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RICHARD W. WIERING
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO/OAKLAND DIVISION
E-FILED

11
12 SIERRA CLUB and MEDICAL ADVOCATES
FOR HEALTHY AIR,

13 Plaintiffs,

14 v.

15 LISA P. JACKSON, in her official capacity as
Administrator of the United States Environmental
16 Protection Agency, and JARED BLUMENFELD, in
his official capacity as Regional Administrator for
17 Region IX of the United States Environmental
Protection Agency,

18 Defendants.

Case No:

C11-03106

DMR

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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

ADR

19
20 **INTRODUCTION**

21 1. This action is brought under the federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, to
22 compel the U.S. Environmental Protection Agency ("EPA") to take statutorily required, non-
23 discretionary action on emission controls on industrial sources that contribute to the extreme ozone
24 pollution problems in the San Joaquin Valley ("Valley").

25 2. The Valley has some of the worst air pollution in the nation with air pollution levels
26 well in excess of federal standards for particulate matter and ozone.

27 3. EPA has allowed the Valley's air quality problems to persist by repeatedly failing to
28 comply with the Clean Air Act's mandatory requirements governing air quality planning.

COMPLAINT

1 reduce air pollution in the United States, California, and the Valley.

2 10. Plaintiff MEDICAL ADVOCATES FOR HEALTHY AIR is a California non-profit
3 organization based in Fresno. The organization consists of medical professionals living in the
4 Valley who regularly treat patients suffering from respiratory ailments that are caused or greatly
5 exacerbated by the Valley's unhealthy levels of air pollution. The organization's mission includes
6 advocating for the expeditious attainment of state and national health-based air quality standards in
7 the Valley through public education, litigation, and other means.

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

16 12. The Clean Air Act violations alleged in this Complaint have injured and continue to
17 injure the interests of Plaintiffs and their members. Granting the relief requested in this lawsuit
18 would redress these injuries by compelling EPA to take the action mandated by Congress in its
19 statutory scheme for improving air quality in areas violating national air quality standards, such as
20 the Valley.

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

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

27 **STATUTORY FRAMEWORK**

28 15. The Clean Air Act directs EPA to prescribe national ambient air quality standards

1 (“NAAQS”), “the attainment and maintenance of which . . . are requisite to protect the public health”
2 with “an adequate margin of safety.” 42 U.S.C. §§ 7409(a), (b).

3 16. The Clean Air Act directs EPA to designate areas with air pollutant concentrations
4 that exceed a national standard as “nonattainment” areas. 42 U.S.C. § 7407(d)(1).

5 17. The Clean Air Act provides that each state with a nonattainment area must adopt a
6 “state implementation plan” for improving air quality in that area in order to meet the national
7 standards. 42 U.S.C. §§ 7407(a), 7410(a), 7502(b) and 7511a.

8 18. Under the Clean Air Act, states must submit such plans to EPA for review. 42 U.S.C.
9 §§ 7410(a) and 7502(b).

10 19. EPA is responsible for ensuring that the plan complies with the requirements of the
11 Clean Air Act and must approve or disapprove the plan accordingly. *Id.* §§ 7410(k) and (l).

12 20. Among the required elements of these plans is a demonstration that existing industrial
13 sources of the pollutants that react to form ozone – volatile organic compounds and oxides of
14 nitrogen – are subject to regulations requiring reasonably available control technology (“RACT”) to
15 reduce emissions. 42 U.S.C. §§ 7502(c)(1), 7511a(b)(2) and (f).

16 21. Within six months after submission of a plan by the state, EPA is required to
17 determine whether the submittal meets EPA completeness criteria. 42 U.S.C. § 7410(k)(1)(B). If
18 EPA makes no completeness finding before the six-month deadline, the plan shall be determined to
19 be complete as a matter of law six months after the date of submittal. *Id.*

20 22. EPA has a non-discretionary duty to act on a submitted plan within 12 months of the
21 completeness determination. 42 U.S.C. § 7410(k)(2).

22 23. If EPA disapproves a portion of a plan or finds that the state has failed to submit a
23 required element of a plan, EPA must, within two years of such disapproval or finding, promulgate a
24 substitute federal implementation plan fulfilling the relevant requirements. 42 U.S.C. § 7410(c).

