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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

MEDICAL ADVOCATES FOR HEALTHY AIR
and SIERRA CLUB,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; LISA P. JACKSON, in
her official capacity as Administrator of the United
States Environmental Protection Agency, and
JARED BLUMENFELD, in his official capacity as
Regional Administrator for Region IX of the United
States Environmental Protection Agency,

Defendants.

Case No:

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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

INTRODUCTION

1. People who live in the San Joaquin Valley (“Valley”) are exposed to some of the most dangerous air pollution in the country, including ground-level ozone (“ozone”), or smog. As a result, Valley residents suffer high levels of chronic asthma, bronchitis, and other respiratory illnesses and disease. Children, as well as the elderly, are among the most vulnerable to ozone pollution. An estimated one in six children in the Valley has been diagnosed with asthma at some time during his or her lifetime.

COMPLAINT

2. The federal Clean Air Act adopts mandatory deadlines for cleaning up ozone pollution that vary depending on the severity of an area’s pollution problem. In the 1990 Clean Air Act Amendments, Congress gave the most polluted areas—designated “extreme” nonattainment—20 years (until November 15, 2010) to attain the federal standard limiting the maximum 1-hour concentration of ozone (“1-hour standard”). Not later than six months after this attainment deadline (*i.e.*, by May 15, 2011) the U.S. Environmental Protection Agency (“EPA”) must determine whether the extreme ozone nonattainment area has met or failed to meet the 1-hour standard. A determination that an area has failed to attain the standard triggers mandatory obligations designed to bring the area into attainment as expeditiously as practicable.

3. The Valley is an “extreme” nonattainment area for the 1-hour ozone standard. The statutory deadline for EPA to make a determination whether or not the Valley has attained the 1-hour ozone standard has now passed, and EPA has not made the required finding of whether the Valley has attained the standard. EPA therefore is in violation of its mandatory legal obligation under the Clean Air Act.

4. Plaintiffs Medical Advocates for Healthy Air and Sierra Club (collectively, “Medical Advocates”) bring this action under the federal Clean Air Act (“CAA”), 42 U.S.C. §§ 7401, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1), to compel EPA to comply with its statutorily required, non-discretionary duty to determine if the Valley has failed to attain the 1-hour ozone standard.

5. Unless and until EPA makes the required finding for the Valley mandated by law, Valley residents and their children will continue to suffer from the adverse effects of extreme ozone pollution that has plagued this region for decades.

JURISDICTION

6. This Court has jurisdiction over this action to compel the performance of non-discretionary duties by EPA pursuant to 42 U.S.C. § 7604(a) (citizen suit provision of the federal Clean Air Act) and 28 U.S.C. § 1331 (federal question jurisdiction).

7. This Court also has jurisdiction over this action to compel the performance of agency action “unlawfully withheld or unreasonably delayed” pursuant to 5 U.S.C. § 706(1) (Administrative Procedure Act), and 28 U.S.C. § 1331.

8. The declaratory and injunctive relief Medical Advocates request is authorized by 28 U.S.C. §§ 2201(a) and 2202, and 42 U.S.C. § 7604.

9. Medical Advocates have exhausted all administrative remedies and have no adequate remedy at law. Specifically, Medical Advocates provided EPA with written notice of the claims stated in this action at least sixty days before commencing this action as required by 42 U.S.C. § 7604(b)(2). *See* Exhibit A (Letter from Paul Cort, counsel for Plaintiffs, to Lisa P. Jackson, Administrator of EPA, dated May 16, 2011).

VENUE

10. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e). First, venue in this district is proper under 28 U.S.C. § 1391(e)(1), because Defendant Jared Blumenfeld, EPA Regional Administrator for Region IX, is located in San Francisco County. Second, venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(e)(2), because EPA’s alleged inactions relate to the duties of the Regional Administrator in San Francisco, and thus, a “substantial part of the events or omissions giving rise to the claim occurred” in this district. Finally, venue in this judicial district is proper under 28 U.S.C. § 1391(e)(3), because Plaintiff Sierra Club resides in San Francisco and no real property is involved in the action.

