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10 *Attorney for Plaintiffs Center for Biological Diversity and*
11 *Center for Environmental Health*

12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 _____)
16)
17 CENTER FOR BIOLOGICAL DIVERSITY)
18 and)
19 CENTER FOR ENVIRONMENTAL HEALTH)
20 Plaintiffs,)
21 v.)
22 ANDREW WHEELER, in his)
23 official capacity as Administrator of the)
24 United States Environmental Protection Agency,)
25 Defendant.)
26 _____)

) Civ. No.

) **COMPLAINT FOR INJUNCTIVE**
) **AND DECLARATORY RELIEF**

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

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1 **INTRODUCTION**

2 1. Plaintiffs Center for Biological Diversity and the Center for Environmental Health,
3 [collectively “Environmental Groups”] bring this Clean Air Act citizen suit to compel the
4 United States Environmental Protection Agency to undertake overdue mandatory duties.
5 Specifically, Andrew Wheeler, in his official capacity as Administrator of the United States
6 Environmental Protection Agency (“EPA”), has failed to determine whether the West
7 Central Pinal nonattainment area for the 2006 National Ambient Air Quality Standard
8 (“NAAQS”) for particulate matter less than 2.5 microns in diameter (“PM2.5”) attained by
9 its attainment date. In addition, EPA has failed to promulgate a Federal Implementation
10 Plan (“FIP”) for Arizona’s New Source Review (“NSR”) program to correct the deficiencies
11 it found when it partially disapproved Arizona’s State Implementation Program (“SIP”).
12 2. Accordingly, Plaintiffs THE CENTER FOR BIOLOGICAL DIVERSITY and CENTER
13 FOR ENVIRONMENTAL HEALTH bring this action against Defendant ANDREW
14 WHEELER, in his official capacity as EPA Administrator, to compel him to perform his
15 mandatory duties with respect to West Central Pinal PM2.5 NAAQS nonattainment area and
16 Arizona’s NSR program.

17 **JURISDICTION**

18 3. This case is a Clean Air Act citizen suit. Therefore, the Court has jurisdiction over this
19 action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 42 U.S.C. § 7604(a)
20 (Clean Air Act citizen suits).
21 4. An actual controversy exists between the parties. This case does not concern federal
22 taxes, is not a proceeding under 11 U.S.C. §§ 505 of 1146, and does not involve the Tariff
23 Act of 1930. Thus, this Court has jurisdiction to order declaratory relief under 28 U.S.C. §
24 2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue
25 injunctive relief.

26 **NOTICE**

27 5. On January 3, 2019, Plaintiffs mailed to EPA by certified mail, receipt requested,
28 written notice of intent to sue regarding the violations alleged in this Complaint. EPA

1 received this notice of intent to sue letter no later than February 4, 2019. More than sixty
2 days have passed since Plaintiffs mailed their “notice of intent to sue” letter. EPA has not
3 remedied the violations alleged in this Complaint. Therefore, a present and actual
4 controversy exists.

5 **VENUE**

6 6. Defendant EPA resides in this judicial district. This civil action is brought against an
7 officer of the United States acting in his official capacity and a substantial part of the events
8 or omissions giving rise to the claims in this case occurred in the Northern District of
9 California. The claims in this Complaint concern EPA’s failure to perform mandatory
10 duties with regard to Arizona’s implementation of the Clean Air Act. EPA Region 9, which
11 is responsible for Arizona, is headquartered in San Francisco. Thus several of the events
12 and omissions at issue in this action occurred at EPA’s Region 9 headquarters in San
13 Francisco. In addition, Plaintiff Center for Environmental Health is headquartered in
14 Oakland and Plaintiff Center for Biological Diversity is incorporated in California with its
15 main California office in Oakland. Accordingly, venue is proper in this Court pursuant to
16 28 U.S.C. § 1391(e).

