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Alaska Community Action on Toxics, and Sierra Club

14 UNITED STATES DISTRICT COURT
15 FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

18 Plaintiffs,)

19 v.)

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

23 Defendants.)
24)

25 COMPLAINT)
(Case No.)

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INTRODUCTION

1
2 1. Fairbanks has the worst episodic fine-particulate matter (“PM-2.5”) pollution in
3 the nation—“worse than Los Angeles, Milwaukee and Detroit combined,” a local newspaper put
4 it. *See* Exhibit 1 (Amanda Bohman, *Air pollution in North Pole worse than Los Angeles,*
5 *Milwaukee and Detroit combined*, Fairbanks News Miner (May 27, 2016)). Defendants have
6 known about Fairbanks’s PM-2.5 problem for half a decade at least, but they have repeatedly
7 failed to take action mandated by the Clean Air Act. Most recently, they have failed to approve
8 or disapprove a proposed state implementation plan within twelve months of deeming it
9 complete as the statute requires. Due in part to Defendants’ ongoing delay, the people of
10 Fairbanks, including children and the elderly, continue to endanger their health with each breath.

11 2. The Federal government recognizes the dangers that PM-2.5 poses to the people
12 of Fairbanks. Under the Clean Air Act, the U.S. Environmental Protection Agency regulates
13 PM-2.5 pollution, imposing relevant 24-hour National Ambient Air Quality Standards. 62 Fed.
14 Reg. 38,652 (July 18, 1997) (adopting 24-hour NAAQS for PM-2.5); 71 Fed. Reg. 61,144 (Oct.
15 17, 2006) (codified at 40 C.F.R. § 50.13) (strengthening standards).

16 3. EPA designated the Borough a nonattainment area for PM-2.5 in November 2009.
17 74 Fed. Reg. 58,688, 58,696, 58,702 (Nov. 13, 2009). It continues to document that the Borough
18 has some of the worst episodic PM-2.5 pollution in the nation, with ambient air concentrations
19 frequently in excess of the NAAQS for PM-2.5—currently by more than any other previously
20 designated non-attainment area. *See* Exhibit 2 at 1 (EPA, *Areas Previously Designated*
21 *Nonattainment for the 2006 PM-2.5 24-hour NAAQS*).

22 4. But EPA has been derelict in its duties to protect the families of Fairbanks from
23 fine particulate matter pollution. EPA has failed to fulfill its statutorily required duty to fully or
24

1 partially approve, or disapprove, the State of Alaska's state implementation plan submission (SIP
 2 submission) addressing the Fairbanks North Star Borough 24-hour fine particulate matter
 3 nonattainment area. The Clean Air Act gives EPA twelve months from its determination that the
 4 State's submission was administratively complete to issue its approval decision. 42 U.S.C. §
 5 7410(k)(2). On December 31, 2014, the State of Alaska made its SIP submission addressing the
 6 Fairbanks PM-2.5 nonattainment to EPA and, on January 29, 2015, supplemented this
 7 submission by transmitting final regulations related to the proposed SIP. On February 18, 2015,
 8 EPA Office of Air, Waste and Toxics Director Kate Kelly determined that the State of Alaska's
 9 submission was complete, and thus, that the EPA would proceed to consider the SIP submission
 10 for approval. The agency's approval decision was due on February 18, 2016. Twelve months
 11 have come and gone without any response from EPA.

12 5. Accordingly, Plaintiffs CITIZENS FOR CLEAN AIR, a project of ALASKA
 13 COMMUNITY ACTION ON TOXICS and SIERRA CLUB bring this action to compel
 14 Defendant GINA MCCARTHY, in her official capacity as EPA Administrator, and Defendant
 15 DENNIS MCLERRAN, in his official capacity as Regional Administrator of EPA Region 10, to
 16 perform their mandatory duties to ensure that the Federal Government is acting timely to provide
 17 the residents of the Fairbanks North Star Borough the health protections promised to them by
 18 federal law.

19 JURISDICTION

20 6. The Court has jurisdiction over this action to compel the performance of EPA's
 21 non-discretionary duties under the Clean Air Act's citizen suit provision 42 U.S.C. § 7604(a) and
 22 28 U.S.C. § 1331. The Court also has authority to order declaratory and injunctive relief
 23 pursuant to 28 U.S.C. §§ 2201 and 2202.

NOTICE

7. On April 6, 2016, Plaintiffs provided EPA written notice of the claim stated in this action, as required by 42 U.S.C. § 7604(b)(2). See Exhibit 3 (Letter from Erik Grafe, counsel for Plaintiffs, to Gina McCarthy, Adm’r of EPA (April 6, 2016)). A period of sixty days has elapsed since EPA was notified of Plaintiffs’ claim, therefore, notice was proper. See 42 U.S.C. § 7604(b)(2).