11. Similarly, because the omissions alleged in this Complaint relate to the duties of the Regional Administrator, assignment to the San Francisco Division or the Oakland Division of this Court is proper under Civil Local Rule 3-2(c) and (d).

PARTIES

12. Plaintiff MEDICAL ADVOCATES FOR HEALTHY AIR is a California non-profit organization based in Fresno. The organization consists of medical professionals living in the Valley who regularly treat patients suffering from respiratory ailments that are caused or greatly exacerbated by the Valley's unhealthy levels of air pollution. The organization's mission includes

1 advocating for the expeditious attainment of state and national health-based air quality standards in
2 the Valley through public education, litigation, and other means.

3 13. Plaintiff SIERRA CLUB is a national conservation organization incorporated under
4 the laws of California and headquartered in San Francisco. The Sierra Club has over 625,000
5 members nationwide, including more than 19,000 members in its Mother Lode, Tehipite, and Kern-
6 Kaweah Chapters covering the Modesto, Fresno, and Bakersfield areas. The Sierra Club's mission
7 includes the protection and restoration of the natural and human environment. Its activities include
8 public education, advocacy, and litigation to enforce environmental laws. For over three decades,
9 the Sierra Club has worked to enact, strengthen, and enforce the Clean Air Act and its regulations to
10 reduce air pollution in the United States, California, and the Valley.

11 14. Plaintiffs' members live, raise their families, work (including treating patients
12 suffering adverse health effects from air pollution), recreate, and conduct educational, research,
13 advocacy and other activities in the Valley. They are adversely affected by exposure to levels of air
14 pollution that exceed the national health-based ozone standards established under the Clean Air Act.
15 The adverse effects of such pollution include actual or threatened harm to their health, their families'
16 health, their patients' health, their professional, educational, and economic interests, and their
17 aesthetic and recreational enjoyment of the environment in the Valley and the bordering Sierra
18 Nevada Mountains.

19 15. The Clean Air Act and other legal violations alleged in this Complaint have injured
20 and continue to injure the interests of Medical Advocates and their members. Granting the relief
21 requested in this lawsuit would redress these injuries by compelling EPA to take actions mandated
22 by Congress in the Clean Air Act's statutory scheme for improving air quality in areas violating
23 national air quality standards, such as the Valley.

24 16. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY is an agency of the
25 federal government responsible for implementing the Clean Air Act, including the requirements
26 alleged in this Complaint to have been violated.

17. Defendant LISA P. JACKSON is sued in her official capacity as the Administrator of the EPA. She is responsible for taking various actions to implement and enforce the Clean Air Act, including the actions sought in this Complaint.

18. Defendant JARED BLUMENFELD is sued in his official capacity as EPA Regional Administrator for Region IX. He is responsible for implementing and enforcing the Clean Air Act in EPA Region IX, which includes the Valley.

STATUTORY FRAMEWORK

19. The Clean Air Act is a model of cooperative federalism wherein states and EPA share responsibility for ensuring that people breathe clean air. In general, EPA must prescribe health-based national ambient air quality standards (“NAAQS” or “standard”) for pollutants, including ozone. 42 U.S.C. §§ 7409(a), (b), and 7407(d)(4)(A). EPA also must designate areas as either in attainment, or nonattainment, with the federal NAAQS. *Id.* § 7407(d)(1).

20. For nonattainment areas, states must develop a “state implementation plan” to bring the areas into compliance with the NAAQS. 42 U.S.C. §§ 7407(a), 7410(a), 7502(b) and 7511a.

21. Nonattainment areas must attain the NAAQS by statutorily mandated deadlines, and EPA has a non-discretionary duty to determine within a prescribed time-frame whether nonattainment areas have attained the NAAQS by those deadlines. 42 U.S.C. §§ 7502(a)(1)(A), (a)(2), and 7509(c).

