

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**AMERICAN LUNG ASSOCIATION**

61 Broadway, Sixth Floor  
New York, NY 10006,

**ENVIRONMENTAL DEFENSE**

257 Park Avenue South  
New York, NY 10010,

**NATURAL RESOURCES DEFENSE COUNCIL**

40 West 20th Street  
New York, NY 10011,

**SIERRA CLUB**

85 Second St., Second Floor  
San Francisco, CA 94105-3441,

**ALABAMA ENVIRONMENTAL COUNCIL**

2717 - 7th Avenue South, Suite 207  
Birmingham, AL 35233,

**CLEAN AIR COUNCIL**

135 S. 19th St., Suite 300  
Philadelphia, PA 19103,

**MICHIGAN ENVIRONMENTAL COUNCIL**

119 Pere Marquette Dr., Suite 2A  
Lansing, MI 48912,

**OHIO ENVIRONMENTAL COUNCIL**

1207 Grandview Avenue, Suite 201  
Columbus, OH 43212, and

**SOUTHERN ALLIANCE FOR CLEAN ENERGY**

117 South Gay Street  
Knoxville, TN 37901,

Plaintiffs,

v.

**CHRISTINE TODD WHITMAN**

Administrator,  
United States Environmental  
Protection Agency, and

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,**

Defendants.

CASE NUMBER 1:03CV00778

JUDGE: Ellen Segal Huvelle

DECK TYPE: Administrative Agency Review

DATE STAMP: 03/31/2003

Civil Action No.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

# COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

## Introduction

1. This action seeks to compel defendants Christine Todd Whitman, et al. (collectively "the Administrator") to perform their duties, prescribed by the Clean Air Act, to complete a thorough review of air quality criteria and national ambient air quality standards for particulate matter and ozone, and to make appropriate revisions in those criteria and standards and promulgate appropriate new standards. Although the Clean Air Act deadline for performing those actions has expired, the Administrator has failed to do so. As a result, plaintiffs' members and others who breathe harmful air pollution in communities around the nation are left without benefit of the up-to-date scientific analysis and air quality standards that Congress intended them to have.

## 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 the Act, 42 U.S.C. § 7604(a)(2), as well as 28 U.S.C. §§ 1331 and 1361, and may issue a declaratory judgment and grant further relief pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. §§ 2201 and 2202. Plaintiffs have a right to bring this action pursuant to 42 U.S.C. § 7604(a)(2) and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

3. Pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, plaintiffs have notified the Administrator of the failures alleged herein, and of their intent to bring the present action. Said notice was given by certified letter posted on December 24, 2002.

## PARTIES

4. Plaintiff American Lung Association, a corporation organized and existing under the laws of the State of Maine, is a national nonprofit organization dedicated to the conquest of lung disease and the promotion of lung health.

5. Plaintiff Environmental Defense, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems.

6. Plaintiff Natural Resources Defense Council, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

7. Plaintiff Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

8. Plaintiff Alabama Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Alabama, works to protect and preserve Alabama's natural heritage.

9. Plaintiff Clean Air Council, a nonprofit corporation organized and existing under the laws of the Commonwealth of Pennsylvania, uses public education, community advocacy, and government oversight to ensure enforcement of environmental laws in its efforts to improve air quality throughout Pennsylvania and Delaware.

10. Plaintiff Michigan Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Michigan, is dedicated to addressing threats to Michigan's environment, promoting alternatives to urban blight and suburban sprawl, advocating for a sustainable environment and economy, protecting Michigan's water legacy, promoting cleaner energy, and working to diminish environmental impacts on children's health.

11. Plaintiff Ohio Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Ohio, works to inform, unite, and empower Ohio citizens to protect the environment and conserve natural resources.

12. Plaintiff Southern Alliance for Clean Energy, a nonprofit corporation organized and existing under the laws of the State of Tennessee, is a regional organization working in eight southeastern states on energy issues, and dedicated to finding positive solutions to the negative impacts of power production by working for clean air policies and promoting the use of renewable energy and implementation of energy efficiency practices.

