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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

)
)
CENTER FOR BIOLOGICAL DIVERSITY,
SIERRA CLUB, and CENTER FOR
ENVIRONMENTAL HEALTH,
)

Plaintiffs,

v.

MICHAEL S. REGAN,
in his official capacity as Administrator of the
United States Environmental Protection Agency,
)

Defendant.
)

) Civil Action No. _____

) **COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

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

I. INTRODUCTION

1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and CENTER FOR ENVIRONMENTAL HEALTH (collectively, “Plaintiffs”) challenge the failure of Defendant MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency, (“Administrator” or “EPA”) to perform mandatory duties

1 required by the Clean Air Act, 42 U.S.C. §§ 7401-7671q. Specifically, the Clean Air Act
2 establishes mandatory deadlines for Defendant to complete a thorough review of the air quality
3 criteria and National Ambient Air Quality Standards (“NAAQS”) for nitrogen oxides (“NOx”),
4 to make such revisions to the air quality criteria and these NAAQS as may be appropriate, to
5 promulgate such new NAAQS as may be appropriate, and to publish notice of such actions in the
6 Federal Register. Administrator Regan has failed to meet these deadlines. Plaintiffs thus bring
7 this action to ensure that they and their members and others who breathe harmful air pollution in
8 communities around the nation and appreciate ecosystems damaged by harmful air pollution will
9 enjoy the up-to-date scientific analysis and air quality standards that Congress intended them to
10 have. Accordingly, Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and
11 CENTER FOR ENVIRONMENTAL HEALTH bring this action against Defendant MICHAEL
12 S. REGAN, in his official capacity as EPA Administrator, to compel him to perform these
13 mandatory duties.

14 15 **II. JURISDICTION**

16 2. This case is a Clean Air Act citizen suit. The Court has jurisdiction over this action
17 pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 42 U.S.C. § 7604(a) (jurisdiction
18 for citizen suits for failure to perform a non-discretionary duty required by the Clean Air Act).

19 3. An actual controversy exists between the parties. This case does not concern federal
20 taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146, and does not involve the Tariff Act of
21 1930. Thus, this Court has authority to order the declaratory relief requested under 28 U.S.C. §
22 2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue
23 injunctive relief.

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III. NOTICE

4. On July 11, 2023, Plaintiffs mailed to EPA by certified mail, return receipt requested, written notice of intent to sue regarding the violations alleged in this Complaint. EPA received this notice of intent to sue letter no later than July 24, 2023. More than sixty days have passed since EPA received the notice of intent to sue letter. EPA has not remedied the violations alleged in this Complaint. Therefore, a present and actual controversy exists.

IV. VENUE

5. Defendant EPA resides in this judicial district. EPA Region 9 is headquartered in San Francisco. This civil action is brought against an officer of the United States acting in his official capacity. A substantial part of the events or omissions giving rise to the claims in this case occurred in the Northern District of California. Plaintiff Center for Environmental Health resides in this judicial district. Plaintiff Sierra Club has its national headquarters in this judicial district. Therefore, venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

V. INTRADISTRICT ASSIGNMENT

6. A substantial part of the events and omissions giving rise to the claims in this case occurred in the County of San Francisco. EPA Region 9 is headquartered in San Francisco. Accordingly, assignment to the San Francisco Division or the Oakland Division is proper pursuant to Civil L.R. 3-2(c) and (d).

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VI. PARTIES

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2 7. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)
3 corporation incorporated in California. The Center for Biological Diversity has approximately
4 48,000 members throughout the United States and the world. The Center for Biological
5 Diversity's mission is to ensure the preservation, protection, and restoration of biodiversity,
6 native species, ecosystems, public lands and waters, and public health through science, policy,
7 and environmental law. Based on the understanding that the health and vigor of human societies
8 and the integrity and wildness of the natural environment are closely linked, the Center for
9 Biological Diversity is working to secure a future for animals and plants hovering on the brink of
10 extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us.

11 8. The Center for Biological Diversity and its members include individuals with varying
12 interests in public health, wildlife species, and their habitat ranging from scientific, professional,
13 and educational to recreational, aesthetic, moral, and spiritual. Further, the Center for Biological
14 Diversity's members enjoy, on an ongoing basis, the biological, scientific, research, educational,
15 conservation, recreational, and aesthetic values of the regions inhabited by these species,
16 including the regions at issue in this action. The Center for Biological Diversity's members
17 observe and study native species and their habitat, and derive professional, scientific,
18 educational, recreational, aesthetic, inspirational, and other benefits from these activities and
19 have an interest in preserving the possibility of such activities in the future. The Center for
20 Biological Diversity and its members have participated in efforts to protect and preserve public
21 health and natural areas, including the habitat essential to the continued survival of native
22 species, and to address threats to the continued existence of these species, including the threats
23 posed by air pollution and other contaminants.