25 24. If EPA fails to take a non-discretionary action, such as acting on a state
26 implementation plan submittal or promulgating a federal implementation plan, citizens are
27 empowered to seek a court order to compel prompt action. 42 U.S.C. § 7604(a)(2).

FACTUAL BACKGROUND

1
2 25. Ozone is a colorless, odorless reactive gas comprised of three oxygen atoms. It is
3 formed by the chemical reaction between nitrogen oxides and volatile organic compounds in the
4 presence of sunlight.

5 26. Breathing ozone can trigger a variety of health problems including chest pain,
6 coughing, throat irritation, and congestion. It can reduce lung function and inflame the linings of the
7 lungs. Repeated exposure to ozone may permanently scar lung tissue. Exposures can also worsen
8 bronchitis, emphysema, and asthma. Ozone concentrations above the national 1-hour and 8-hour
9 standards result in increases in school absenteeism, increases in respiratory hospital emergency
10 department visits among asthmatics and patients with other respiratory diseases, increases in
11 hospitalizations for respiratory illnesses, increases in symptoms associated with adverse health
12 effects, including chest tightness and medication usage, and increases in mortality due to non-
13 accidental, cardio-respiratory deaths.

14 27. Nitrogen oxides are emitted primarily from fuel combustion. Thus, sources include
15 car and truck exhaust and emissions from industrial combustion sources such as power plants,
16 industrial boilers and glass manufacturing plants. Volatile organic compounds are also emitted in car
17 and truck exhaust, but more typically result from the evaporation of chemical solvents and gasoline.
18 Thus, sources include factories with coating operations or facilities like refineries that store or
19 handle volatile chemicals.

20 28. In 1979, EPA promulgated a national ambient air quality standard limiting the
21 maximum 1-hour ambient concentration of ozone at 0.12 parts per million. 44 Fed. Reg. 8202 (Jan
22 26, 1979) (codified at 40 C.F.R. § 50.9(a)).

23 29. In 1997, EPA adopted a national ambient air quality standard on the daily maximum
24 8-hour average concentrations of ozone at 0.08 parts per million. 62 Fed. Reg. 38856 (July 18,
25 1997) (codified at 40 C.F.R. § 50.10).

26 30. Though the Valley is not a densely populated region, ozone concentrations in the
27 Valley continue to violate both the 1-hour and 8-hour ozone standards.

28 31. As a result of these continued violations, the Valley is classified as an "Extreme

1 Nonattainment Area” for both the 1-hour and 8-hour ozone standards, the worst air-quality
2 classification for a nonattainment area provided under the Clean Air Act.

3 32. The preparation of state implementation plans demonstrating how the Valley will
4 meet the national ambient air quality standards is the responsibility of the California Air Resources
5 Board (“State”) and the San Joaquin Valley Unified Air Pollution Control District (“District”).

6 33. To show how it planned to meet the national 1-hour ozone standard, the District
7 adopted its Extreme Ozone Attainment Demonstration Plan on October 8, 2004, and amended it on
8 October 20, 2005 (collectively “2004 1-Hour Ozone Plan”).

9 34. The State submitted the 2004 1-Hour Ozone Plan for EPA review and approval, on
10 November 15, 2004 and March 6, 2006.

11 35. The 2004 1-Hour Ozone Plan included the District’s demonstration required under
12 Clean Air Act sections 172(c)(1), 182(b)(2) and 181(f), 42 U.S.C. §§ 7502(c)(1), 7511a(b)(2) and
13 (f), that District regulations required reasonably available control technology (“RACT”) on existing
14 sources of volatile organic compounds and oxides of nitrogen (“2004 RACT demonstration”).

15 36. The 2004 1-Hour Ozone Plan was required to provide for the attainment of the 1-hour
16 ozone standard as expeditiously as practicable, but no later than November 15, 2010. 69 Fed. Reg.
17 20550, 20552 (April 16, 2004).

18 37. The Valley failed to attain the 1-hour ozone standard by the November 15, 2010
19 deadline.

20 38. On August 17, 2006, the District adopted a new RACT demonstration to support its
21 plan for meeting the 8-hour ozone standard in the Valley (“2006 RACT demonstration”).

22 39. On January 31, 2007, the State submitted the 2006 RACT demonstration to EPA for
23 review and approval. *See* Letter from Catherine Witherspoon, California Air Resources Board, to
24 Deborah Jordan, EPA (Jan. 31, 2007).