VENUE

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

PARTIES

9. Plaintiff CITIZENS FOR CLEAN AIR, a project of ALASKA COMMUNITY ACTION ON TOXICS, is a coalition of local community members and citizens groups in Fairbanks, Alaska who are committed to cleaning up the air while keeping everyone warm in the winter. Alaska Community Action on Toxics is a non-profit environmental health research and advocacy organization whose mission is to assure justice by advocating for environmental and community health.

10. Plaintiff SIERRA CLUB is a national nonprofit organization with 64 chapters and over 625,000 members dedicated to exploring, enjoying, and protecting the wild places of the

1 Earth; to practicing and promoting the responsible use of the Earth’s ecosystems and resources;
2 to educating and enlisting humanity to protect and restore the quality of the natural and human
3 environment; and to using all lawful means to carry out these objectives. The Alaska Chapter of
4 the Sierra Club has approximately 1,475 members, including members in the Fairbanks North
5 Star Borough.

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

13 12. EPA’s failure timely to perform the mandatory duties described in this Complaint
14 has injured and continues to injure the interests of Plaintiffs and their members. The relief
15 requested in this lawsuit would redress these injuries by compelling EPA to take the action
16 mandated by Congress in the Clean Air Act’s requirements for addressing and improving air
17 quality in areas violating national air quality standards, such as the Fairbanks North Star
18 Borough.

19 13. Defendant GINA MCCARTHY is sued in her official capacity as the
20 Administrator of the EPA. She is responsible for taking various actions to implement and
21 enforce the Clean Air Act, including the mandatory duty at issue in this case.

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

4 **STATUTORY FRAMEWORK**

5 15. Congress enacted the Clean Air Act to “speed up, expand, and intensify the war
6 against air pollution in the United States with a view to assuring that the air we breathe
7 throughout the Nation is wholesome once again.” H.R. Rep. No. 91-1146, at 1 (1970), *reprinted*
8 *in* U.S.C.C.A.N. 5356, 5356. Consistent with these goals, the Act requires EPA to set NAAQS
9 for certain pollutants, “the attainment and maintenance of which . . . are requisite to protect the
10 public health” with “an adequate margin of safety,” 42 U.S.C. §§ 7409(a)-(b), and designate
11 areas with air pollution levels that exceed the national standards as “nonattainment” areas, 42
12 U.S.C. § 7407(d)(1).

13 16. The Clean Air Act provides that each state with a nonattainment area must adopt a
14 “state implementation plan” for improving air quality in that area in order to meet the NAAQS.
15 42 U.S.C. §§ 7407(a), 7410(a), 7502(b), and 7513a.

16 17. Under the Clean Air Act, states must submit such plans to EPA for review. 42
17 U.S.C. §§ 7410(a)(1), 7502(b). Once the EPA has determined that a submission is complete, the
18 Clean Air Act requires EPA to reach a “completeness finding” determining whether the SIP
19 submission is complete. 42 U.S.C. § 7410(k)(1)(B).

20 18. Where the EPA has determined that a submission is complete, the agency shall
21 approve in whole or in part or disapprove the State’s submission within twelve months of its
22 completeness finding. 42 U.S.C. §§ 7410(k)(2), (3).

1 19. If EPA fails to take a non-discretionary action, such as approving in whole or in
 2 part or disapproving a SIP submission within 12 months of a completeness finding, “any person
 3 may commence a civil action” to compel prompt action. 42 U.S.C. § 7604(a)(2).

4 STATEMENT OF FACTS

5 20. PM-2.5 refers to fine particles less than or equal to 2.5 micrometers in diameter,
 6 including hazardous forms of dirt, soot, smoke, and liquid droplets found in the air. 71 Fed. Reg.
 7 61,144, 61,145 (Oct. 17, 2006). PM-2.5 is “produced chiefly by combustion processes and by
 8 atmospheric reactions of various gaseous pollutants,” thus “[s]ources of fine particles include . . .
 9 motor vehicles, power generation, combustion sources at industrial facilities, and residential fuel
 10 burning.” *Id.* at 61,146.