13. Members of plaintiff organizations live, work and travel widely in all fifty states and the District of Columbia, during all seasons of the year. As a result, members of plaintiff organizations breathe particulate matter and ozone in all fifty states and the District of Columbia.

14. Scientific evidence has linked particulate matter and ozone to a wide variety of adverse effects on human health and welfare. Indeed, recent scientific evidence indicates that those adverse effects are occurring at particulate and ozone concentrations meeting the previously promulgated NAAQS for those pollutants. Plaintiffs' members are exposed to this pollution by breathing it, as well as by experiencing its adverse impacts on visibility, aquatic and terrestrial life, human-made materials, and other aspects of public welfare.

15. The agency actions sought herein include completion of agency review of air quality criteria and NAAQS for particulate matter and ozone, the making of revisions in those criteria and NAAQS, and the promulgation of new NAAQS as appropriate. These review, revision and promulgation processes offer plaintiffs and their members an opportunity to advocate more accurate and protective criteria and NAAQS. Indeed, plaintiffs and their members have repeatedly availed themselves of advocacy opportunities in air quality criteria and NAAQS proceedings, including during the proceedings that produced the 1996 air quality criteria for particulate matter and ozone and the 1997 NAAQS for those pollutants. Failure to complete the review and promulgation process deprives plaintiffs' members of these advocacy opportunities.

16. Failure to complete the review and promulgation processes described above likewise deprives plaintiffs and their members of the agency actions resulting from those processes -- including decisions concerning revision of air quality criteria and NAAQS and promulgation of new NAAQS, as well as the resulting revised criteria and NAAQS and new NAAQS. Those actions will offer crucial information concerning the health and welfare effects of particulate matter and ozone. That information will assist members of plaintiff organizations in making informed choices concerning their own and their families' exposure to those pollutants, and in urging federal, state, local, and private decisionmakers to take steps to abate those pollutants. Likewise, more protective NAAQS for particulate matter and ozone will set in motion statutory requirements for abatement of particulate matter and ozone levels violating such NAAQS. In particular, such NAAQS would trigger requirements for states -- or the Administrator, if the states fail to respond or if they respond inadequately -- to design pollution control plans sufficient to attain revised or new NAAQS as expeditiously as practicable, but no later than statutorily specified deadlines. Clean Air Act §§ 107, 110 and 171 *et seq.*, 42 U.S.C. §§ 7407,

7410, and 7501 *et seq.* Failure to complete the statutorily mandated review, revision and promulgation addressed herein deprives plaintiffs and their members of these benefits.

17. For the foregoing reasons, the failures of the Administrator challenged herein cause plaintiffs injury for which they have no adequate remedy at law.

18. Defendant Christine Todd Whitman ("the Administrator") is the Administrator of the United States Environmental Protection Agency ("EPA"), and in that role has been charged by Congress with the duty to administer the Clean Air Act, including the duty to review and revise air quality criteria and NAAQS, and to promulgate new NAAQS. Defendant United States Environmental Protection Agency is the federal agency charged with implementation of the Clean Air Act.

### **GENERAL ALLEGATIONS**

#### **A. Particulate Matter and Ozone.**

19. Particulate matter is an air pollutant consisting of solid particles and liquid droplets. Particulate matter has profound adverse effects on human health. Compelling scientific evidence, including a large number of peer-reviewed epidemiological studies, links particulate matter to a variety of heart and lung ailments, leading to premature deaths, hospitalizations, emergency room visits, respiratory symptoms, and missed work and school days. The elderly, the young, and those with heart disease or lung ailments (such as chronic bronchitis or emphysema), are especially vulnerable to these effects.

20. Compelling scientific evidence likewise links particulate matter to a variety of welfare effects, including acid deposition that damages forests, streams, and lakes; eutrophication that causes algal blooms in estuaries and other waters; soiling and corrosion of

human-made materials; and impairment of visibility in national parks and wilderness areas as well as in communities where people live.