22. The Clean Air Act specifically requires EPA to designate areas that are not in attainment with the NAAQS for ozone. *See* 42 U.S.C. § 7407(d)(4)(A). The Clean Air Act classifies ozone nonattainment areas as marginal, moderate, serious, severe, or extreme, based on the severity of the ozone pollution in each area. *Id.* § 7511(a)(1) (Table 1). Extreme areas must attain the ozone standard no later than 20 years after November 15, 1990, or November 15, 2010. *Id.*

23. “As expeditiously as practicable,” but not later than six months after the statutorily prescribed attainment date, the Administrator of the EPA has a non-discretionary, mandatory duty to determine whether a nonattainment area attained the ozone standard by the prescribed deadline. 42 U.S.C. § 7509(c)(1); *id.* § 7511(b)(2)(A) (EPA “shall” determine if ozone nonattainment areas have attained the ozone standard within six months of the applicable attainment date).

24. A failure to attain the applicable NAAQS by the statutory deadline has specific consequences. Within one year after EPA’s nonattainment finding, the state must submit to EPA a revised state implementation plan including “such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the area . . .” 42 U.S.C. § 7509(d)(2). The revised plan must demonstrate attainment of the standard as expeditiously as practicable, but no later than five years after the date of the failure to attain notice. *Id.*

§ 7509(d)(3). In addition, revised plans for extreme ozone nonattainment areas must require that all stationary sources pay a fee as a penalty for such failure until the area is redesignated as an attainment area for ozone. *Id.* § 7511d(a).

25. If EPA’s Administrator fails to take a non-discretionary action, such as determining whether an area has or has not attained the federal ozone standard, the Clean Air Act empowers citizens to seek a court order to compel EPA to perform its non-discretionary duty. 42 U.S.C. § 7604(a)(2).

FACTUAL BACKGROUND

26. Ozone is a colorless, odorless reactive gas comprised of three oxygen atoms. It is formed by the chemical reaction between nitrogen oxides and volatile organic compounds in the presence of sunlight.

27. Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. It can reduce lung function and inflame the linings of the lungs. Repeated exposure to ozone may permanently scar lung tissue. Exposures can also worsen bronchitis, emphysema, and asthma. Elevated ozone concentrations result in increases in school absenteeism, increases in respiratory hospital emergency department visits among asthmatics and patients with other respiratory diseases, increases in hospitalizations for respiratory illnesses, increases in symptoms associated with adverse health effects, including chest tightness and medication usage, and increases in mortality due to non-accidental, cardio-respiratory deaths.

28. Nitrogen oxides are emitted primarily from fuel combustion. Thus, sources include car and truck exhaust and emissions from industrial combustion sources such as power plants, industrial boilers and glass manufacturing plants. Volatile organic compounds are also emitted in car

1 and truck exhaust, but more typically result from the evaporation of chemical solvents and gasoline.
2 Thus, sources include factories with coating operations or facilities like refineries that store or
3 handle volatile chemicals.

4 29. In 1979, EPA promulgated a national ambient air quality standard limiting the
5 maximum 1-hour ambient concentration of ozone to 0.12 parts per million. 44 Fed. Reg. 8202 (Jan
6 26, 1979) (codified at 40 C.F.R. § 50.9(a)). This is commonly referred to as the “1-hour ozone
7 standard.”

8 30. On November 15, 1990, the Valley was designated a “serious” nonattainment area for
9 the 1-hour ozone standard by operation of law pursuant to the 1990 amendments to the Clean Air
10 Act. *See* 42 U.S.C. § 7511(a)(1) and (a)(1)(Table 1); 65 Fed. Reg. 37926, 37927 (Jun. 19, 2000).