17 **INTRADISTRICT ASSIGNMENT**

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

21 **PARTIES**

22 8. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)
23 corporation incorporated in California. The Center for Biological Diversity has more than
24 69,000 members throughout the United States and the world. The Center for Biological
25 Diversity’s mission is to ensure the preservation, protection, and restoration of
26 biodiversity, native species, ecosystems, public lands and waters, and public health
27 through science, policy, and environmental law. Based on the understanding that the
28 health and vigor of human societies and the integrity and wildness of the natural

1 environment are closely linked, the Center for Biological Diversity is working to secure a
2 future for animals and plants hovering on the brink of extinction, for the ecosystems they
3 need to survive, and for a healthy, livable future for all of us.

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

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

23 11. Plaintiffs' members live, work, recreate, travel, and engage in other activities
24 throughout the areas at issue in this complaint and will continue to do so on a regular
25 basis. Pollution in the affected areas threatens and damages, and will continue to threaten
26 and damage, the health and welfare of Plaintiffs' members as well as their ability to
27 engage in and enjoy their other activities. Pollution diminishes Plaintiffs' members'
28 ability to enjoy the aesthetic qualities and recreational opportunities of the affected area.

1 12. EPA's failure to timely perform the mandatory duties described herein also
2 adversely affects Plaintiffs, as well as their members, by depriving them of procedural
3 protection and opportunities, as well as information that they are entitled to under the
4 Clean Air Act. The failure of EPA to perform these mandatory duties also creates
5 uncertainty for Plaintiffs' members as to whether they are exposed to excess air pollution.

6 13. The above injuries will continue until the Court grants the relief requested herein.

7 14. Defendant ANDREW WHEELER is the Administrator of the EPA. In that role
8 Administrator Wheeler has been charged by Congress with the duty to administer the
9 Clean Air Act, including the mandatory duties at issue in this case. Administrator
10 Wheeler is also charged with overseeing all EPA regional offices including EPA Region
11 9, which has authority over Arizona and is headquartered in San Francisco.

12 **LEGAL BACKGROUND AND FACTS**

13 15. Congress enacted the Clean Air Act to "speed up, expand, and intensify the war
14 against air pollution in the United States with a view to assuring that the air we breathe
15 throughout the Nation is wholesome once again." H.R.Rep. No. 1146, 91st Cong., 2d
16 Sess. 1,1, 1970 U.S.Code Cong. & Admin. News 5356, 5356. To promote this, the Act
17 requires EPA to set National Ambient Air Quality Standards for certain pollutants,
18 including PM2.5. National Ambient Air Quality Standards establish maximum allowable
19 concentrations in the air of these pollutants.

20 16. Each National Ambient Air Quality Standard is supposed to be stringent enough
21 to protect public health and welfare. Effects on welfare include, but are not limited to,
22 effects on soils, water, vegetation, manmade materials, wildlife, visibility (*i.e.*, haze),
23 climate, damage to property, economic impacts and effects on personal comfort and well-
24 being.

25 17. In 2006, EPA strengthened the 24-hour PM2.5 National Ambient Air Quality
26 Standard from 65 micrograms per cubic meter to 35 micrograms per cubic meter. 71
27 Fed.Reg. 61,144 (Oct. 17, 2006).
28

1 18. After EPA promulgates a National Ambient Air Quality Standard, the Clean Air
2 Act requires that EPA designate each area of the country as either a clean air area for that
3 standard, which is known as “attainment” in Clean Air Act jargon, or a dirty air area,
4 which is known as “nonattainment” in Clean Air Act jargon. See 42 U.S.C. § 7407(d).

5 19. On March 7, 2011 EPA designated West Central Pinal, Arizona as a moderate
6 nonattainment area. 40 C.F.R. § 81.303. Therefore, the area has an attainment date of no
7 later than December 31, 2017. 81 Fed.Reg. 91,088. 91,091, fn. 7 (Dec. 16, 2016); 42
8 U.S.C. § 7513(c)(1). Therefore, EPA has a mandatory duty to determine if the West
9 Central Pinal nonattainment area attained by its attainment date and publish notice of
10 such a finding by no later than June 30, 2018. 42 U.S.C. §§ 7509(c)(1) & (2), 7513(b)(2).
11 EPA has failed to perform this mandatory duty.

12 20. Under the Clean Air Act, each state is required to submit state implementation
13 plans to ensure that each National Ambient Air Quality Standard will be achieved,
14 maintained, and enforced. Without such plans, the public is not afforded full protection
15 against the harmful impacts of air pollution.