21. Ozone, the principal component of smog, has profound adverse effects on human health. Compelling scientific evidence, including peer-reviewed clinical studies and epidemiological studies, has shown associations between ozone and a variety of respiratory effects -- among which are asthma attacks, respiratory-related hospitalizations, reductions in lung function, respiratory symptoms (such as coughing, shortness of breath, and nausea), increased airway responsiveness, increased susceptibility to respiratory infection, and pulmonary inflammation. Ozone can increase the severity and frequency of respiratory symptoms, and can precipitate acute episodes such as asthma attacks. Asthma attacks cause acute distress; can lead to the need to take medication and seek medical attention; and can even require hospitalization. Those with respiratory conditions such as asthma, emphysema or chronic bronchitis, those who are young or elderly, and those who are active outdoors, are especially vulnerable to these effects.

22. Compelling scientific evidence likewise links ozone to a variety of adverse welfare effects, including damage to crops and forests.

23. The last several years have seen the emergence of extensive scientific evidence concerning the health and welfare effects of particulate matter and ozone that was not considered in the most recent air quality criteria for those pollutants in 1996, or in the promulgation of revised NAAQS for those pollutants in 1997. This recent evidence indicates that particulate matter and ozone are each causing adverse effects to human health and welfare at levels allowed by the 1997 NAAQS for those pollutants.

**B. Clean Air Act Provisions Concerning Air Quality Criteria and NAAQS, and the Administrator's Actions Pursuant to Those Provisions.**

24. In 1970, Congress enacted amendments to the Clean Air Act that require the Administrator to issue "air quality criteria." § 108(a)(2), 42 U.S.C. § 7408(a)(2).

Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on --

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

Id. (emphasis added). *See also* § 302(h), 42 U.S.C. § 7602(h) ("All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.").

25. Likewise in 1970, Congress amended the Act to require that, "based on" the air quality criteria, EPA must propose and promulgate national ambient air quality standards ("NAAQS") -- including "primary" NAAQS sufficient to "protect the public health" with "an adequate margin of safety" and "secondary" NAAQS sufficient to "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." § 109(b)(1) and (2), 42 U.S.C. § 7409(b)(1) and (2).



26. Pursuant to the above mandates, EPA promulgated (*inter alia*) primary and secondary NAAQS for particulate matter and photochemical oxidants. 36 Fed. Reg. 8187 (April 30, 1971). The NAAQS for photochemical oxidants were subsequently amended to focus on ozone, a form of photochemical oxidant. 44 Fed. Reg. 8202 (February 8, 1979). See *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1182-83 (D.C. Cir. 1981).

27. Congress enacted amendments in 1977 designed to "ensure" that NAAQS "reflect the latest scientific knowledge and fully protect the public." *American Lung Association v. Browner*, 884 F. Supp. 345, 346 (D. Ariz. 1994). Specifically, Congress added § 109(d), which provides *inter alia*:

Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

§ 109(d)(1), 42 U.S.C. § 7409(d)(1) (emphasis added).

28. Courts have held that the duties prescribed by § 109(d)(1) are nondiscretionary. For example, the Second Circuit rejected an argument that § 109(d)(1) merely imposed a duty to avoid unreasonable delay, finding that the provision instead established a nondiscretionary duty: "when, as here, a statute sets forth a bright-line rule for agency action, ... there is no room for debate -- Congress has prescribed a categorical mandate that deprives EPA of all discretion over the timing of its work." *American Lung Association v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992) (emphasis added). The D.C. Circuit subsequently "agree[d]" with this Second Circuit ruling. *American Trucking Assns. v. USEPA*, 175 F.3d 1027, 1047 (D.C. Cir. 1999), *rehearing granted*

*in part on other grounds, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd in part on other grounds, aff'd in part sub nom. Whitman v. American Trucking Assns.*, 531 U.S. 457 (2001).

