

E-filing

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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

COMITE CIVICO DEL VALLE, INC.,

Case No:

C09-04095

ADR
PJH

Plaintiff,

v.

COMPLAINT

LISA JACKSON, in her official capacity as
Administrator of the United States Environmental
Protection Agency, and LAURA YOSHII, in her
official capacity as Acting Regional Administrator
for Region IX of the United States Environmental
Protection Agency,

Defendants.

INTRODUCTION

1. This citizen enforcement action is brought under the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et. seq.*, to compel the U.S. Environmental Protection Agency ("EPA") to undertake an overdue, non-discretionary duty to enforce national air quality requirements in California's Imperial Valley ("Valley").

2. Specifically, EPA has failed to fulfill its mandatory duty to take timely final action to approve, disapprove, or partially approve/disapprove the Imperial Valley Air Pollution Control District ("District") Rules 800 through 806 inclusive that pertain to control of particulate matter

Complaint

1 (“PM-10”) in the Valley. The CAA requires EPA to have acted by deadlines now past due to
2 approve or disapprove Rules 800 through 806 and this lawsuit seeks to compel EPA action.

3 **JURISDICTION**

4 3. This Court has jurisdiction over this action to compel the performance of non-
5 discretionary duties by EPA pursuant to 42 U.S.C. § 7604(a) (citizen suit provision of the CAA) and
6 28 U.S.C. § 1331 (federal question jurisdiction). The relief requested is authorized by 28 U.S.C. §
7 2201(a) and 2202, and 42 U.S.C. § 7604.

8 4. Plaintiff has provided EPA with written notice of the claims stated in this action at
9 least sixty days before commencing this action, as required by 42 U.S.C. § 7604(b)(2). *See Exhibit*
10 *A attached hereto* (Letter from Gideon Kracov, counsel for plaintiff, to Lisa Jackson, Administrator
11 of EPA, dated June 30, 2009).

12 **VENUE AND INTRADISTRICT ASSIGNMENT**

13 5. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) because (1) the
14 EPA Regional Administrator for Region IX is located in San Francisco County and (2) EPA’s
15 alleged inactions relate to the duties of the EPA Regional Administrator in San Francisco. Similarly,
16 because the omissions alleged in this Complaint relate to the duties of the Regional Administrator,
17 assignment to the San Francisco Division of this Court is proper under Civil L.R. 3-2(c) and (d).

18 **PARTIES**

19 6. Plaintiff COMITE CIVICO del VALLE, Inc. (“COMITE”) is a California non-profit
20 corporation located in Brawley in Imperial County, California, dedicated to serving the needs of the
21 Imperial Valley’s unserved and underserved populations through health promotion and education.
22 COMITE has numerous members including members of protected classifications residing in the
23 Valley area who breathe PM-10 and are negatively affected by the violations identified herein.

24 7. Members of plaintiff organization live, raise their families, work (including assisting
25 patients suffering adverse health effects from air pollution), recreate, and conduct educational,
26 research, advocacy and other activities in the Valley. They are adversely affected by exposure to
27 levels of air pollution that exceed the national health-based ozone and particulate matter standards
28 established under the CAA. The adverse effects of such pollution include actual or threatened harm

1 to their health, their families' health, their professional, educational, and economic interests, and
2 their aesthetic and recreational enjoyment of the environment in the Valley.

3 8. The CAA violations alleged in this Complaint have injured and continue to injure the
4 interests of the plaintiff organization and its members. Granting the relief requested in this lawsuit
5 would redress these injuries by compelling EPA action that Congress determined to be an integral
6 part of the statutory scheme for improving air quality in areas such as the Valley.

7 9. Defendant LISA JACKSON is sued in her official capacity as the Administrator of
8 the EPA. She is responsible for taking various actions to implement and enforce the CAA, including
9 the actions sought in this Complaint.

10 10. Defendant LAURA YOSHII is sued in her official capacity as Acting EPA Regional
11 Administrator for Region IX. She is responsible for implementing and enforcing the CAA in Region
12 IX, which includes the Valley.

13 STATUTORY FRAMEWORK

14 11. The CAA directs EPA to prescribe national ambient air quality standards ("NAAQS")
15 "the attainment and maintenance of which . . . are requisite to protect the public health" with "an
16 adequate margin of safety." 42 U.S.C. § 7409(a), (b).