25 40. Before EPA took action on either the RACT demonstration in the 2004 1-Hour Ozone
26 Plan or the new 2006 RACT demonstration, the State formally withdrew the RACT demonstration
27 portion of the 2004 1-Hour Ozone Plan. *See* Letter from James N. Goldstene, California Air
28 Resources Board, to Wayne Nastro, EPA (Sept. 5, 2008). The State indicated that the District would

1 satisfy the RACT demonstration requirement for the 1-hour ozone standard separately from the 2004
2 1-Hour Ozone Plan, with a revised 8-hour ozone RACT demonstration updating the 2006 RACT
3 demonstration.

4 41. As a result of the withdrawal of the 2004 RACT demonstration, on January 21, 2009,
5 EPA issued a final rule finding that California had failed to submit, for the Valley 1-hour ozone
6 nonattainment area, a state implementation plan revision required to address the 1-hour ozone RACT
7 requirements in Clean Air Act sections 172(c)(1), 182(b)(2), and 182(f), 42 U.S.C. §§ 7502(c)(1),
8 7511a(b)(2) and (f). 74 Fed. Reg. 3442 (Jan. 21, 2009).

9 42. Pursuant to Clean Air Act section 110(c), 42 U.S.C. § 7410(c), the January 21, 2009
10 finding triggered a two-year deadline for EPA to promulgate a substitute federal implementation
11 plan addressing the 1-hour ozone RACT requirements, unless the State submitted a RACT
12 demonstration and EPA approved the demonstration within that time.

13 43. Because EPA did not approve a RACT demonstration within two years of its January
14 21, 2009 finding, EPA was required to promulgate a substitute federal implementation plan
15 providing for the implementation of RACT on existing sources of volatile organic compounds and
16 oxides of nitrogen by January 21, 2011. *See* 42 U.S.C. § 7410(c).

17 44. To date, EPA has failed to promulgate a substitute federal implementation plan
18 addressing the 1-hour ozone RACT requirements for the Valley.

19 45. On June 18, 2009, the State submitted to EPA the District's "2009 RACT
20 demonstration," developed to satisfy the RACT requirements for both its 1-hour and 8-hour ozone
21 plans for the Valley. *See* Letter from James N. Goldstene, California Air Resources Board, to Laura
22 Yoshii, EPA (June 18, 2009).

23 46. On December 11, 2009, EPA found the submittal of the 2009 RACT demonstration
24 complete, triggering a 12-month deadline for EPA to act on the RACT submittal under Clean Air
25 Act section 110(k)(2), 42 U.S.C. § 7410(k)(2). *See* Letter from Deborah Jordan, EPA, to James N.
26 Goldstene, California Air Resources Board (Dec. 11, 2009).

27 47. EPA was required to act on the District's 2009 RACT demonstration by December
28 11, 2010.

1 48. To date, however, EPA has failed to take any action pursuant to Clean Air Act section
2 110(k)(2), 42 U.S.C. § 7410(k)(2), to approve or disapprove the District's 2009 RACT
3 demonstration.

4 49. Since the State's submittal of the 2009 RACT demonstration, EPA has considered the
5 individual approval of various pollution control regulations relied upon by the District to support the
6 2009 RACT demonstration.

7 50. EPA has disapproved or proposed to disapprove a number of these regulations, for
8 failure to satisfy the Clean Air Act's RACT requirements under section 182(b)(2). *See e.g.*, 75 Fed.
9 Reg. 3996 (Jan. 6, 2010) (disapproving regulations controlling crude oil sump and wastewater
10 separator emissions); 76 Fed. Reg. 298 (Jan. 4, 2011) (proposing to disapprove regulations
11 controlling aerospace coatings and polyester resin emissions).

12 51. Given that EPA has already found certain regulations relied upon in the 2009 RACT
13 demonstration to be inadequate, there is no reason why EPA cannot now immediately act upon the
14 2009 RACT demonstration and disapprove it.

15 **FIRST CLAIM FOR RELIEF**

16 **EPA Is in Violation of the Clean Air Act Because It Has Failed to Act on a Submitted State 17 Implementation Plan Revision Addressing RACT Requirements**

18 52. Plaintiffs reallege each and every allegation set forth above, as if fully set forth
19 herein.