29. Subsequent to enactment of § 109(d) in 1977, EPA completed two reviews of the air quality criteria and NAAQS for particulate matter. First, EPA issued revised air quality criteria for particulate matter in 1982 (supplemented in 1986), and promulgated revised primary and secondary particulate matter NAAQS on July 1, 1987. 52 Fed. Reg. 24634. Second, EPA issued revised air quality criteria for particulate matter in April 1996, and promulgated revised primary and secondary particulate matter NAAQS on July 18, 1997. 62 Fed. Reg. 38652. Since this second review, no review of the particulate matter criteria or NAAQS has been completed, nor has there been any revision of such criteria or NAAQS or promulgation of new NAAQS pursuant to such a review.

30. Subsequent to enactment of § 109(d) in 1977, EPA completed three reviews of the air quality criteria and NAAQS for ozone. First, EPA issued revised air quality criteria for ozone and other photochemical oxidants in April 1978, and promulgated revised primary and secondary ozone NAAQS on February 8, 1979. 44 Fed. Reg. 8202. Second, EPA issued revised air quality criteria for ozone in 1986 (supplemented in 1992), and on March 9, 1993, issued a decision not to revise the primary or secondary ozone NAAQS. 58 Fed. Reg. 13008 (March 9, 1993). Third, EPA issued revised air quality criteria for ozone in July 1996, and promulgated revised primary and secondary ozone NAAQS on July 18, 1997. 62 Fed. Reg. 38856. Since this third review, no review of the ozone criteria or NAAQS has been completed, nor has there been any revision of such criteria or NAAQS or promulgation of new NAAQS pursuant to such a review.

## CLAIMS FOR RELIEF

### **Count One (Failure to Perform § 109(d) Duties As to Particulate Matter)**

31. The allegations of all preceding paragraphs are hereby incorporated as if fully set forth herein.

32. The deadline under § 109(d)(1) for the Administrator to complete another cycle of review, revision, and promulgation actions with respect to particulate matter has expired. Nonetheless, the Administrator has failed to perform those actions. Specifically, the Administrator has failed to complete a thorough review of the air quality criteria and the primary and secondary NAAQS for particulate matter. Furthermore, the Administrator has failed to make such revisions in the foregoing criteria and primary and secondary NAAQS for particulate matter, and to promulgate such new primary and secondary NAAQS, as may be appropriate in accordance with §§ 108 and 109(b). Moreover, the Administrator has failed to publish in the Federal Register (1) a revision decision concerning the review of the air quality criteria and the primary and secondary NAAQS for particulate matter (including any revised and/or new NAAQS resulting from that review), see 42 U.S.C. § 7607(d), and (2) notice of the issuance of any revised air quality criteria for particulate matter, *see* 42 U.S.C. § 7408(d). The Administrator's failure to perform each of the above actions constitutes a failure to perform an act or duty (or acts or duties) that are not discretionary with the Administrator within the meaning of Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2).

### **Count Two (Failure to Perform § 109(d) Duties As to Ozone)**

33. The allegations of all preceding paragraphs are hereby incorporated as if fully set forth herein.

34. The deadline under § 109(d)(1) for the Administrator to complete another cycle of review, revision, and promulgation actions with respect to ozone has expired. Nonetheless, the Administrator has failed to perform those actions. Specifically, the Administrator has failed to complete a thorough review of the air quality criteria and the primary and secondary NAAQS for ozone. Furthermore, the Administrator has failed to make such revisions in the foregoing criteria and primary and secondary NAAQS for ozone, and to promulgate such new primary and secondary NAAQS, as may be appropriate in accordance with §§ 108 and 109(b). Moreover, the Administrator has failed to publish in the Federal Register (1) a revision decision concerning the review of the air quality criteria and the primary and secondary NAAQS for ozone (including any revised and/or new NAAQS resulting from that review), see 42 U.S.C. § 7607(d), and (2) notice of the issuance of any revised air quality criteria for ozone, see 42 U.S.C. § 7408(d). The Administrator's failure to perform each of the above actions constitutes a failure to perform an act or duty (or acts or duties) that are not discretionary with the Administrator within the meaning of Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2).