11 21. The detrimental effects of PM-2.5 on human health are significant. Exposure has
 12 been associated “with an array of health effects, notably premature mortality, increased
 13 respiratory symptoms and illnesses (e.g. bronchitis and cough in children), and reduced lung
 14 function.” 62 Fed. Reg. 38,652, 38,668 (July 18, 1997). Numerous scientific studies have linked
 15 particle pollution exposure, especially exposure to fine particles, to a variety of problems,
 16 including premature death in people with heart or lung disease, non-fatal heart attacks, irregular
 17 heartbeat, aggravated asthma, decreased lung function, and increased respiratory symptoms, such
 18 as irritation of the airways, coughing, or difficulty breathing, as well as possibly cancer, and
 19 reproductive and developmental harms. *See* Exhibit 4 (EPA, *Particulate Matter (PM)* (May 17,
 20 2016)); Exhibit 5 at 8 (Am. Lung Ass’n, *State of the Air 2015* at 31 (citing EPA, *Integrated*
 21 *Science Assessment for Particulate Matter*, EPA 600/R-08/139F (2009))).

22 22. EPA first adopted 24-hour NAAQS for PM-2.5 in 1997. 62 Fed. Reg. 38,652
 23 (July 18, 1997). In 2006, EPA strengthened these standards, revising the maximum allowed 24-

1 hour average concentration of PM-2.5 from 65 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) to 35 $\mu\text{g}/\text{m}^3$.
2 71 Fed. Reg. 61,144 (Oct. 17, 2006) (codified at 40 C.F.R. § 50.13).

3 23. Fairbanks North Star Borough has some of the worst fine particulate matter
4 pollution in the nation, with ambient air concentrations frequently in excess of the 24-hour
5 NAAQS for PM-2.5. Of all previously designated nonattainment areas for 24-hour PM-2.5,
6 measured by 2012-2014 design values, Fairbanks is the most polluted, with levels almost double
7 the next most-polluted area, at 397 percent of the 24-hour PM-2.5 NAAQS. *See* Exhibit 2 at 1
8 (EPA, *Areas Previously Designated Nonattainment for the 2006 PM-2.5 24-hour NAAQS*).
9 Within the United States, the highest measures of episodic PM-2.5 are reported from a pollution
10 monitor on Hurst Road in the Borough's North Pole area. *See* Exhibit 1 (Amanda Bohman, *Air*
11 *pollution in North Pole worse than Los Angeles, Milwaukee and Detroit combined*, Fairbanks
12 News Miner (May 27, 2016)).

13 24. In designating attainment and nonattainment areas for the 2006 24-hour PM-2.5
14 NAAQS on November 13, 2009, EPA designated the Fairbanks North Star Borough as a
15 nonattainment area. 74 Fed. Reg. 58,688, 58,696, 58,702 (Nov. 13, 2009). Because December
16 14, 2009 was the effective date for EPA's designations, a nonattainment state implementation
17 plan submission for the Fairbanks North Star Borough was due no later than December 14, 2012.
18 42 U.S.C. §§ 7502(b), 7513(a)(2)(B).

19 25. The State of Alaska did not make a SIP submission by December 14, 2012, and
20 failed to comply with its legal duty to submit for the 2006 24-hour PM-2.5 National Ambient Air
21 Quality Standard no later than six months after the plan submission deadline—i.e., no later than
22 June 14, 2013. *See* 42 U.S.C. § 7410(k)(1)(B).

1 31. Having determined the State's SIP submission complete, EPA was required to
2 approve in whole or in part, or disapprove the State's submission within 12 months of EPA's
3 completeness finding. 42 U.S.C. §§ 7410(k)(2), (3), (4). Since EPA's completeness
4 determination was rendered on February 18, 2015, EPA's approval decision was due on
5 February 18, 2016.

6 32. To date, EPA has failed to approve in whole or in part, or disapprove the State's
7 submission addressing the 24-hour PM-2.5 National Ambient Air Quality Standard in the
8 Fairbanks North Star Borough.

9 **CLAIM FOR RELIEF**
10 **(Failure to approve in whole or in part, or disapprove the State's submission)**

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

13 34. The deadline for approval in whole or in part, or disapproval of the State's 2006
14 24-hour PM-2.5 National Ambient Air Quality Standard nonattainment state implementation
15 plan submission was no later than February 18, 2016.

16 35. The EPA has not approved, in whole or in part, or disapproved the State's
17 submission.

18 36. Pursuant to 42 U.S.C. §§ 7410(k)(2), (3), EPA had a mandatory duty to approve
19 in whole or in part or disapprove the State's submission within twelve months of the
20 completeness determination deadline and no later than February 18, 2016.

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

22 38. Accordingly, EPA has been in continuous violation of the Clean Air Act, 42
23 U.S.C. §§ 7410(k)(2), (3), since February 19, 2016, or earlier.

1 Respectfully submitted this 9th day of June, 2016.

2 s/ Janette K. Brimmer

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