20 53. Since the Valley's 2009 RACT demonstration was found complete on December 11,
21 2009, EPA was obligated to act on the RACT submittal no later than December 11, 2010. 42 U.S.C.
22 § 7410(k)(2).

23 54. EPA has taken no action to approve or disapprove the Valley's 2009 RACT
24 demonstration.

25 55. Accordingly, EPA has been in continuous violation of Clean Air Act section
26 110(k)(2), 42 U.S.C. § 7410(k)(2), since December 11, 2010.

27 56. This Clean Air Act violation constitutes a "failure of the Administrator to perform
28 any act or duty under this chapter which is not discretionary with the Administrator," within the

1 meaning of the Clean Air Act's citizen suit provision. 42 U.S.C. § 7604(a)(2). This violation is
2 ongoing and will continue unless remedied by this Court.

3 **SECOND CLAIM FOR RELIEF**

4 **EPA Is in Violation of the Clean Air Act Because It Has Failed to Promulgate a Substitute
5 Federal Implementation Plan Addressing RACT Requirements**

6 57. Plaintiffs reallege each and every allegation set forth above, as if fully set forth
7 herein.

8 58. Since EPA did not approve a state implementation plan addressing the Clean Air Act
9 RACT requirements within two years of its January 21, 2009 finding that the District failed to
10 submit a RACT demonstration for the 2004 1-hour ozone plan, EPA was required to promulgate a
11 substitute federal implementation plan by January 21, 2011 providing for the implementation of
12 RACT on existing sources of volatile organic compounds and oxides of nitrogen in the Valley. *See*
13 42 U.S.C. § 7410(c).

14 59. EPA has failed to promulgate a substitute federal implementation plan providing for
15 the implementation of RACT on existing sources of volatile organic compounds and oxides of
16 nitrogen for the Valley 1-hour ozone nonattainment area.

17 60. Accordingly, EPA has been in continuous violation of Clean Air Act section 110(c),
18 42 U.S.C. § 7410(c), since January 21, 2011.

19 61. This Clean Air Act violation constitutes a "failure of the Administrator to perform
20 any act or duty under this chapter which is not discretionary with the Administrator," within the
21 meaning of the Clean Air Act's citizen suit provision. 42 U.S.C. § 7604(a)(2). This violation is
22 ongoing and will continue unless remedied by this Court.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs respectfully request the Court to grant the following relief:

- 25 1. DECLARE that EPA is in violation of the Clean Air Act for:
- 26 (a) failing to act on the Valley's 2009 RACT demonstration deemed complete on
27 December 11, 2009, and
 - 28 (b) failing to promulgate a substitute federal implementation plan providing for

1 the implementation of RACT on existing sources of volatile organic
2 compounds and oxides in the Valley, in compliance with Clean Air Act
3 sections 172(c)(1), 182(b)(2) and 181(f), 42 U.S.C. §§ 7502(c)(1),
4 7511a(b)(2) and (f);

5 2. ISSUE an injunction directing EPA to:

6 (a) take action on the Valley's 2009 RACT demonstration within 60 days of the
7 Court's order, and

8 (b) promulgate a substitute federal implementation plan providing for the
9 implementation of RACT on existing sources of volatile organic compounds
10 and oxides of nitrogen in the Valley, in compliance with Clean Air Act
11 sections 172(c)(1), 182(b)(2) and 181(f), 42 U.S.C. §§ 7502(c)(1),
12 7511a(b)(2) and (f) within six months of the Court's order;

13 3. RETAIN jurisdiction over this matter until such time as EPA has complied with its
14 non-discretionary duties under the Clean Air Act;

15 4. AWARD to Plaintiffs their costs of litigation, including reasonable attorney and
16 expert witness fees; and/or

17 5. GRANT such additional relief as the Court may deem just and proper.

18
19 DATED: June 23, 2011

Respectfully submitted,



20
21 PAUL R. CORT
22 WENDY S. PARK

23 Attorneys for Plaintiffs
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EXHIBIT A



January 31, 2011

Via Certified and Electronic Mail

Ms. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: 60-Day Notice of Intent to File Clean Air Act Citizen Suit

Dear Administrator Jackson:

This letter is submitted on behalf of Medical Advocates for Healthy Air¹ and Sierra Club² to notify you, pursuant to section 304(b) of the Clean Air Act ("CAA" or "Act"), that they intend to sue the U.S. Environmental Protection Agency ("EPA") for its failure to perform non-discretionary duties related to the reasonably available control technology demonstrations required for the ozone plans for the San Joaquin Valley. Medical Advocates and Sierra Club ask that you direct Region 9 to take the immediate action required under the Act.

