

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND)
257 Park Avenue South, 17th Floor)
New York, NY 10010)
)
NATIONAL PARKS CONSERVATION)
ASSOCIATION)
1300 19th Street NW, Suite 300)
Washington, DC 20036)
)
Plaintiffs,)
v.)
)
STEPHEN L. JOHNSON, Administrator,)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Defendant.)
)

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action to compel the Administrator of the United States Environmental Protection Agency (“Administrator” or “EPA”) to determine whether states have submitted complete plans required by the Clean Air Act (“CAA” or “the Act”) to prevent and remedy haze air pollution in “class I” national parks and wilderness areas (“haze plans”). The Act and EPA regulations required EPA to determine by June 17, 2008 whether each state had submitted haze plans meeting minimum completeness criteria set forth in CAA §110(k)(1)(A), but EPA has failed to do so.

JURISDICTION AND VENUE

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 citizen suit provision of the Clean Air Act, 42

U.S.C. § 7604, as well as 28 U.S.C. § 1331 and § 1361. The relief requested is authorized pursuant to 42 U.S.C. § 7604, 28 U.S.C. §§ 1361, 2201 & 2202, and 5 U.S.C. §§701-706.

3. Pursuant to 42 U.S.C. § 7604, plaintiffs served timely prior notice on the Administrator of the acts and omissions complained of herein and of their intent to bring the present action. Said notice was accomplished by certified letter, posted on June 25, 2008, and addressed to the Administrator. Notwithstanding such notice, the EPA acts and omissions complained of herein are continuing.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because defendant's official residence is in the District of Columbia.

PARTIES

5. Plaintiff Environmental Defense Fund (EDF) is a not-for-profit corporation organized and existing under the laws of New York, with its principal place of business in New York, New York. Environmental Defense Fund is a national membership organization, with more than 300,000 members. EDF members reside in each of the States as defined in 42 U.S.C. §7602(d) ("States"). EDF's mission is to protect the environmental rights of all people, including the rights to clean air and water and a flourishing ecosystem. Since the organization was founded in 1967, a key aspect of Environmental Defense Fund's mission has been to advocate control of air pollution for the benefit of human health and the environment. EDF and its members are greatly concerned about the effects of air pollution on human health and the environment, and have a long history of involvement in activities related to air quality. EDF is bringing this action on behalf of itself and its members, staff and officers.

6. Plaintiff National Parks Conservation Association (NPCA) is a national not-for-profit corporation organized and existing under the laws of the District of Columbia with its

principal place of business in Washington, D.C. Its mission is to protect and enhance America's National Parks for present and future generations. Since NPCA was established in 1919, it has advocated for the national parks and the National Park Service, educated decision makers and the public about the importance of preserving the parks, worked to convince officials in the Executive Branch and members of Congress to uphold the laws that protect the parks and to support new legislation to address threats to the parks, fought attempts to weaken or undermine these laws in the courts, and assessed the health of the parks and adequacy of park management to better inform the public and advocate for national parks.

7. The Act requires the haze plans at issue herein to remedy and protect against any existing and future human-caused visibility impairment in specified national parks, wilderness areas, wildlife refuges, and other areas designated by the Act and EPA rules as mandatory "Class I" Federal areas. Plaintiffs' members use and enjoy these Class I areas throughout the nation for recreation and aesthetic enjoyment, including enjoyment of the scenic vistas. These areas suffer from significant visibility impairment due to human-caused air pollution, and/or are threatened with future visibility impairment due to human-caused air pollution. Plaintiffs' members' use and enjoyment of these areas is adversely affected by the visibility impairment that the Act requires haze plans to remedy and protect against.

8. The acts and omissions of EPA complained of herein cause injury to plaintiffs and their members by delaying the adoption, submission, review, approval or promulgation, and implementation of plans required by the Act to remedy and protect against visibility impairment adversely affecting use and enjoyment of Class I areas by plaintiffs' members. These delays cause injury to plaintiffs' members by prolonging existing, and allowing future visibility impairment that significantly interferes with members' use and enjoyment of Class I areas, and

by nullifying or delaying measures mandated by the Act to remedy and prevent such visibility impairment. The recreational, aesthetic, and environmental interests of plaintiffs' members have been and continue to be adversely affected by the acts and omissions of EPA alleged herein.