16 21. If a state implementation plan submittal is inadequate or inconsistent with the
17 Clean Air Act, EPA must disapprove it. 42 U.S.C. § 7410(k)(3). If, after two years, the
18 state has failed to correct the deficiencies in a disapproved state implementation plan
19 submittal, EPA must promulgate a federal implementation plan. 42 U.S.C. § 7410(c)(1).

20 22. On November 2, 2015, EPA found that Arizona’s state implementation plan
21 submittal did not comply in part with the Clean Air Act. 80 Fed. Reg. 67,319 (Nov. 2,
22 2015). EPA issued a limited approval and limited disapproval, which was effective
23 December 2, 2015. *Id.* Therefore, EPA has a mandatory duty to promulgate a federal
24 implementation plan by December 2, 2017 for the parts of the Arizona submittal subject
25 to EPA’s limited disapproval. 42 U.S.C. § 7410(c)(1).

26 23. Arizona has failed to correct every deficiency in its state implementation plan.
27 EPA did approve certain provisions into Arizona’s state implementation plan to address
28 some of the deficiencies which were the basis of the November 2, 2015 limited

1 disapproval. 83 Fed. Reg. 19,631 (May 4, 2018). However, EPA's May 4, 2018 action
 2 did not address "all of the outstanding limited disapproval issues" related to Arizona's
 3 state implementation plan. 82 Fed. Reg. 25,213 (June 1, 2017). As a result, many
 4 deficiencies persist.

5 24. EPA's Technical Support Document to the May 4, 2018 action "provides a summary
 6 of the remaining limited disapproval issues." *Id.* The Technical Support Document, EPA's
 7 Notice of Proposed Rulemaking: Air Plan Approval; Arizona; Stationary Source; New
 8 Source Review, May 2017, EPA-R09-OAR-2017-0255-0005, Document C-1 at 22-23,
 9 provides the list of items that Arizona Department of Environmental Quality ("ADEQ")
 10 failed to correct from the November 2, 2015 limited disapproval. EPA must promulgate a
 11 federal implementation plan that addresses each of these disapprovals. This list includes:

TABLE 1

Federal Regulation	Arizona's Rule
40 CFR 51.160(a) and (b)	ADEQ rules do not ensure review of NAAQS in neighboring areas outside ADEQ permitting jurisdiction
40 CFR 51.160(a) and (b)	Add reference to "or maintenance" of a standard
40 CFR 51.160(b)(1)	Rule missing requirement to ensure sources must comply with all applicable portions of control strategy, similar to language in other portion of rules, e.g. R18-2-306(A)(2).
40 CFR 51.160(c)	R18-2-302.01 does not fully meet requirement to submit necessary information for ADEQ to review source. In requiring sources to provide potential emissions the rules reference procedures for determining "actual" emissions and the referenced rule is not in the SIP and has not been submitted for SIP-approval.
40 CFR 51.160(c)(1)	Rules allow some emissions units to be exempt from being included in applications for NSR purposes
40 CFR 51.160(d)	Registration rule missing provision that approval does not affect responsibility of owner/operator to comply with other requirements
40 CFR 51.160(f)(1)	Sources subject to registration program missing requirement to use Appendix W, when applicable
40 CFR 51.160(e)	Submittal did not include a sufficient basis for the program's minor NSR thresholds in nonattainment areas, must provide additional analysis or revise thresholds, as needed.

1 2 3	40 CFR 51.160(e)	Submittal did not include basis for exemptions of certain agricultural sources and fuel burning equipment. See our TSD for the 2015 NSR action on page 27 for four specific issues to be addressed.
4	40 CFR 51.160(e)	Submittal did not include basis for PM2.5 permitting exemption threshold
5 6 7 8	40 CFR 51.161(a)	Submittal did not require public notice in all instances for permitting program. Federal rules do not allow for exemptions - including for disapprovals. Public notice is required for all sources defined under 40 CFR 51.160(e); clarification of the public notice procedures in R18-2-330 that apply to registrations is necessary; and program must require public notice for permit disapproval actions
9 10 11 12	40 CFR 51.161(a)	Elective limits for registrations need additional requirements to ensure enforceability, including technically accurate limit and the portion of the source subject to the limit, the time period over which the limit applies, and compilation of daily records if limit is not on a daily basis
13	40 CFR 51.161(d)	The registration portion of ADEQ's program needs to require notices to specific parties
14 15	40 CFR 51.163	Submittal contained references to administrative procedures not included in SIP submittal (or existing SIP)
16 17	References to increment, as related to the PSD program. ADEQ corrected this issue in the rules associated with the April 2017 NSR submittal. However, there remain [] references that need to be submitted for rules R18-2-319 and 320.	

