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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In Re Ozone Designation Litigation	Case No: 4:17-cv-06900-HSG **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Date: February 22, 2018 Time: 2:00 p.m. Place: Courtroom 2, 4th Floor Judge: Haywood S. Gilliam, Jr.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant summary judgment to Plaintiffs Health and Environmental Groups[1] and order Defendant, the Administrator of the U.S. Environmental Protection Agency ("the Administrator" or "EPA"), to fulfill his overdue legal obligation to promulgate initial air quality designations for all areas of the country under the 2015 national ambient air quality standards ("NAAQS" or "standards") for ozone pursuant to the schedule below, with the designations to take effect immediately upon promulgation.

Liability. There is no dispute that the Administrator has failed to carry out his mandatory duty by the statutory deadline of October 1, 2017. Pls.' Br. 12-13 (Dkt. 11). EPA concedes it and does not contest its liability. EPA Opp. 2, 9 (Dkt. 40). Thus, entering summary judgment in favor of Plaintiffs is appropriate. *See, e.g.*, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52 (D.D.C. 2006) (citing cases).

Partial Dispute on Remedy. To end and remedy the Clean Air Act violation EPA has undisputedly committed, Health and Environmental Groups seek two kinds of relief: a declaratory judgment and an order compelling EPA to complete designations by a fixed deadline. Pls.' Br. 1, 23; Pls.' Admin. Mot. 4 (Dkt. 37).[2] On the first, EPA does not respond, and thus there is no dispute that declaratory relief should be granted. On the second, EPA admits that an order to compel action is appropriate and does not oppose entry of such an order. *See* EPA Opp. 2-3, 7-8, 15. For most areas of the country, EPA seeks entry of an order compelling it to promulgate designations by April 30, 2018, a deadline that accords with Health and Environmental Groups' relief request. Pls.' Admin. Mot. 4; EPA Opp. 15. Because EPA has already taken steps that

[1] Health and Environmental Groups consist of American Lung Association, American Public Health Association, American Thoracic Society, Appalachian Mountain Club, Center for Biological Diversity, Environmental Defense Fund, Environmental Law and Policy Center, National Parks Conservation Association, Natural Resources Defense Council (NRDC), Sierra Club, and West Harlem Environmental Action.

[2] Though EPA styles its filing an opposition to Plaintiffs' Administrative Motion, EPA does not actually oppose Plaintiffs' changing the injunctive relief they requested in their motion. It instead opposes the substance of the changed relief.

further delay the San Antonio area's designations, Health and Environmental Groups must amend their relief request for the San Antonio area.

Thus, Health and Environmental Groups and EPA disagree solely on two aspects of the remedial order: (1) the deadline for EPA to complete its overall legal obligation by promulgating designations for the San Antonio area; and (2) the effective date of the designations. Health and Environmental Groups take no position on State Plaintiffs' request for immediate designations of areas for which EPA is not changing the state or tribal recommendation.

Rather than work diligently to complete its duty to make designations, EPA has dawdled. That is especially the case for the San Antonio area, where EPA waited months before notifying the public that it sought more time to designate that area than any other region of the country. The Administrator is not moving as expeditiously as possible to promulgate designations for the area. Far from what is required by the Clean Air Act, EPA's process contravenes it and threatens to open a significant loophole in the clear deadline the Act establishes for EPA action on designations. The result is more pollution for a longer time, and more asthma attacks, hospitalizations, and other serious harms. Instead, this Court should require EPA to issue a "120-day" letter to Texas, informing it of EPA's intended designations for the area, within seven days of the Court's order and promulgate the designations 120 days later.

EPA's attempts to dispute the appropriateness of an order compelling it to make the designations effective immediately upon promulgation are similarly untenable. Nowhere does EPA dispute that Plaintiffs will receive the protections to which the Clean Air Act entitles them sooner with an earlier effective date. Thus, an order compelling an effective date concurrent with promulgation is appropriate because, compared with EPA's preference, it will more effectively remedy the harms to Plaintiffs from EPA's concededly unlawful delay and meet the objectives of the Clean Air Act. That is the relevant standard, not, as EPA contends, what the scope of EPA's unperformed nondiscretionary duty is or what EPA's preferences for further delay and past practice on effective dates are.