1 9. Plaintiff SIERRA CLUB is a non-profit conservation organization with its national
2 headquarters in Oakland, California. Sierra Club’s mission is to explore, enjoy, and protect the
3 wild places of the Earth; to practice and promote the responsible use of the Earth's resources and
4 ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and
5 human environment; and to use all lawful means to carry out these objectives. Sierra Club
6 performs this mission through advocacy, litigation, and educational outreach. Sierra Club and its
7 members are greatly concerned about the effects of air pollution on human health and the
8 environment and have a long history of involvement in activities related to air quality.

9 10. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH is an Oakland, California-based
10 non-profit organization that helps protect the public from toxic chemicals and promotes business
11 products and practices that are safe for public health and the environment. The Center for
12 Environmental Health works in pursuit of a world in which all people live, work, learn, and play
13 in healthy environments.

14 11. Plaintiffs’ members live, work, recreate, travel, and engage in other activities throughout
15 the areas at issue in this complaint and will continue to do so on a regular basis. Pollution in the
16 affected areas threatens and damages, and will continue to threaten and damage, the health and
17 welfare of Plaintiffs’ members, as well as their ability to engage in and enjoy their other
18 activities. Pollution diminishes Plaintiffs’ members’ ability to enjoy the aesthetic qualities and
19 recreational opportunities of the affected areas.

20 12. Plaintiff Center for Biological Diversity has a member that has lived and worked in the
21 Denver Metro/North Front Range ozone nonattainment area, in Boulder, Colorado, for 24 years.
22 This member also resides in Lyons, Colorado, off and on. This member suffers from asthma that
23 is triggered and made worse by poor air quality. This member enjoys outdoor activities,

1 including running, biking, hiking, playing Ultimate Frisbee, and climbing. This member
2 partakes in these activities weekly and will continue to do so except for his limitations due to
3 asthma. This member takes medication to treat his asthma which is expensive and gives them
4 side effects that affect his daily life. Moreover, this member regularly travels around the country
5 for his work as a political activist—including to northern and southern California; Iowa;
6 Louisiana; Massachusetts; New York; Ohio; and Pennsylvania—and enjoys engaging in outdoor
7 activities when he travels. He intends to continue traveling for work and these activities. Thus,
8 this member is affected by poor air quality nationwide. This member is adversely affected by
9 EPA's failure to review and revise, as necessary, the primary NO_x NAAQS and the air quality
10 criteria.

11 13. Plaintiff Center for Biological Diversity also has a staff member whose work focuses on
12 mitigating the effects of pesticides on human health. In his assessment of the adverse health
13 effects caused by various air pollutants, he uses NO_x standards and analyses, including the air
14 quality criteria, done by the EPA to anticipate the cascading effects that spraying pesticides will
15 have, given the ambient air pollution. This individual has given expert testimony, and intends to
16 provide more in the future, to entities such as the Oregon state senate, advising them on air
17 emissions from dairy farming operations. To provide up-to-date, informed testimony to these
18 entities, this member relies on NAAQS and associated work products published by EPA. This
19 member is adversely affected by EPA's failure to review the primary NO_x NAAQS and the air
20 quality criteria within the timeframe required by law.

21 14. EPA's failure to timely perform the mandatory duties described herein also adversely
22 affects Plaintiffs, as well as their members, by depriving them of procedural protection and
23 opportunities, in addition to information that they are entitled to under the Clean Air Act. The

1 failure of EPA to perform the mandatory duties also creates uncertainty for Plaintiffs’ members
2 as to whether they are exposed to excess air pollution. The above injuries will continue until the
3 Court grants the relief requested herein.

4 15. Defendant MICHAEL S. REGAN is the Administrator of the EPA. In that role
5 Administrator Regan has been charged by Congress with the duty of administering the Clean Air
6 Act, including the mandatory duties at issue in this case. Administrator Regan is also charged
7 with overseeing all EPA regional offices, including EPA Region 9, which is headquartered in
8 San Francisco.