17 12. EPA has established a 24-hour NAAQS for PM-10. 40 C.F.R. § 50.6(a), (b). PM-10
18 is defined as particulate matter having a diameter of less than or equal to ten microns. 42 U.S.C. §
19 7602(t).

20 13. The CAA directs EPA to designate areas with ambient air concentrations that exceed
21 the PM-10 standards as "nonattainment" areas. *Id.* § 7407(d)(4)(B). The CAA further classifies
22 these nonattainment areas as either "moderate" or "serious" based on the severity of the PM-10
23 pollution problem in each. *Id.* § 7513.

24 14. The Valley on numerous days and in numerous locations suffers from ambient air
25 concentrations well in excess of federal standards for PM-10. PM-10 is comprised of fine particles
26 such as dust, soot, smoke, and fumes that can be suspended in the air for extended periods of time.
27 "[W]hen inhaled, PM-10 particles can penetrate deep into the respiratory tract where they can lodge
28 in the lung tissue and lead to a variety of respiratory problems." Sierra Club v. United States

1 Environmental Protection Agency, 346 F.3d 955, 957 n.2 (9th Cir. 2003). In 2003, the Ninth Circuit
2 Court of Appeals confirmed the Valley's exceedances and ordered that EPA reclassify the area to be
3 in "serious nonattainment" for PM-10. *Id.* EPA did so in 2004.

4 15. Each state, or region of a state, must adopt a pollution control plan containing
5 measures and rules to ensure attainment or maintenance of the national standards. 42 U.S.C. §
6 7410(a)(1). All such plans and rules must be submitted to and approved by EPA. *Id.* § 7410(a)(1),
7 (k). Collectively, the full set of state air quality rules approved by EPA for each state is known as a
8 State Implementation Plan ("SIP"). Once a SIP or rule revision is approved by EPA, its
9 requirements become federal law. *Id.* § 7604.

10 16. Pursuant to these laws, EPA shall act on a state's SIP submissions and revisions,
11 including the District's Rules 800 through 806 at issue here, by full or partial approval or
12 disapproval, within twelve months of a completeness finding. 42 U.S.C. § 7410(k)(2). Section
13 110(k)(1)(B) of the Act, 42 U.S.C. § 7410(k)(1)(B), requires that EPA shall make a completeness
14 finding within 60 days of the date that EPA receives a plan or plan revision. A Plan or Plan revision
15 shall be deemed complete by operation of law if EPA fails to make a completeness finding within 6
16 months of the date that EPA receives a plan or plan revision. 42 U.S.C. § 7410(k)(1)(B).

17 17. If EPA disapproves the revision, then the CAA requires EPA to impose sanctions
18 against the offending state or region, including increased offsets for new and modified major
19 stationary sources or a prohibition on the use of federal highway funds, unless the State submits
20 revisions within 18 months. *Id.* §§ 7509(a), (b).

21 18. Once EPA approves a SIP or SIP revision, the region must comply with any and all
22 emission standards and limitations contained in the SIP, and all such standards and limitations
23 become federal law and are enforceable by EPA and citizens in federal courts. 42 U.S.C. § 7413; 42
24 U.S.C. § 7604(a), (f).

25 19. If EPA fails to comply with a non-discretionary duty, such as acting on a proposed
26 SIP revision within the CAA deadlines, the CAA allows citizens to bring suit to compel EPA to
27 perform its duty. *Id.* § 7604(a)(2).

FACTUAL BACKGROUND

1
2 20. As required by Sierra Club, 346 F.2d at 957, EPA reclassified the Imperial Valley to
3 be a “serious” nonattainment area for PM-10 on August 11, 2004. 69 Fed. Reg. 48792.

4 21. The primary sources of PM-10 pollution in the Valley are unpaved roads, farming
5 operations, re-suspended dust on paved roads, windblown dust, waste burning and disposal,
6 construction and demolition, industrial processes, fuel combustion and mobile sources, including on-
7 road motor vehicles.