11 31. The original deadline for the Valley to attain the 1-hour ozone standard was
12 November 15, 1999. *See* 42 U.S.C. § 7511(a)(1) and (a)(1)(Table 1).

13 32. The California Air Resources Board has delegated to the San Joaquin Valley Air
14 Pollution Control District (“District”) the responsibility to develop and implement a state
15 implementation plan for the Valley to attain the 1-hour ozone standard. The District adopted a
16 1-hour ozone plan in 1994. 62 Fed. Reg. 1150 (Jan. 8, 1997).

17 33. On November 8, 2001, EPA determined that the Valley failed to attain the 1-hour
18 ozone standard by the statutory deadline of November 15, 1999. 66 Fed. Reg. 56476 (Nov. 8, 2001).
19 As a result, the Clean Air Act mandated that EPA reclassify the Valley from “serious” to “severe”
20 nonattainment. *Id.* The severe classification meant that the District was required to submit a revised
21 state implementation plan demonstrating how the Valley would attain the 1-hour ozone standard by
22 November 15, 2005. *See* 42 U.S.C. § 7511a(d); 66 Fed. Reg. at 56481. EPA determined that the
23 District was required to submit the new state 1-hour ozone plan to EPA on or before May 31, 2002.
24 *See* 66 Fed. Reg. at 56481.

25 34. On October 2, 2002, EPA determined that the District had failed to submit a complete
26 1-hour ozone plan by the May 31, 2002 deadline. 67 Fed. Reg. 61784 (Oct. 2, 2002). Among other
27 failures, the District’s plan failed to demonstrate how the Valley would attain the 1-hour ozone
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1 standard by the mandatory deadline of November 15, 2005. *Id.* EPA extended the deadline for the
2 District to submit a complete 1-hour ozone plan an additional 18 months. *Id.*

3 35. On January 9, 2004, the California Air Resources Board requested that the Valley be
4 reclassified as an “extreme” nonattainment area for the 1-hour ozone standard. 69 Fed. Reg. 8126,
5 8127 (Feb. 23, 2004). On April 16, 2004, EPA granted the request and reclassified the Valley as an
6 “extreme” nonattainment area for the 1-hour ozone standard. 69 Fed. Reg. 20550 (Apr. 16, 2004).

7 36. As a result, pursuant to Clean Air Act section 189, the deadline for the Valley to
8 attain the 1-hour standard was again extended to no later than 20 years after November 15, 1990, or
9 November 15, 2010. 42 U.S.C. § 7511(a)(1).

10 37. The Valley did not attain the 1-hour ozone standard by the November 15, 2010
11 deadline.

12 38. On November 15, 2010, Medical Advocates petitioned EPA pursuant to section
13 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e), to take immediate rulemaking action
14 to determine if the Valley had failed to attain the 1-hour ozone standard.

15 39. EPA did not determine by the statutorily mandated deadline of May 15, 2011 whether
16 the Valley had failed to attain the 1-hour ozone standard.

17 40. To date, EPA has not responded to Medical Advocates’ rulemaking petition.

18 **FIRST CLAIM FOR RELIEF**

19 **EPA Is in Violation of the Clean Air Act Because It Has Failed to Determine Whether or Not** 20 **the Valley Has Attained the Ozone 1-Hour Standard**

21 41. Medical Advocates reallege each and every allegation set forth above, as if fully set
22 forth herein.

23 42. The Valley is classified as an “extreme” nonattainment area for the 1-hour ozone
24 standard. *See* 74 Fed. Reg. 20550 (Apr. 16, 2004); 40 C.F.R. § 81.305.

25 43. The Clean Air Act mandated deadline for the Valley to attain the 1-hour ozone
26 standard was November 15, 2010. 42 U.S.C. § 7511(a)(1)(Table 1).

27 44. EPA “shall” determine if ozone nonattainment areas have attained the ozone standard
28 within 6 months of the applicable attainment date. 42 U.S.C. § 7509(c)(1); *id.* § 7511(b)(2)(A).