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10 **VII. LEGAL BACKGROUND**

11 16. Congress enacted the Clean Air Act to “speed up, expand, and intensify the war against
12 air pollution in the United States with a view to assuring that the air we breathe throughout the
13 Nation is wholesome once again.” H.R. Rep. No. 1146, 91st Cong., 2d Sess. 1,1, 1970 U.S.
14 Code Cong. & Admin. News 5356, 5356. To promote this, the Act requires EPA to set National
15 Ambient Air Quality Standards for certain pollutants. 42 U.S.C. § 7409(a). National Ambient
16 Air Quality Standards establish maximum allowable concentrations in the air of such pollutants.

17 17. Specifically, Section 108 of the CAA requires EPA to identify pollutants that “may
18 reasonably be anticipated to endanger public health and welfare” and to issue air quality criteria
19 for those pollutants. 42 U.S.C. § 7408. Section 109 requires EPA to promulgate primary
20 NAAQS for the pollutants identified under section 108. 42 U.S.C. § 7409. Primary standards
21 must be sufficient to protect the public health, while secondary standards must safeguard the
22 public welfare. 42 U.S.C. § 7409(b).

1 18. Section 109(d)(1) further requires that “at five year intervals” EPA “shall complete a
2 thorough review of the criteria published under [section 108] and the national ambient air quality
3 standards promulgated under this section and shall make such revisions in such criteria and
4 standards and promulgate such new standards as may be appropriate.” 42 U.S.C. § 7409(d)(1).
5 Each time it goes through this review process, EPA must publish in the Federal Register its
6 revision decision concerning the air quality criteria and NAAQS for the pollutant at issue
7 (including any new or revised NAAQS resulting from that review), as well as notice of the
8 issuance of any revised air quality criteria for that pollutant. *See* 42 U.S.C. §§ 7408(d), 7607(d).

9 19. Courts have held that the duties prescribed by § 109(d)(1) are nondiscretionary. For
10 example, the Second Circuit rejected an argument that § 109(d)(1) merely imposed a duty to
11 avoid unreasonable delay, finding that the provision instead established a nondiscretionary duty:
12 “when, as here, a statute sets forth a bright-line rule for agency action, . . . there is no room for
13 debate—Congress has prescribed a categorical mandate that deprives EPA of all discretion over
14 the timing of its work.” *American Lung Association v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992)
15 (emphasis added). The D.C. Circuit subsequently “agree[d]” with this Second Circuit ruling.
16 *American Trucking Assns. v. United States EPA*, 175 F.3d 1027, 1047 (D.C. Cir. 1999),
17 *rehearing granted in part on other grounds, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd in*
18 *part on other grounds, aff'd in part sub nom. Whitman v. American Trucking Assns.*, 531 U.S.
19 457 (2001).

20 20. Moreover, EPA’s own interpretation of § 109(d)(1) acknowledges the nondiscretionary
21 nature of the deadline. For example, with respect to the NAAQS for NO_x, EPA long ago
22 recognized that section 109(d)(1) “requires EPA to review the scientific basis of existing
23 National Ambient Air Quality Standards (NAAQS) every 5 years.” 45 Fed. Reg. 77,768 (Nov.

1 24. 1980). More recently, EPA reaffirmed this straightforward reading with respect to the
2 NAAQS for ozone: “Under section 109(d)(1) of the Act, EPA is required to perform a review of
3 the ozone NAAQS every five years.” 61 Fed. Reg. 19,195 (May 1, 1996). Thus, EPA has
4 interpreted 42 U.S.C. § 7409(d)(1) to impose a mandatory duty.

6 **VIII. FACTS**

7 21. Nitrogen oxides, such as nitrogen dioxide (NO₂), are highly reactive gases emitted
8 primarily through the combustion of fossil fuels in mobile and stationary sources.

9 22. NO_x emissions contribute to a variety of public health problems. NO_x emissions are a
10 precursor of ground-level ozone and particulate matter pollution. NO_x emissions also play a role
11 in the accumulation of excess nitrates in drinking water, the eutrophication of aquatic ecosystems
12 and nitrification of soils, global climate change, increases in toxic pollutant levels, and the
13 depletion of the ozone layer. 70 Fed. Reg. 8,888-89 (Feb. 23, 2005).

