleged in this Complaint has injured and continues
21 to injure the interests of Plaintiffs and their members. The relief requested in this lawsuit would
22 redress these injuries by compelling EPA to take the action mandated by Congress in the Clean
23

1 Air Act’s requirements for improving air quality in areas violating national air quality standards,
2 such as the Fairbanks North Star Borough.

3 12. Defendant GINA MCCARTHY is sued in her official capacity as the
4 Administrator of the EPA. She is responsible for taking various actions to implement and
5 enforce the Clean Air Act, including the mandatory duties at issue in this case.

6 13. Defendant DENNIS MCLERRAN is sued in his official capacity as EPA
7 Regional Administrator for Region 10. He is responsible for implementing and enforcing the
8 Clean Air Act in EPA Region 10, which includes the Fairbanks North Star Borough, Alaska.

9 **STATUTORY FRAMEWORK**

10 14. Congress enacted the Clean Air Act to “speed up, expand, and intensify the war
11 against air pollution in the United States with a view to assuring that the air we breathe
12 throughout the Nation is wholesome once again.” H.R. Rep. No. 91-1146, at 1 (1970), *reprinted*
13 *in U.S.C.C.A.N.* 5356, 5356. Consistent with these goals, the Act requires EPA to set National
14 Ambient Air Quality Standards for certain pollutants, “the attainment and maintenance of which
15 . . . are requisite to protect the public health” with “an adequate margin of safety.” 42 U.S.C.
16 §§ 7409(a), (b).

17 15. The Clean Air Act directs EPA to designate areas with air pollution levels that
18 exceed a national standard as “nonattainment” areas. 42 U.S.C. § 7407(d)(1).

19 16. The Clean Air Act provides that each state with a nonattainment area must adopt a
20 “state implementation plan” for improving air quality in that area in order to meet the National
21 Ambient Air Quality Standards. 42 U.S.C. §§ 7407(a), 7410(a), 7502(b), and 7513a.

22 17. Under the Clean Air Act, states must submit such plans to EPA for review. 42
23 U.S.C. §§ 7410(a)(1) and 7502(b). The Act prescribes deadlines for plan submission. Generally,

1 nonattainment state implementation plans are due no later than three years after a nonattainment
2 designation. *See id.* §§ 7501–7509a (Subpart 1 of Part D of Title I of the Act, “Nonattainment
3 Areas in General”); § 7502(b) (general deadline). For areas designated as nonattainment for
4 particulate matter pollution, the Act establishes a more stringent plan submission deadline of 18
5 months. *See id.* §§ 7513–7513b (Subpart 4 of Part D of Title I of the Act, “Additional Provisions
6 for Particulate Matter Nonattainment Areas”); 7513a(a)(2)(B) (particulate matter deadline).

7 18. The Clean Air Act requires EPA to determine whether any state implementation
8 plan is administratively complete. 42 U.S.C. § 7410(k)(1)(B). EPA must make this
9 determination “no later than 6 months after the date, if any, by which a State is required to
10 submit the plan or revision.” *Id.*

11 19. If a state completely fails to submit a required state implementation plan by the
12 deadline, then there is no submittal that may be deemed administratively complete, and EPA
13 therefore must make a determination—and publish notice of that determination in the *Federal*
14 *Register*—stating that the state failed to submit an administratively complete state
15 implementation plan. 42 U.S.C. § 7410(k)(1)(B). Such a determination is referred to as a
16 “finding of failure to submit.”

17 20. Upon issuing a finding of failure to submit, the Clean Air Act establishes a two-
18 year deadline for EPA either to approve a state implementation plan (subsequently submitted by
19 state authorities to address the deficiency) or to promulgate a federal implementation plan. 42
20 U.S.C. § 7410(c)(1). When a state implementation plan is required to address nonattainment of
21 an air quality standard, a finding of failure to submit also starts the clock on mandatory sanctions
22 intended to induce states to develop and submit their plan. More specifically, eighteen (18)
23 months after the finding, all proposed new pollution sources within the nonattainment area

1 become subject to a heightened permitting requirement. *Id.* § 7509(a), (b)(2); 40 C.F.R.
2 § 52.31(c), (d). Twenty-four (24) months after the finding, a moratorium on federal highway
3 funds also is imposed, with an exemption for safety and mass transit projects. 42 U.S.C. §
4 7509(b)(1); 40 C.F.R. § 52.31(d).

5 21. If EPA fails to take a non-discretionary action, such as acting on a state
6 implementation plan submittal or failing to issue a “finding of failure to submit,” citizens are
7 empowered to seek a court order to compel prompt action. 42 U.S.C. § 7604(a)(2).

8 22. Implementing the foregoing statutory provisions, EPA established attainment and
9 nonattainment designations for the 2006 24-hour PM-2.5 National Ambient Air Quality
10 Standards on November 13, 2009. 74 Fed. Reg. 58,688 (Nov. 13, 2009). At the time, EPA
11 declared that, “[f]or those areas designated nonattainment, states must develop a State
12 Implementation Plan . . . and [] must submit these plans no later than three years from the
13 effective date” of the agency’s designations to provide for attainment of the standard. *Id.* at
14 58,689 (citing Clean Air Act section 172(b), 42 U.S.C. § 7502(b)).

15 23. Subsequently, the United States Court of Appeals for the District of Columbia
16 determined that EPA incorrectly promulgated regulations to implement the various PM-2.5
17 standards pursuant to the more lenient implementation provisions of Subpart 1 of Part D of Title
18 I of the Clean Air Act, 42 U.S.C. §§ 7501–7509a, without also addressing the particulate-matter-
19 specific provisions of Subpart 4 of Part D of Title I of the Act, *id.* §§ 7513–7513b. *See Natural*
20 *Res. Def. Council v. EPA*, 706 F.3d 428, 429, 434-36 (D.C. Cir. 2013).