8 22. In response to the Sierra Club decision and the “serious” non-attainment designation,
9 on or about November 11, 2005, the District adopted Rules 800 through 806 to implement the
10 requirements of the “serious” PM-10 reclassification of Imperial County pursuant to the Act. The
11 Rules, which form the core of the Valley’s PM-10 control strategy, include measures to address
12 emissions from construction activities, open areas, paved and unpaved roads and conservation
13 management practices. The District thereafter transmitted the Rules to the California Air Resources
14 Board (“ARB”) for approval and submission to EPA.

15 23. The ARB then submitted the District’s Rules 800 through 806 to EPA on or about
16 June 16, 2006, but EPA since then has not taken action to approve or disapprove the Rules.

17 24. EPA had a mandatory duty to act on Rules 800 through 806 no later than on or about
18 December 16, 2007. Thus, for more than one and a half years, EPA has violated and continues to
19 violate its non-discretionary duty under section 110(k)(2) of the Act, 42 U.S.C. § 7410(k)(2), to take
20 action on the Rules.

21 25. EPA has not only failed to adhere to the Act’s timelines, but its lack of action has
22 failed the duty to ensure that the District’s rules comport with the Act and the applicable PM-10
23 requirements. Thus, for example, although it has not formally taken action, EPA noted in a writing
24 to the District dated July 3, 2008 (*see Exhibit B attached hereto*) with regard to the District’s Rules
25 800 through 806, *inter alia*, that “we do not believe they represent BACM (Best Available Control
26 Measures) for sources that must reduce windblown dust” (parens added).

27 26. Had EPA approved these Rules on time, EPA and citizens would already be able to
28 enforce them. Had EPA disapproved the Rules as inconsistent with the CAA, California and the

1 District would have already made changes to ensure that the Rules meet the minimum requirements
2 of the CAA.

3 27. Instead, EPA has failed to act on these Rules, ignoring EPA's role to ensure timely
4 that California's and the Valley's rules and plans comply with the CAA.

5
6 **FIRST CLAIM FOR RELIEF**

7 **FAILURE TO PERFORM A NON-DISCRETIONARY DUTY TO ACT ON**

8 **DISTRICT RULES 800 THROUGH 806**

9 **(42 U.S.C. § 7604(a)(2))**

10 28. Plaintiff realleges each and every allegation set forth above, as if fully set forth
11 herein.

12 29. The ARB submitted the District's Rules 800 through 806 to EPA on or about June 16,
13 2006. EPA was therefore obligated to act on the District's rules, by full or partial approval or
14 disapproval, within twelve months of a completeness finding. 42 U.S.C. § 7410(k)(2). A revision
15 shall be deemed complete by operation of law if EPA fails to make a completeness finding within 6
16 months of the date that EPA receives it. *Id.* § 7410(k)(1)(B).

17 30. However, to this day, EPA has not taken action with regard to the District's Rules
18 800 to 806 pursuant to 42 U.S.C. § 7410(k)(2). Accordingly, EPA has been in continuous violation
19 of 42 U.S.C. § 7410(k)(2) since on or about December 16, 2007.

20 31. This CAA violation constitutes a "failure of the Administrator to perform any act or
21 duty under this chapter which is not discretionary with the Administrator," within the meaning of the
22 CAA citizen suit provision. *Id.* § 7604(a)(2). This violation is ongoing and will continue unless
23 remedied by this Court.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

26 1. DECLARE:

27 A. EPA is in violation of the CAA for failing to act on the District's Rules 800
28 through 806;

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- 2. ISSUE a preliminary and/or permanent injunction directing EPA to:
 - A. act on the District's Rules 800 through 806;
- 3. RETAIN jurisdiction over this matter until such time as EPA has complied with its non-discretionary duties under the CAA;
- 4. AWARD to plaintiff its costs of litigation, including reasonable attorney and expert witness fees; and
- 5. GRANT such additional relief as the Court may deem just and proper.

DATED: September 1, 2009

Respectfully submitted,



GIDEON KRACOV

Attorney for Plaintiff

1 Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed government
2 agencies have a non-financial interest in the subject matter of this case that could be substantially
3 affected by the outcome of this proceeding: 1) the California Air Resources Board is responsible for
4 submitting air quality plans and rules to defendant United States EPA and 2) the Imperial County Air
5 Pollution Control District is responsible for submitting air quality plans and rules to defendant
6 United States EPA.

7 DATED: September 1, 2009

Respectfully submitted,

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10 GIDEON KRACOV

11 Attorney for Plaintiff
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