9. The acts and omissions of EPA alleged herein further deprive plaintiffs and their members of procedural rights and protections to which they would otherwise be entitled, including, but not limited to, the right to comment on and judicially challenge the adequacy of state haze plans, and the right to ensure EPA effectuates its statutory duty to promulgate a Federal implementation plan to address state planning deficiencies. Plaintiffs contend that nearly all of the states have failed to timely submit complete haze plans and that EPA must therefore make a determination that those states have failed to submit haze SIPs that meet the completeness criteria, as mandated by 42 U.S.C. § 7410(k)(1)(B). EPA's failure to timely determine whether the states have submitted complete SIPs prolongs delay in the adoption or promulgation of the required SIPs, thereby thwarting the public comment and judicial review rights of plaintiffs and their members with respect to such SIPs. EPA's failure to timely make such determinations further deprives plaintiffs and their members of the right they would otherwise have to seek judicial review of any such determination under § 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1).

10. An EPA determination that a state has failed to timely submit a haze SIP that meets the completeness criteria promulgated under § 110(k)(1)(A) would trigger a two-year statutory deadline for the Administrator to prepare a federal implementation plan ("FIP") to implement the Act's requirements for a haze plan in that state. 42 U.S.C. § 7410(c)(1). EPA's failure to timely determine whether the states have submitted haze SIPs meeting the minimum completeness requirements in the Act thereby causes an indefinite delay that thwarts plaintiffs' and their members' rights, to which they would otherwise be entitled, to comment on, be protected by and (if

necessary) challenge in court the adequacy of haze state implementation plans required by the Act and to compel EPA to carry out its responsibility to issue federal implementation plans for deficient states.

11. The acts and omissions alleged herein further deprive plaintiffs and their members of information to which they would otherwise have access, specifically, a formal published finding by EPA on whether the states have timely submitted state implementation plans to address haze that meet the minimum completeness requirements of the Act. If plaintiffs and their members had access to such information, they would use it to educate the public about air pollution throughout the nation, and to advocate for adoption of measures to remedy and protect against haze in Class I areas. EPA's failure to produce such information deprives plaintiffs and their members of these benefits and thus causes them injury.

12. For all the foregoing reasons, the failures complained of herein cause plaintiffs and their members injuries for which they have no adequate remedy at law. Granting the requested relief would redress these injuries.

13. Defendant Stephen L. Johnson is Administrator of the United States Environmental Protection Agency (EPA), and is charged in that role with taking various actions to implement and enforce the Clean Air Act, including the actions sought herein. Defendant is sued in his official capacity, and he officially resides in Washington, D.C.

BACKGROUND AND FACTS

14. Regional haze is visibility impairment caused by the cumulative air pollutant emissions from numerous sources over a wide geographic area. Regional Haze Regulations, 64 Fed. Reg. 35,173 at 35,174 (July 1, 1999) (codified at 40 C.F.R. pt. 51). Visibility impairment is caused by both primary and secondary particle pollution, principally sulfates, nitrates, organics,

elemental carbon, and soil dust. NATIONAL RESEARCH COUNCIL, COMMITTEE ON HAZE IN NATIONAL PARKS AND WILDERNESS AREAS, PROTECTING VISIBILITY IN NATIONAL PARKS AND WILDERNESS AREAS, 22 (1993). Primary particles are emitted directly to the atmosphere, while secondary particles, which include sulfates, nitrates, and some organics, are formed in the atmosphere from gaseous precursors. *See id.*

15. In 1977, Congress established a national goal of preventing any future, and remedy any existing, impairment of visibility in “mandatory class I Federal areas” which impairment results from manmade air pollution. CAA § 169A, 42 U.S.C. § 7491(a)(1). The Secretary of the Interior, in consultation with other Federal land managers, was required to identify those class I Federal areas where visibility is an important value of the area and to update the list periodically. *Id.* § 7491(a)(2). Today, there are more than 150 designated Class I areas across the country, including many well-known national parks and wilderness areas, such as the Grand Canyon, Great Smoky Mountains, Shenandoah, Yellowstone, Yosemite, the Everglades, and the Boundary Waters. 64 Fed. Reg. at 35,174.

16. The Act required states to submit state implementation plans to curb haze (“haze plans” or “haze SIPs”) not later than 3 years after date the Administrator promulgated designations of areas as “attainment” or “nonattainment” for the PM national ambient air quality standards adopted in July 1997. 42 U.S.C. § 7407(d)(7)(A). EPA issued these designations on December 17, 2004; thus the states were required to submit their haze SIPs to the Administrator by December 17, 2007. *See* 70 Fed. Reg. 944 (January 5, 2005). EPA regulations likewise expressly mandated submission of haze SIPs by all states by December 17, 2007. 40 C.F.R. §§51.308(b), 309(c) (2007).