21 24. Under Subpart 4, nonattainment state implementation plans for particulate matter,
22 including the 2006 24-hour PM-2.5 National Ambient Air Quality Standards, are due no later
23 than “18 months after the designation as nonattainment.” 42 U.S.C. § 7513a(a)(2)(B).

STATEMENT OF FACTS

25. This case involves EPA’s failure to timely implement the National Ambient Air Quality Standards for 24-hour concentrations of PM-2.5. PM-2.5 includes hazardous forms of dirt, soot, smoke, and liquid droplets found in the air.

PM-2.5 is “produced chiefly by combustion processes and by atmospheric reactions of various gaseous pollutants,” thus “[s]ources of fine particles include . . . motor vehicles, power generation, combustion sources at industrial facilities, and residential fuel burning.” 71 Fed. Reg. 61,144, 61,146 (Oct. 17, 2006).

The effects of PM-2.5 on human health are significant. For example, exposure has been associated “with an array of health effects, notably premature mortality, increased respiratory symptoms and illnesses (e.g. bronchitis and cough in children), and reduced lung function.” 62 Fed. Reg. 38,652, 38,668 (July 18, 1997). It is therefore vital that EPA timely implement Clean Air Act requirements for PM-2.5 to protect public health and welfare against PM-2.5.

EPA first adopted 24-hour National Ambient Air Quality Standards for PM-2.5 in 1997. 62 Fed. Reg. 38,652 (July 18, 1997). In 2006, EPA strengthened these standards, revising the maximum allowed 24-hour average concentration of PM-2.5 from 65 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) to 35 $\mu\text{g}/\text{m}^3$. 71 Fed. Reg. 61,144 (Oct. 17, 2006) (codified at 40 C.F.R. § 50.13).

EPA made attainment and nonattainment designations for the 2006 24-hour PM-2.5 National Ambient Air Quality Standards on November 13, 2009. 74 Fed. Reg. 58,688 (Nov. 13, 2009). In that rulemaking, effective on December 14, 2009, EPA designated the Fairbanks North Star Borough as a nonattainment area. *Id.* at 58,696, 58,702. Because December 14, 2009 was the effective date for EPA’s designations, a nonattainment state implementation plan for the

1 Fairbanks North Star Borough was due no later than December 14, 2012. 42 U.S.C. §§ 7502(b);
2 7513a(a)(2)(B).

3 30. To date, the State of Alaska has failed to submit to EPA a state implementation
4 plan to address unhealthy 24-hour levels of PM-2.5 pollution in the Fairbanks North Star
5 Borough.

6 31. EPA was required to issue, with respect to the Fairbanks North Star Borough, a
7 finding of failure to submit a state implementation plan for the 2006 24-hour PM-2.5 National
8 Ambient Air Quality Standard no later than six months after the plan submission deadline—i.e.,
9 no later than June 14, 2013. 42 U.S.C. § 7410(k)(1)(B).

10 32. To date, EPA has failed to make a finding of failure to submit for the State of
11 Alaska’s obligation to submit a nonattainment state implementation plan for the Fairbanks North
12 Star Borough addressing the 24-hour PM-2.5 National Ambient Air Quality Standard.

13 **CLAIM FOR RELIEF**
14 **(Failure to make a finding of failure to submit)**

15 33. Plaintiffs reallege each and every allegation set forth above, as if fully set forth
16 herein.

17 34. The deadline for 2006 24-hour PM-2.5 National Ambient Air Quality Standard
18 nonattainment state implementation plan submissions was no later than December 14, 2012.

19 35. The State of Alaska has not submitted a nonattainment state implementation plan
20 to address violations of the 2006 24-hour PM-2.5 National Ambient Air Quality Standards in the
21 Fairbanks North Star Borough.

22 36. Pursuant to 42 U.S.C. § 7410(k)(1)(B), EPA had a mandatory duty to make a
23 finding of failure to submit within six months of the submission deadline and no later than June
24 14, 2013.

1 37. EPA has failed to perform this mandatory duty.

2 38. Accordingly, EPA has been in continuous violation of the Clean Air Act, 42
3 U.S.C. § 7410(k)(1)(B), since June 15, 2013, or earlier.

4 39. This Clean Air Act violation constitute a “failure of the Administrator to perform
5 any act or duty under this chapter which is not discretionary with the Administrator,” within the
6 meaning of the Clean Air Act’s citizen suit provision. 42 U.S.C. § 7604(a)(2). This violation is
7 ongoing.

8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiffs respectfully request that the Court:

10 1. Declare that the Administrator is in violation of the Clean Air Act with regard to
11 her mandatory, nondiscretionary duty under 42 U.S.C. § 7410(k)(1)(B) to make a finding that the
12 State of Alaska has failed to submit a nonattainment state implementation plan addressing 24-
13 hour concentrations of PM-2.5 in the Fairbanks North Star Borough;

14 2. Issue an injunction requiring the Administrator to make and publish in the
15 *Federal Register* a finding of failure to submit, as required by law;

16 3. Retain jurisdiction of this matter until such time as EPA has complied with its
17 non-discretionary duties under the Clean Air Act;

18 4. Award to Plaintiffs their reasonable costs of litigation, including attorneys’ fees
19 and expert witness fees; and

20 5. Grant such further relief as the Court deems just and proper.

1 Respectfully submitted this 24th day of April, 2014.

2 s/ Janette K. Brimmer

3 Janette K. Brimmer (WSB #41271)

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