STATEMENT OF FACTS RELEVANT TO SAN ANTONIO AREA

Texas met its deadline for providing area designation recommendations—including Bexar County as a nonattainment area—by submitting them a full year before EPA's promulgation deadline of October 1, 2017. Wehrum Decl. ¶ 37 & attach.7 at 4. In August 2017, Texas sent a letter to EPA providing substantive additional data on Hood and El Paso Counties, making no mention of additional information being gathered or available on any other part of the state. https://www.epa.gov/sites/production/files/2017-09/documents/texas_08-23-17_supplemental.pdf, ex.49. Then, just four days before EPA's promulgation deadline, Texas's governor wrote to "urge" EPA to make no new nonattainment designations in Texas at all, and instead to allow Texas "more time to show that additional data and considerations…warrant an 'attainment' or 'unclassifiable/attainment' designation." Wehrum Decl. ¶ 37 (quoting attach.8 at 2) (internal quotation mark omitted); *id.* attach.8 at 2. Notably, the letter does not describe or provide any of the data to which it vaguely alludes in a single sentence, nor even suggest that Texas possessed any such data. Rather, the governor claimed a nonattainment designation would impose costs on the San Antonio area, raised the specter of unspecified "national security implications," and noted Texas's objection to the 2015 standards themselves. Wehrum Decl. ¶ 37.

EPA made no response for months—well beyond its October 1, 2017, promulgation deadline. In its 120-day letter to Texas on December 22, it entirely ignored the San Antonio area. *See id.* attach.5; https://www.epa.gov/sites/production/files/2017-12/documents/tx_120d_tsd_12_22_17final.pdf, ex.50. In a Federal Register notice announcing the 120-day letters, EPA gave the public the impression that it was in fact planning on taking some action regarding the area, saying that it "intends to complete designations for all of the areas addressed in the [120-day notice letters] no later than April 30, 2018. This would complete the designation process for the 2015 Ozone NAAQS." 83 FR 651, 653/1 (Jan. 5, 2018) (emphasis added). Only a month later, on January 19, 2018, did EPA finally say anything publicly about its intentions for the San Antonio area—that it was not planning to promulgate any designations for it by April 30, and instead inviting Texas to provide "any additional

information" it wished by February 28. Wehrum Decl. ¶ 38 (quoting attach.9). Thus, even now, EPA "does not yet know the content or volume of any additional information or revised designation recommendations that Texas will provide." *Id.* ¶ 39.

ARGUMENT

I. THIS COURT SHOULD REJECT EPA'S PROPOSED DEADLINE FOR PROMULGATING OZONE DESIGNATIONS FOR THE SAN ANTONIO AREA.

A. EPA's Proposed Deadline Is Illegally and Unnecessarily Slow.

EPA's approach for the San Antonio area is not the most expeditious possible remedy under the Clean Air Act, and thus must be rejected under case law governing remedies for agencies' failure to meet a statutory deadline. The standard for setting a deadline for EPA action in this case is simple: "the 'agency carries a heavy burden to show' that its proposed remedy is as expeditious as possible, and that faster compliance is 'impossible.'" Pls.' Br. 20 (quoting *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 347 (D. Ariz. 1994)).[3] Further, the remedy must be consistent with the statute and avoid requiring steps that Congress did not require. *See Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (upholding remedial order that advanced "the congressional objectives" of the statute); *Train*, 510 F.2d at 713 (district court must "separate justifications grounded in the purposes of the Act from the footdragging efforts of a delinquent agency"); *American Lung*, 884 F. Supp. at 348 (rejecting agency attempt to build in time for process that "serves no congressional purpose and is wholly discretionary"). EPA's plans for slow-walking the status of the San Antonio area and its dilatory past actions make it impossible for the agency to carry its burden, and are inconsistent with the Act. *See* EPA Opp. 7-8 (one consideration relevant to how "the district court exercises its discretion to fashion a remedy" is "whether 'the official involved…has in good faith employed the utmost diligence in