14 23. EPA completed its last review of the primary NO_x NAAQS on April 18, 2018. 83 Fed.
15 Reg. 17,226 (Apr. 18, 2018). As part of this review, EPA determined that it did not need to
16 revise the primary NO_x NAAQS. *Id.* This final action became effective on May 18, 2018. *Id.*

17 24. The EPA last reviewed the air quality criteria document as it relates to the primary NO_x
18 NAAQS, which EPA now calls an Integrated Science Assessment (“ISA”), for NO_x on January
19 28, 2016. 81 Fed. Reg. 4,910 (Jan. 28, 2016). In December 2022, EPA issued a call for
20 scientific and policy relevant information for the development of a new ISA for nitrogen oxides
21 in connection with the primary NAAQS. 87 Fed. Reg. 75,625 (December 9, 2022). EPA has not
22 finalized this new ISA.

1 25. More than five years have passed since EPA completed its last review of the primary
2 NO_x NAAQS and air quality criteria, but EPA has not fulfilled its mandatory duty to review and
3 update as necessary these NAAQS and criteria. According to the clear statutory deadlines, EPA
4 has a non-discretionary duty to complete this review by May 18, 2023. Thus, EPA's ongoing
5 failure to complete this review and to make the necessary revisions to the NAAQS is contrary to
6 Section 109(d)(1) of the Clean Air Act. *See* 42 U.S.C. § 7409(d)(1).

7 26. EPA's failure to perform this mandatory duty is all the more problematic because science
8 evidence indicates that the primary NO_x NAAQS need to be improved to adequately protect
9 human health. The 2016 ISA was finalized after the promulgation of the NO_x NAAQS in 2010,
10 but before the last review of the primary NO_x NAAQS in 2018. The 2016 ISA demonstrates
11 that the health impacts from NO₂ are worse than was known when EPA set the 2010 NAAQS,
12 but EPA failed to update the primary NO_x NAAQS to reflect this as part of its 2018 review.

13 27. For example, for setting the 2010 NAAQS, the science was sufficient to infer a likely
14 causal relationship between short-term exposure NO₂ and respiratory effects. Integrated Science
15 Assessment for Oxides of Nitrogen – Health Criteria, January 2016 (2016 ISA) at lxxxii.
16 However, the 2016 ISA solidifies this finding such that EPA can definitively say there is a causal
17 relationship between short term NO₂ exposure and respiratory effects. There are now controlled
18 human exposure studies showing NO₂ can trigger asthma attacks. 2016 ISA at lxxxiii. There is
19 also now consistent evidence showing long-term exposure can cause the development of asthma.
20 2016 ISA at lxxxiv.

21 28. Moreover, for the setting of the 2010 NAAQS, the science was inadequate to infer a
22 relationship between short-term NO₂ exposure and cardiovascular effects. In the 2016 ISA,
23 however, the science suggests that there is a causal relationship between NO₂ and cardiovascular

1 effects. 2016 ISA at lxxxii. The same is true for long-term exposure and cardiovascular effects,
2 diabetes, birth outcomes, total mortality, and cancer. *Id.*

3 29. These suggestions of a causal relationship are very important. NAAQS setting is not like
4 a tort case where EPA must prove causation by a preponderance of the evidence. Rather,
5 Congress' directive that EPA provide an adequate margin of safety is meant to address
6 uncertainties associated with inconclusive scientific and technical information. 2016 ISA at lxxi.
7 This new science, however, provides no protection to the American public until EPA uses the
8 science to revise the NAAQS.

9 30. As stated above, this 2016 ISA predates EPA's last review of the primary NO_x NAAQS
10 from 2018. That said, the new information contained in the 2016 ISA has yet to be reflected in
11 the NAAQS, since EPA declined to revise the NO_x NAAQS after its review in 2018. Thus, the
12 above information regarding the 2016 ISA has yet to be incorporated into the NAAQS and is
13 relevant to EPA's duty to review the NAAQS and revise them as needed every five years.

14 31. Moreover, studies post-dating the 2016 ISA and EPA's 2018 review have expounded
15 upon the causal relationships assessed in the ISA. For example, in 2021, a multilocational study
16 claims to have provided key evidence on the independent and linear associations between short-
17 term NO₂ pollution and increased risk of total, cardiovascular, and respiratory mortality. Xia
18 Meng et al., *Short term associations of ambient nitrogen dioxide with daily total, cardiovascular,*
19 *and respiratory mortality: multilocation analysis in 398 cities*, 372 *BMJ* 534 (2021). Similarly,
20 long-term exposures to NO₂ have been further linked to cardiovascular effects. Daniela Fetch et
21 al., *Exposure to Elevated Nitrogen Dioxide Concentrations and Cardiac Remodeling in Patients*
22 *with Dilated Cardiomyopathy*, 6 *Journal of Cardiac Failure* 924 (2021). These studies post-

1 dating the 2016 ISA, among several others, provide EPA with new information it must consider
2 in an updated ISA as part of a new review of the primary NO_x NAAQS.