17. Each haze SIP must meet the minimum regulatory criteria promulgated by EPA under § 110(k)(1)(A), 42 U.S.C. § 7410(k)(1)(A) (“completeness criteria”), and must meet requirements set out in the Act and in 40 C.F.R. §§51.308 and 51.309, including, *inter alia*, plans for making reasonable progress towards achieving natural visibility conditions. 40 C.F.R. § 51.308(d)(1). In addition, state implementation plans must contain emission limitations representing the “best available retrofit technology” (“BART”) and schedules for compliance with BART for covered sources, unless the State demonstrates that other alternatives will achieve greater reasonable progress toward natural visibility conditions. 40 C.F.R. § 51.308(e).

18. The Act further sets forth mandatory deadlines for EPA action with respect to plan submissions required under the Act. Pursuant to § 110(k)(1)(B) of the Act, 42 U.S.C. § 7410(k)(1)(B), EPA must determine “no later than 6 months after the date, if any, by which a State is required to submit the plan or revision” whether a state has submitted a required plan meeting the completeness criteria promulgated under section 110(k)(1)(A).

19. Plaintiffs are informed and believe that, as of the date of this complaint, only fourteen states and other jurisdictions have submitted haze SIPs purporting to meet the above-described requirements. Accordingly, plaintiffs allege on information and belief that the vast majority of states required to submit haze SIPs by December 17, 2007, have as yet failed to do so.

20. As discussed above, the Act required each state to submit to haze SIPs by December 17, 2007. Pursuant to section 110(k)(1)(B) of the Act, EPA was therefore required to determine by June 17, 2008 whether each state had submitted the legally mandated haze SIPs meeting the completeness criteria promulgated pursuant to section 110(k)(1)(A) of the Act. Plaintiffs are informed and believe that, as of the date of this complaint, EPA has failed to make such a determination with respect to any state. Accordingly, the Administrator is in violation of

his nondiscretionary duty under § 110(k)(1)(B) to make such determinations within six months of the applicable submittal deadline.

CLAIMS FOR RELIEF

21. Plaintiffs hereby incorporate all previous paragraphs by reference.

22. The Administrator has failed to determine, as required by the Clean Air Act § 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B), whether each of the states have submitted haze SIPs satisfying the completeness criteria promulgated by EPA under CAA section § 110(k)(1)(A), 42 U.S.C. § 7410(k)(1)(A).

23. The acts and omissions referenced in paragraph 22 constitute failure to perform acts or duties that are not discretionary with the Administrator within the meaning of 42 U.S.C. § 7604(a)(2). Plaintiffs are informed and believe that the EPA acts and omissions complained of herein will continue unless enjoined by order of this Court.

24. By letter dated June 25, 2008, plaintiffs placed the Administrator on notice of their intention to commence a civil action against him for failing to perform nondiscretionary duties as alleged in this Complaint. Said Notice is attached hereto and marked as Exhibit A. Notwithstanding such notice, the EPA acts and omissions complained of herein are continuing.

RELIEF REQUESTED

25. WHEREFORE, plaintiffs pray that this Court:

(1) Declare that EPA acts and omissions complained of herein constitute failure to perform a nondiscretionary act or duty (or acts or duties) within the meaning of Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2);

(2) Preliminarily and permanently enjoin the Administrator from continuing his failure to perform nondiscretionary duties as described above;

(3) Order the Administrator to complete all the actions required by 42 U.S.C. §§ 7410(k)(1)(B) no later than 60 days from the date of the Court's order ;


(4) Award plaintiffs their costs of litigation, including reasonable attorney and expert witness fees;

(5) Retain jurisdiction over this action to ensure compliance with the Court's orders; and

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

Dated this 21st day of October, 2008.