#### **REQUEST FOR RELIEF**

WHEREFORE, plaintiffs respectfully request that this Court do each of the following:

(1) Declare that the Administrator's failure (a) to complete a thorough review of the air quality criteria and the primary and secondary NAAQS for particulate matter, and (b) to make such revisions in the foregoing criteria and primary and secondary NAAQS for particulate matter, and to promulgate such new primary and secondary NAAQS, as may be appropriate in accordance with §§ 108 and 109(b), each constitutes a failure to perform an act or duty (or acts or duties) that are not discretionary with the Administrator within the meaning of Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2).

(2) Order the Administrator (a) to complete a thorough review of the air quality criteria and the primary and secondary NAAQS for particulate matter, (b) to make such revisions in the foregoing criteria and primary and secondary NAAQS for particulate matter, and to promulgate such new primary and secondary NAAQS, as may be appropriate in accordance with §§ 108 and 109(b), and (c) to publish in the Federal Register (i) a revision decision concerning the review of the air quality criteria and the primary and secondary NAAQS for particulate matter (including any revised and/or new NAAQS resulting from that review), and (ii) notice of the issuance of any revised air quality criteria for particulate matter -- all in accordance with expeditious deadlines prescribed by the Court, including deadlines for notices of proposed rulemaking and other interim milestones.

(3) Declare that the Administrator's failure (a) to complete a thorough review of the air quality criteria and the primary and secondary NAAQS for ozone, and (b) to make such revisions in the foregoing criteria and primary and secondary NAAQS for ozone, and to promulgate such new primary and secondary NAAQS, as may be appropriate in accordance with §§ 108 and 109(b), each constitutes a failure to perform an act or duty (or acts or duties) that are not discretionary with the Administrator within the meaning of Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2).

(4) Order the Administrator (a) to complete a thorough review of the air quality criteria and the primary and secondary NAAQS for ozone, (b) to make such revisions in the foregoing criteria and primary and secondary NAAQS for ozone, and to promulgate such new primary and secondary NAAQS, as may be appropriate in accordance with §§ 108 and 109(b), and (c) to publish in the Federal Register (i) a revision decision concerning the review of the air quality criteria and the primary and secondary NAAQS for ozone (including any revised and/or new

NAAQS resulting from that review), and (ii) notice of the issuance of any revised air quality criteria for ozone -- all in accordance with expeditious deadlines prescribed by the Court, including deadlines for notices of proposed rulemaking and other interim milestones.

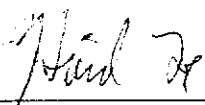
(5) Retain jurisdiction of this action to ensure compliance with the Court's decree.

(6) Award plaintiffs the costs of this action, including attorney's fees. *See* 42 U.S.C.

§ 7604(d).

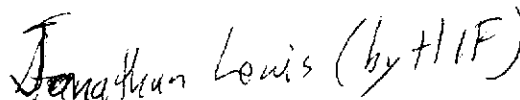
(7) Grant such other relief as the Court deems just and proper.

DATED: March 31, 2003.

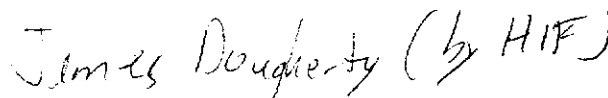


Howard I. Fox  
D.C. Bar No. 322198  
Earthjustice  
1625 Massachusetts Ave., NW,  
Suite 702  
Washington, D.C. 20036-2212  
(202) 667-4500

Attorney for plaintiffs  
American Lung Association,  
Environmental Defense,  
Natural Resources Defense Council, and  
Sierra Club



Ann B. Weeks  
Jonathan F. Lewis  
Clean Air Task Force  
77 Summer Street, 8th floor  
c/o Grants Management Associates  
Boston, MA 02110  
(617) 292-0234



James Dougherty  
D.C. Bar No. 939538  
709 Third Street, SW  
Washington, D.C. 20024-3103  
(202) 488-1140

Attorneys for plaintiffs  
Alabama Environmental Council,  
Clean Air Council,  
Michigan Environmental Council,  
Ohio Environmental Council, and  
Southern Alliance for Clean Energy