18
19
20 25. Accordingly, EPA has a mandatory duty to promulgate a federal implementation
21 plan for Arizona. 42 U.S.C. §§ 7410(c)(1).

22 CLAIMS FOR RELIEF

23 CLAIM ONE

24 (Failure to bump up the West Central Pinal 2006 PM2.5 NAAQS nonattainment area)

25 26. Plaintiffs incorporates by reference all paragraphs listed above.

26 27. Moderate 2006 PM2.5 nonattainment areas have an attainment date of December
27 31, 2017. Therefore, EPA has a mandatory duty to by no later than June 30, 2018. 42
28 U.S.C. §§ 7509(c)(2), 7513(b)(2).

1 28. West Central Pinal is a moderate nonattainment area for the 2006 PM2.5
2 NAAQS.

3 29. It is after June 30, 2018.

4 30. EPA has not determined if the West Central Pinal moderate 2006 PM2.5 NAAQS
5 nonattainment area has attained by its attainment date and EPA has not published notice of
6 such a determination.

7 31. Therefore, EPA is in violation of its mandatory duty 42 U.S.C. §§ 7509(c)(2) and
8 7513(b)(2) with regard to the West Central Pinal moderate 2006 PM2.5 NAAQS
9 nonattainment area.

10 CLAIM TWO

11 (Failure to promulgate a FIP for Arizona's New Source Review program)

12 32. Plaintiffs incorporate by reference all paragraphs listed above.

13 33. EPA has a mandatory duty to promulgate a Federal Implementation Plan (FIP) no
14 later than two years after disapproving a SIP submittal. 42 U.S.C. § 7410(c)(1).

15 34. EPA issued a limited approval and limited disapproval of rules for the issuance of
16 New Source Review permits for stationary sources of air pollution in Arizona. 80 Fed. Reg.
17 67,319 (Nov. 2, 2015). This rule was effective December 2, 2015. *Id.*

18 35. Therefore, EPA's FIP was due no later than December 2, 2017.

19 36. EPA has not promulgated a FIP for the items listed in Table 1. Nor has EPA
20 approved a SIP addressing the items listed in Table 1. Thus is in violation of its mandatory
21 duty.

22 REQUEST FOR RELIEF

23 WHEREFORE, Plaintiffs respectfully request that the Court:

- 24
- 25 A. Declare that the Administrator is in violation of the Clean Air Act with regard to his
26 failure to perform each mandatory duty listed above;
- 27 B. Issue a mandatory injunction requiring the Administrator to perform his mandatory duties
28 by certain dates;

- 1 C. Retain jurisdiction of this matter for purposes of enforcing and effectuating the Court's
2 order;
- 3 D. Grant Plaintiffs their reasonable costs of litigation, including attorneys' and expert fees;
4 and
- 5 E. Grant such further relief as the Court deems just and proper.

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7 Respectfully submitted,

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9 Dated: March 26, 2019

/s/Lauren Packard _____

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*Attorney for Plaintiffs Center for Biological
Diversity and Center for Environmental Health*

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing Complaint and Summons on the following parties by certified mail pursuant to Federal Rules of Civil Procedure Rule 4

(i)(1)(A)(ii) and (i)(2):

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency HQ
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

U.S. Environmental Protection Agency HQ
1200 Pennsylvania Avenue, N.W.
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Civil Process Clerk
United States Attorney
Northern District of California
Federal Courthouse
450 Golden Gate
San Francisco, CA 94102

Dated: March 26, 2019

/s/ Andrea Weber