Respectfully submitted,


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*Counsel for Plaintiffs
Environmental Defense Fund and
National Parks Conservation Association*



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA NEW YORK, NEW YORK OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

June 25, 2008

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Stephen L. Johnson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

RE: Notice of citizen suit under section 304 of the Clean Air Act regarding violation of nondiscretionary duties and unreasonable delay with respect to regional haze state implementation plans

Dear Administrator Johnson:

Pursuant to 42 U.S.C. §7604(b)(2) and 40 C.F.R. Pt. 54, we hereby give notice on behalf of Environmental Defense Fund and National Parks Conservation Association of intent to commence a civil action against the Administrator of the United States Environmental Protection Agency ("Administrator," "you," or "EPA") for failing to perform certain nondiscretionary duties under the Clean Air Act ("the Act"). As further specified below, you have failed to carry out your nondiscretionary duty under section 110(k)(1)(B) of the Act to timely determine whether the states have submitted state implementation plan revisions ("SIPs" or "plans") required by section 107(d)(7)(A) of the Act and 40 C.F.R. §§51.308 & 51.309 that meet the minimum criteria under §110(k)(1)(A) of the Act. The Act and EPA rules required the states to submit such plans by December 17, 2007 and for EPA to make its nondiscretionary determination under section 110(k)(1)(B) by June 17, 2008.¹

In §169A of the Act, Congress established a national goal of preventing any future, and remedying any existing visibility impairment in mandatory Class I areas which impairment results from manmade air pollution. Sections 169A and 169B of the Act further provided for adoption of SIPs to prevent and remedy such visibility impairment ("haze SIPs"). The Act and rules adopted by EPA pursuant to the Act further required each state to submit haze SIPs to EPA by December 17, 2007. 42 U.S.C. § 7407(d)(7)(A); 40 C.F.R. §§51.308(b), 309(c) (2007).² These haze SIPs must meet requirements set out in the Act and in 40 C.F.R. §51.308 & 51.309.

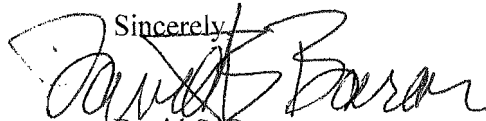
¹ In the alternative, this letter serves as notice of intent to commence a civil action pursuant to section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), to remedy EPA's unreasonable delay in making the required finding

² Section 107(d)(7)(A) of the Act required each State to submit its haze SIP "not later than 3 years after the date on which Administrator promulgates the designations referred to" in §107(d)(6)(B) – that is, designations for the July 1997 PM_{2.5} national ambient air quality standards. EPA promulgated those designations on December 17, 2004. See 70 Fed. Reg. 944,

Section 110(k)(1)(B) of the Act imposes on the Administrator a nondiscretionary duty to determine whether a state has submitted a required plan meeting the minimum criteria ("completeness criteria") promulgated under section 110(k)(1)(A) "no later than 6 months after the date, if any, by which a State is required to submit the plan or revision." Accordingly, section 110(k)(1)(B) of the Act imposed on you a nondiscretionary duty to determine by June 17, 2008 whether each state had submitted a haze SIP as required by §107(d)(7)(A) and 40 C.F.R. §§51.308 & .309 meeting the completeness criteria under §110(k)(1)(A). The June 17, 2008 deadline has passed, but the Administrator has not determined, as mandated by the Act, whether each state has submitted haze SIPs required by the Act and EPA rules satisfying the minimum criteria of 110(k)(1)(A). Accordingly, the Administrator is in violation of his nondiscretionary duty under section 110(k)(1)(B) to make such determinations within six months of the applicable submittal deadline.³

This notice letter is submitted on behalf of: a) Environmental Defense Fund, 257 Park Avenue South, New York, N.Y. 10010, (212) 505-2100; and b) National Parks Conservation Association, 1300 19th Street NW, Suite 300, Washington DC 20036, (202) 454-3335. Environmental Defense Fund and National Parks Conservation Association intend to commence a civil action to enforce the nondiscretionary duties described in this letter (and, in the alternative, to remedy EPA's unreasonable delay) unless EPA has fully performed these duties within sixty days of the postmark date of this letter.

I am acting as legal counsel for the above-named organizations in this matter. I would be happy to discuss the concerns raised in this letter with you. Any communications should be addressed to the undersigned at: Earthjustice, 1625 Massachusetts Avenue, N.W., Suite 702, Washington, D.C. 20036, (202) 667-4500.

Sincerely,

David S. Baron
Attorney

951 (2005). By rule, EPA expressly directed states to submit their haze SIPs not later than December 17, 2007. 40 C.F.R. §§51.308(b), .309(c)(2007).

³ As noted, in the alternative, the Administrator has unreasonably delayed in making the required determinations.