[3] *See also id.* (citing and glossing *NRDC v. Train*, 510 F.2d 692, 712-13 (D.C. Cir. 1974) ("injunction should serve like adrenalin, to heighten the response and to stimulate the fullest use of resources," and agency has burden to demonstrate it is impossible to comply by deadline); and *Communities for a Better Env't v. EPA*, No. C 07-03678 JSW, 2008 WL 1994898, at *2 (N.D. Cal. May 5, 2008) (rejecting EPA's argument that "it is only obligated to demonstrate a reasonable schedule" and finding that "EPA bears the heavy burden of proving impossibility")).

discharging his statutory responsibilities'" (alteration in original) (quoting *Train*, 510 F.2d at 713)).

EPA has delayed obvious actions and built numerous unnecessary extra steps into its process. First, it abruptly granted itself an extension of its deadline for promulgating designations, when it appeared to be on track for making designations, before just as abruptly recanting. Pls.' Br. 8-9, 21. That likely caused delay—indeed, EPA did not meet its deadline for promulgating designations. *Id.* 9. Next, it took no action for three and a half months in response to Texas's September 2017 letter that purportedly confused EPA about what Texas's recommended designations were for the area. *See supra* p.3. Then, in the letter it finally sent the same day as it filed its response in this case and finally told the public that, contrary to prior indications, the San Antonio area was on a different track, it gave Texas another 40 days, until February 28, to clarify itself and to provide any additional information it might want. Wehrum Decl. attach.9. To finally promulgate designations for the San Antonio area, EPA seeks 313 days from the October 1, 2017, actual deadline; 231 days from the date it sent Texas a 120-day letter that ignored the San Antonio area; 203 days from when it finally asked Texas for more information; and 163 days from the deadline it gave Texas to provide information. The steps EPA has started taking engender delay and are not consistent with the Act. Nothing indicates the Administrator "has in good faith employed the utmost diligence in discharging his statutory responsibilities," at least with regard to San Antonio. EPA Opp. 7-8.

To the contrary, the Administrator's past and planned actions contravene the Clean Air Act's mandatory scheme for ozone designations. That scheme is straightforward: states and Tribes submit to EPA, within one year of the promulgation of a new standard, area recommendations based on air quality monitoring data; next, EPA must promulgate designations by a statutorily-determined deadline. *See* Pls.' Br. 3-4, 7-8; 42 U.S.C. § 7407(d)(1)(A)-(B). The deadline may be extended solely when EPA "has insufficient information to promulgate the designations." *Id.* § 7407(d)(1)(B)(i). There is no other exception.

Here, EPA does not claim its delayed schedule for San Antonio fits within the sole statutory exception. EPA knows what information is necessary to promulgate designations:

information about air quality at air quality monitoring sites, and information about what nearby areas affect air quality in areas with monitors that violate the standards. *See id.* § 7407(d)(1)(A)(i)-(iii); *see also* Pls.' Br. 7-8 (describing EPA's usual approach to promulgating designations); Wehrum Decl. ¶ 10 (relying on same Memorandum cited in Plaintiffs' Brief (Ex.4 thereto)). Neither Texas nor EPA has ever identified any gaps in the relevant information EPA already has. *See* Pls.' Br. 7-8 (describing copious information and well-developed processes EPA already has for making designation). Nothing in the Clean Air Act authorizes EPA or this Court to prolong designation promulgations simply because a state would like more time to look around for information that might be able to excuse it from implementing public health protections. As well as being inconsistent with the Act, EPA's rationale for its slow schedule falls short of the expeditious-as-possible standard for remedying EPA's failure to act. *See American Lung*, 884 F. Supp. at 347 ("Excuses for delay must go beyond the general proposition that further study and analysis of materials will make final agency action better….").