Background on Missed Deadlines³

On January 21, 2009, EPA issued a final rule finding that California had failed to submit, for the San Joaquin Valley 1-hour ozone nonattainment area, a State Implementation Plan revision required by CAA sections 172(c)(1), 182(b)(2), and 182(f). 74 Fed. Reg. 3442 (Jan. 21, 2009). These provisions of the Act require that ozone plans provide for the implementation of reasonably available control technology ("RACT") on major stationary sources of volatile organic compounds and oxides of nitrogen. EPA's finding triggered a 2-year time clock (*i.e.*, January 21, 2011) by which, if EPA did not approve the State's RACT submittal, EPA was obligated to promulgate a federal implementation plan addressing the 1-hour ozone RACT requirements in the San Joaquin Valley. *See* 74 Fed. Reg. at 3443; *see also* CAA § 110(c)(1).

¹ Medical Advocates for Healthy Air, 5919 E. Robinson Avenue, Fresno, CA 93727

² This notice is submitted on behalf of the Sierra Club (85 Second Street, San Francisco, CA 94105), including its Tehipite Chapter (P.O. Box 5396, Fresno, CA 93755-5396), Kern-Kaweah Chapter (P.O. Box 3357, Bakersfield, CA 93385-3357) and Mother Lode Chapter (801 K Street, Suite 2700, Sacramento, CA 95814).

³ The failures outlined here are just the latest in a long history of failures involving Region 9's oversight of air quality planning in the San Joaquin Valley. Medical Advocates and Sierra Club have outlined this history to you on several occasions, and will not do so again here.

January 31, 2011

Page 2 of 2

On June 18, 2009, California submitted the San Joaquin Valley Air Pollution Control District's "2009 RACT SIP," which was developed to satisfy the RACT demonstration requirements for both the 1-hour and 8-hour ozone plans for the San Joaquin Valley. See Letter from James N. Goldstene, Executive Office, California Air Resources Board, to Laura Yoshii, Acting Regional Administrator, EPA (June 18, 2009). EPA found the submittal complete on December 11, 2009. See Letter from Deborah Jordan, Air Div. Dir., EPA, to James N. Goldstene, Executive Office, California Air Resources Board (Dec. 11, 2009). EPA's completeness finding triggered a 12-month deadline (*i.e.*, by December 11, 2010) for EPA to act on the RACT submittal under section 110(k)(2) of the Act.

EPA has Violated the Clean Air Act by Failing to Act on San Joaquin Valley's 2009 RACT SIP and Failing to Address the 1-Hour Ozone RACT Requirements Through a Federal Implementation Plan

Under section 110(k)(2) of the Act, EPA has a non-discretionary duty to approve a state implementation plan revision within 12 months after EPA makes a completeness finding under section 110(k)(1). On December 11, 2009, EPA made the completeness finding on the 2009 RACT SIP submitted for EPA approval. To date, however, EPA has not taken any action to approve or disapprove that submittal despite the statutory deadline to take action by December 11, 2010. As a result, EPA has been in violation of section 110(k)(2) of the Act since December 11, 2010.

Under section 110(c)(1) of the Act, unless EPA approved a RACT demonstration for the San Joaquin Valley, EPA had a non-discretionary duty to promulgate a federal implementation plan no later than January 21, 2011 to address the 1-hour ozone RACT requirements in the San Joaquin Valley. Because EPA has not approved an ozone RACT demonstration for the San Joaquin Valley and has also failed to promulgate a federal implementation plan to address the missing demonstration, EPA has been in violation of section 110(c)(1) since January 21, 2011.

Unless the identified deficiencies are promptly mitigated, Medical Advocates for Healthy Air and the Sierra Club anticipate filing suit in the U.S. District Court of the Northern District of California sixty days after your receipt of this letter. Please feel free to contact Paul Cort at the address and telephone number provided above to further discuss the basis for this claim, or to explore possible options for resolving this claim short of litigation.

Sincerely,



Paul Cort
Staff Attorney

Cc: Jared Blumenfeld, Regional Administrator, Region IX