1 EPA has a non-discretionary, mandatory duty to determine by no later than May 15, 2011 whether
2 the Valley failed to attain the 1-hour ozone standard.

3 45. To date, EPA has not made the mandatory determination regarding whether or not the
4 Valley failed to attain the 1-hour ozone standard.

5 46. As a result, EPA has been in continuous violation of 42 U.S.C. §§ 7509(c)(1) and
6 7511(b)(2)(A) since May 15, 2011.

7 47. This ongoing violation of the Clean Air Act constitutes a “failure of the Administrator
8 to perform any act or duty under this chapter which is not discretionary with the Administrator,”
9 within the meaning of the Clean Air Act’s citizen suit provision. 42 U.S.C. § 7604(a)(2). This
10 violation is ongoing and will continue unless remedied by this Court.

11 **SECOND CLAIM FOR RELIEF**

12 **EPA Is in Violation of the Administrative Procedure Act Because It Has “Unreasonably** 13 **Delayed” Responding to Medical Advocates’ Rulemaking Petition**

14 48. Medical Advocates reallege each and every allegation set forth above, as if fully set
15 forth herein.

16 49. The Administrative Procedure Act requires that agencies “shall” conclude matters
17 presented to them “within a reasonable time.” 5 U.S.C. § 555(b).

18 50. On November 15, 2010, Medical Advocates petitioned EPA pursuant to section
19 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e), to take immediate rulemaking action
20 to determine whether the Valley had failed to attain the 1-hour ozone standard.

21 51. In the Clean Air Act, the Legislature set reasonable time frames for EPA to determine
22 whether extreme nonattainment areas, such as the Valley, have attained, or have failed to attain, the
23 1-hour ozone standard. Specifically, EPA must determine whether extreme nonattainment areas
24 have failed to attain the 1-hour ozone standard “as expeditiously as practicable,” but no later than six
25 months following the attainment deadline. 42 U.S.C. §§ 7509(c)(1) and 7511(b)(2)(A).
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52. Even though more than six months have passed since November 15, 2010, the attainment deadline for the Valley, EPA has not responded to Medical Advocates' rulemaking petition to determine if the Valley has failed to attain the 1-hour ozone standard.

53. EPA has failed to respond to Medical Advocates’ rulemaking petition within a reasonable time. EPA’s failure to respond to Medical Advocates’ rulemaking petition therefore constitutes agency action “unreasonably delayed.” Accordingly, this Court has authority pursuant to 5 U.S.C. § 706(1) to compel EPA to respond to Medical Advocates’ November 15, 2010 rulemaking petition.

PRAYER FOR RELIEF

WHEREFORE, Medical Advocates respectfully request the Court to grant the following relief:

1. DECLARE that EPA is in violation of the Clean Air Act for failing to determine, on or before May 15, 2011, whether or not the Valley attained the 1-hour ozone standard;
2. DECLARE that EPA violated the Administrative Procedure Act by unreasonably delaying a decision on Medical Advocates' November 15, 2010 rulemaking petition to determine if the Valley failed to attain the 1-hour ozone standard;
3. ISSUE an injunction directing EPA:
 - (a) to make a determination whether or not the Valley attained the 1-hour ozone standard; and
 - (b) to respond to Medical Advocates' November 15, 2010 rulemaking petition to determine whether or not the Valley attained the ozone 1-hour standard;
3. RETAIN jurisdiction over this matter until such time as EPA has complied with its non-discretionary duties under the Clean Air Act and the Administrative Procedure Act;
4. AWARD to Medical Advocates their costs of litigation, including reasonable attorney and expert witness fees; and/or
5. GRANT such additional relief as the Court may deem just and proper.

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2 DATED: July 18, 2011

Respectfully submitted,

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PAUL R. CORT
ERIN M. TOBIN

5 Attorneys for Plaintiffs
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