3 32. Further, as stated above, in December 2022, EPA issued a call for scientific and policy
4 relevant information for the development of a new ISA for nitrogen oxides in connection with
5 the primary NAAQS. 87 Fed. Reg. at 75,625. EPA has not finalized this new ISA. Through
6 this process, EPA will receive new information with which to make updated determinations on
7 causal relationships between nitric oxide pollution and adverse health effects.

8 33. In addition, EPA has used NO₂, one type of NO_x, as the “indicator” for the primary NO_x
9 NAAQS to determine which parts of the country are violating the NO_x NAAQS since first
10 promulgating the NO_x NAAQS in 1971. *See* 36 Fed. Reg. 8186 (Apr. 30, 1971). EPA
11 continues to use NO₂ as the indicator, *see* 83 Fed. Reg. at 17,252, despite evidence that
12 measuring only NO₂ does not fully capture NO_x emissions. For example, nitrogen pollution
13 from exposure to traffic can lead to elevated levels of nitric oxide exposure before nitric oxide
14 converts to NO₂ in the ambient air. Studies show that both nitric oxide and NO₂ both contribute
15 to adverse health effects. For instance, in a study published in *Atmospheric Environment*,
16 researchers found that nitric oxide, separate and apart from NO₂, is associated with increased
17 healthcare costs for patients. *See, e.g.,* Stacey E. Alexeeff et al., *Association between traffic*
18 *related air pollution and direct health care costs in Northern California*, 287 *Atmospheric*
19 *Environment* 119271 (2022). Accordingly, measurement of NO₂ alone as a surrogate for NO_x
20 fails to accurately account for NO_x in the ambient air and the harms NO_x imposes on public
21 health. EPA’s delay in reviewing the primary NO_x NAAQS and air quality criteria prolongs and
22 exacerbates this problem, and deprives the public and Plaintiffs of the opportunity to submit
23 formal public comment on this important issue.

1
2 **IX. CLAIM FOR RELIEF**

3 CLAIM ONE

4 **(CAA Sections 304(a)(2); 109(d)(1); & 307(d) for NO_x)**

5 34. Each allegation set forth in the complaint is incorporated herein by reference.

6 35. The deadline under § 109(d)(1) of the Clean Air Act for Defendant to complete another
7 cycle of review, revision, and promulgation actions with respect to NO₂ and NO_x expired on
8 May 18, 2023. Nonetheless, Defendant has failed to perform those actions.

9 36. Specifically, EPA completed its last review of the primary NO_x NAAQS on April 18,
10 2018. 83 Fed. Reg. 17,226 (Apr. 18, 2018) (with an effective date of May 18, 2018).

11 37. Thus, EPA had a mandatory duty to complete a thorough review of the NAAQS and
12 criteria document, revise the existing primary NO_x NAAQS and criteria document, promulgate
13 new NAAQS as appropriate, and publish notice of such actions no later than May 18, 2023. 42
14 U.S.C. §§ 7409(d), 7607(d).

15 38. Defendant has failed to do so.

16 39. Defendant's failure to perform each of the above actions constitutes a failure to perform
17 an act or duty (or acts or duties) that are not discretionary with Defendant within the meaning of
18 Clean Air Act § 304(a)(2). 42 U.S.C. § 7604(a)(2).

19
20 **REQUEST FOR RELIEF**

21 WHEREFORE, Plaintiffs respectfully request that the Court:

- 22 A. Declare that the Administrator is in violation of the Clean Air Act with regard to his
23 failure to perform the mandatory duties listed above;

- 1 B. Issue a mandatory injunction requiring the Administrator to perform his mandatory duties
2 listed above by certain dates;
- 3 C. Retain jurisdiction of this matter for purposes of enforcing the Court’s order;
- 4 D. Grant Plaintiffs their reasonable costs of litigation, including attorneys’ and experts’ fees;
5 and;
- 6 E. Grant such further relief as the Court deems just and proper.

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8 Respectfully submitted,

9 /s/ Jonathan Evans

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