Nor does Texas's September 27, 2017, letter justify further EPA delay, notwithstanding EPA's claim that it is "unclear whether [that] letter was intended to revise Texas's 2016 recommended designation for the area," EPA Opp. 12; *accord* Wehrum Decl. ¶ 38; *id.* attach.9. The Act carefully limits delays in the designations process stemming from states' changing their recommendation. The deadline for states to submit initial designation recommendations is "not later than 1 year after promulgation of a…revised" standard, 42 U.S.C. § 7407(d)(1)(A); nothing in the Act allows states to revise them after that date. To the contrary, Congress provided that when a governor submits designation suggestions outside the context of the initial designations process, the Administrator must comply with an entirely different set of procedures relating to redesignation. *Id.* § 7407(d)(1)(B)(iii). EPA's approach here illegally contravenes the Act's text.

Further, the approach EPA has thus far elected to follow here cannot be reconciled with the comprehensive statutory deadline scheme that Congress established. Congress put into the Act a strict deadline—and single exception thereto—for EPA to promulgate initial area designations and thereby initiate vital health protections. 42 U.S.C. § 7407(d)(1)(B)(i); Pls.' Br. 3-5. It further dealt expressly with the possibility that a state might not submit recommendations

or that it might change its recommendations later. 42 U.S.C. § 7407(d)(1)(B)(ii)-(iii). But if this Court condoned EPA's approach, all a state would need do to evade or seriously delay a nonattainment designation and its concomitant public health protections is to hint to EPA that it might be able to find some reason to change its recommendation in the future. Nothing would prevent a state from doing so repeatedly. This approach would be "inconsistent with the [Clean Air Act]." *Catawba County v. EPA*, 571 F.3d 20, 51 (D.C. Cir. 2009) (rejecting argument that "iterative process of revision" can continue indefinitely because "Congress imposed deadlines on EPA and thus clearly envisioned an end to the designation process"). Indeed, because the Act's mechanisms for bringing areas with unhealthy air into attainment depends on those areas being designated nonattainment, Pls.' Br. 3-5, 14-19, EPA's approach unlawfully and irrationally threatens to "frustrate[] the statutory design" and open "a glaring loophole" in the Clean Air Act. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 685 (9th Cir. 2007); *South Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248 (D.C. Cir. 2007).[4]

Nor has EPA shown either that the "budgetary" and "manpower demands" required are "beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs," or that it requires "more time to sufficiently evaluate complex technical issues." *Train*, 510 F.2d at 712-13; EPA Opp. 8 (citing *Train*, 510 F.2d at 712-13). It has not given any reason to think that the actions it has taken and proposes to take are dictated by budget or staffing considerations. Even its claim to need 43 days—from February 28 to April 12—to develop a 120-day letter for the area is vague, providing no detail about the number of staff available to work on the needed materials, what their other responsibilities are, or even how long it generally takes the agency to develop such a letter. *See* Wehrum Decl. ¶¶ 11, 40. Thus, even if there were merit to EPA's general approach, EPA has not carried its burden of showing that a faster deadline than August 10 is impossible.

[4] Buried in its supporting declaration, EPA suggests that it might seek to implement a similar loophole, where the agency would seek extensions of court-ordered deadlines to newly modify or change proposed modifications of state designation recommendations. Wehrum Decl. ¶ 35. This too is contrary to the Act, as the D.C. Circuit has already held. *Catawba County*, 571 F.3d at 51.

For the San Antonio area, EPA has already gone on an illegal three-month digression. Its requested remedial order would expand that delay and illegality. It thus must be rejected.

B. A 127-Day Timeframe from the Date of the Court's Order Is Expeditious and Appropriate.

Plaintiffs respectfully request that the Court order EPA to take an approach that is consistent with the Act: promptly send Texas a 120-day notice letter detailing the designations EPA intends to make for the San Antonio area, and promulgate designations by 120 days later. This timeframe for action is what EPA was supposed to have done under the Act (and would have allowed EPA to undertake a notice and comment process, as well). *See* 42 U.S.C. § 7407(d)(1)(B)(i)-(ii) (requiring EPA to promulgate designations "as expeditiously as practicable" and establishing 120-day notice letter procedure). As such, the Court should order EPA to belatedly follow it. *See Sierra Club v. McCarthy*, No. 15-CV-01165-HSG, 2016 WL 1055120, at *3 (N.D. Cal. Mar. 15, 2016) (Gilliam, J.) ("if Congress found that a certain amount of time was appropriate for the agency to complete its statutory duty in the first instance, that timeframe should generally still control.").

Here, the agency has had months to work on its analysis for the San Antonio area under Texas's recommendations and its follow-up letters. By the time of the scheduled hearing in this case, it will further have had nearly a month's notice of Plaintiffs' requested relief and, during that time, it will likely not have been diverted from addressing the San Antonio area by responding to additional information from other states. Thus, seven days from the Court's order should be adequate for EPA to put out a 120-day letter.

The need for this expeditious, practicable schedule is further supported by the urgency of reducing the unhealthy ozone pollution levels in San Antonio. *See* Berman Decl. ¶ 16 (Pls.' Br. ex.21); Henagan Decl. ¶ 4 (Pls.' Br. ex.33). Even in its September letter, Texas implicitly concedes that air quality in San Antonio violates the 2015 ozone standards. *See* Wehrum Decl. attach.8. The area is not currently designated nonattainment, *see id.*, meaning that a fast, achievable deadline for making designations in the area will almost certainly result in important

health protections becoming effective sooner. *See* Berman Decl. ¶¶ 26-27. That outcome well serves the fundamental purpose of the Clean Air Act. Pls.' Br. 3.

II. THE COURT SHOULD REQUIRE EPA TO MAKE ALL DESIGNATIONS EFFECTIVE IMMEDIATELY UPON PROMULGATION.

As explained above, the sole remaining points of dispute relate to the remedy for EPA's breach of its statutory duty. Accordingly, EPA's arguments (at 13-14) about whether EPA has some non-discretionary duty regarding the effective date of designations are non sequiturs. Instead, the question is whether ordering EPA to make the designations effective immediately upon promulgation is appropriate. *See* EPA Opp. 7 ("A district court has broad discretion to fashion equitable remedies."). Here, it is appropriate because that relief will most swiftly redress the harms from EPA's unlawful failure to promulgate designations and is well-tailored to further "the congressional objectives" of the Clean Air Act. *Alaska Ctr.*, 20 F.3d at 986.

There is no dispute that important protections will kick in for nonattainment areas immediately upon designations becoming effective. For example, as EPA itself confirms, the Act's stringent "nonattainment new source review permit program…will apply immediately upon the effective date of the nonattainment designation" and will require significant emission limitations on new or modified major sources of ozone-forming pollution. Wehrum Decl. ¶ 46; 40 C.F.R. § 52.24(k); Pls.' Br. 4. Nor does EPA anywhere suggest that it might change its historical approach to establishing the deadlines for submitting plans for emission reductions or for ultimate attainment of the ozone standards. *See* EPA Opp. 15; Wehrum Decl. ¶¶ 47-48. Thus, requiring EPA to set the effective date to be simultaneous with promulgation will result in at least one protection becoming immediately effective and will also likely result in others being realized sooner. Given the serious harms to Plaintiffs and the public from ozone pollution, Pls.' Br. 16-19, such a requirement is fully appropriate. *See* Pls.' Admin. Mot. 3. *See Ctr. for Biological Diversity v. Kempthorne*, No. C 08-1339 CW, 2008 WL 1902703, at *3-4 (N.D. Cal. Apr. 28, 2008) (ordering agency to make rule regarding endangerment status of polar bears effective "immediately upon publication in the Federal Register"); *Pub. Citizen Health Research Grp. v. Comm'r*, 724 F. Supp. 1013, 1022 (D.D.C. 1989) (making rule effective immediately

upon publication given long overdue status of rule and serious human health harms it is intended to address).[5]

Moreover, ordering EPA to make the designations effective immediately upon promulgation serves the objectives of the Clean Air Act. The Act makes plain that ozone standards must be implemented with dispatch, calling for designations to be made and attainment to be reached "as expeditiously as practicable." Pls.' Admin. Mot. 3-4 (quoting 42 U.S.C. §§ 7407(d)(1)(B)(i), 7511(a)(1)). Congress accordingly made designations effective as soon as they were done, without any delayed effective date, and specifically exempted them from the Administrative Procedure Act's rulemaking requirements. *Id.* 3 (citing 42 U.S.C. § 7407(d)(2)(B)). Though EPA contends (at 14) that other Clean Air Act provisions have specific language addressing effective dates, it has no response to Plaintiffs' points. Immediately effective designations unquestionably allow for quicker implementation.

EPA's arguments against designations being effective immediately upon promulgation rest on the unsound foundation of its wholly discretionary choices to encourage delay. Without any explanation, it says it "believes that a gap between publication and the effective date for designation actions is appropriate to give States and affected parties time to comply with requirements that apply upon the effective date of designation," especially nonattainment designations. Wehrum Decl. ¶ 46. But such entities have long been on notice about potential requirements: the ozone standards have been final since 2015, air quality data is readily available to allow assessment of the likelihood of a nonattainment designation, and 120-day notice letters are, or likely will be, available to warn them of the firm possibility of a nonattainment designation. *See Ctr. for Biological Diversity*, 2008 WL 1902703, at *3 (given long notice of upcoming final rule, "affected parties will have had adequate notice that publication was forthcoming"); *cf. Treasure State Resource Indus. Ass'n v. EPA*, 805 F.3d 300, 305-06 (D.C. Cir.

[5] *See also, e.g.*, *Mendoza v. Perez*, 72 F. Supp. 3d 168, 175 (D.D.C. 2014) (entering remedial order requiring rulemaking and specifying effective date of final rule).

2015) (rejecting argument that regulated parties could rationally rely on status quo of designations, given years of notice of possibility of stronger standards).

EPA further points (at 14) to the Administrative Procedure Act's general requirement for effective dates to be at least 30 days after publication, 5 U.S.C. § 553(d), but that is arbitrarily self-serving. EPA chose to be bound by those requirements: "Though not required, EPA has elected to comply with the rulemaking requirements of the [Administrative Procedure Act] for these designations." Wehrum Decl. ¶ 44 (emphasis added); *see* Pls.' Admin. Mot. 3 (designations are exempt from such requirements). The Act's suggestion that notice of and comment on designations not be "preclud[ed]…whenever possible" implies that the Administrative Procedure Act's effective date delay is disfavored. 42 U.S.C. § 7407(d)(2)(B); *see, e.g.*, *Elgin v. Dep't of Treasury*, 567 U.S. 1, 13 (2012) (where Congress included some exceptions, it did not intend to include others).

Even if some delay were justified or required, EPA presents no rationale for an effective date 60 days after publication, double the base period identified in 5 U.S.C. § 553(d). *See* EPA Opp. 14; Wehrum Decl. ¶ 45. Its past practice—all it relies on—is no support for delay here, for all the reasons given above.[6]

CONCLUSION

For the foregoing reasons, Health and Environmental Groups respectfully request that this Court enter summary judgment in their favor on the question of liability, declare EPA to be in violation of its mandatory Clean Air Act duty to promulgate initial area air quality designations under the 2015 ozone standards for all areas of the country by October 1, 2017, and order EPA to complete its overdue duty by promulgating final designations for all areas of the country except for the eight undesignated counties composing the San Antonio area no later than

[6] EPA contends (at 14 n.2) that it "does not control the date of publication" in the Federal Register. But EPA ignores that it controls how quickly it transmits documents to the Office of the Federal Register for publication and whether it seeks to modify or withdraw a transmitted document. *See* Wehrum Decl. ¶ 49; Office of the Federal Register, *Document Drafting Handbook* 5-1 to -3 (May 2017), https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf (cited in Wehrum Decl. ¶ 49).

April 30, 2018, by promulgating final designations for the San Antonio area no later than 127 days from the date of this Court's order (or, to avoid granting EPA more time than it requested, August 10, 2018, whichever is earlier), and by making all designations effective immediately upon promulgation. *See Train*, 510 F.2d at 705 ("The authority to set enforceable deadlines both of an ultimate and an intermediate nature is an appropriate procedure for exercise of the court's equity powers to vindicate the public interest.").

Dated: January 26, 2018

Respectfully submitted,

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