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Counsel for Plaintiffs Center for Biological
Diversity, Center for Environmental Health,
Environmental Integrity Project, and WildEarth
Guardians

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

CENTER FOR BIOLOGICAL DIVERSITY,)
CENTER FOR ENVIRONMENTAL)
HEALTH, ENVIRONMENTAL)
INTEGRITY PROJECT, AND)
WILDEARTH GUARDIANS,)
Plaintiffs,)

v.)

MICHAEL S. REGAN,)
in his official capacity as Administrator,)
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.*)

1 **INTRODUCTION**

2 1. Ground-level ozone is the principal component of what people commonly refer to as
3 smog. Ozone pollution can cause decreased lung function, increased respiratory symptoms,
4 emergency department visits, hospital admissions for respiratory causes, and even premature
5 mortality. Those most at risk from ozone pollution are children; active people, *e.g.*, runners and
6 people who do manual labor outside; people with pre-existing lung and heart diseases such as
7 asthma; and older people.

9 2. Ozone also damages vegetation, both native vegetation and commercial crops. Damage to
10 native vegetation results in ecosystem damage, including diminished ecosystem services, that is,
11 the life-sustaining services that ecosystems provide to people for free, such as clean air, clean
12 water, and carbon sequestration.

14 3. To better protect the public from the damage caused by ozone pollution, the
15 Administrator of the United States Environmental Protection Agency (EPA) promulgated revised
16 ozone National Ambient Air Quality Standards (NAAQS) in 2008. EPA then designated areas
17 with ambient air monitors showing ozone above the NAAQS as “nonattainment” and assigned
18 these nonattainment areas a level of nonattainment and a date by which the area must attain the
19 2008 ozone NAAQS.

21 4. The promulgation of revised ozone NAAQS creates various mandatory duties that EPA
22 must perform in order to effectively implement the ozone NAAQS.

23 5. For nonattainment areas which fail to attain the 2008 ozone NAAQS by their attainment
24 date, EPA has a mandatory duty to find that the areas failed to attain the 2008 ozone NAAQS by
25 their attainment date, thus “bumping up” the nonattainment to the next level of nonattainment.

27 6. EPA is in violation of its mandatory duty to issue a final determination as to whether the
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1 following areas have attained the 2008 ozone NAAQS by their attainment date and, if not, to
2 bump these areas up from serious to severe 2008 ozone NAAQS nonattainment areas: the
3 Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas; Greater Connecticut,
4 Connecticut; Houston-Galveston-Brazoria, Texas; Nevada County (Western part), California;
5 New York-North New Jersey-Long Island, New York-New Jersey-Connecticut; Ventura County,
6 California; and Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado nonattainment areas.

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8 7. Accordingly, Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR
9 ENVIRONMENTAL HEALTH, ENVIRONMENTAL INTEGRITY PROJECT, AND
10 WILDEARTH GUARDIANS bring this action against Defendant MICHAEL S. REGAN, in his
11 official capacity as EPA Administrator, to compel him to perform his mandatory duties with
12 respect to the 2008 ozone NAAQS.
13

14 **JURISDICTION**

15 8. This case is a Clean Air Act citizen suit. Therefore, the Court has jurisdiction over this
16 action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 42 U.S.C. § 7604(a)
17 (Clean Air Act citizen suits).
18

19 9. 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 jurisdiction to order declaratory relief under 28 U.S.C. § 2201. If the
22 Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive relief.
23

24 **NOTICE**

25 10. On January 21, 2022, Plaintiffs Center for Biological Diversity, Center for Environmental
26 Health, and Environmental Integrity Project mailed to EPA by certified mail, return receipt
27 requested, written notice of intent to sue regarding the violations alleged herein. EPA received it
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1 no later than January 28, 2022. Plaintiff WildEarth Guardians submitted separate written notice
2 of intent to sue on January 21, 2022. More than 60 days have passed since Plaintiffs mailed these
3 notice letters. EPA has not remedied the violations alleged in this Complaint.

4 **VENUE**

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6 11. Venue is proper in this Court under 28 U.S.C. § 1391(e) for several reasons. First,
7 Plaintiff Center for Environmental Health resides in the district with its headquarters in Oakland.
8 Second, Defendant EPA has an office and performs its official duties in this district. EPA's
9 Region 9 headquarters are located at 75 Hawthorne Street, San Francisco, California. Third, a
10 substantial part of the events or omissions giving rise to the claims in this case occurred in the
11 Northern District of California.

12 **DIVISIONAL ASSIGNMENT**

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14 12. Pursuant to Civil L.R. 3-2(c) and (d), this case is properly assigned to the San Francisco
15 or Oakland Division of this Court because a substantial part of the events and omissions giving
16 rise to the claims in this case occurred in the County of San Francisco, where EPA Region 9 is
17 headquartered.

18 **PARTIES**

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20 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)
21 corporation incorporated and existing under the laws of the State of California, with its main
22 California office in Oakland. The Center for Biological Diversity has over 89,000 members
23 throughout the United States and the world. The Center for Biological Diversity's mission is to
24 ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems,
25 public lands and waters, and public health through science, policy, and environmental law.
26 Based on the understanding that the health and vigor of human societies and the integrity and
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1 wildness of the natural environment are closely linked, the Center for Biological Diversity is
2 working to secure a future for animals and plants hovering on the brink of extinction, for the
3 ecosystems they need to survive, and for a healthy, livable future for all of us.

4 14. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH is a nonprofit corporation
5 organized and existing under the laws of the State of California, with its headquarters located in
6 Oakland. The Center for Environmental Health protects the public from toxic chemicals by
7 working with communities, consumers, workers, government, and the private sector to demand
8 and support business practices that are safe for public health and the environment. The Center
9 for Environmental Health works in pursuit of a world in which all people live, work, learn, and
10 play in healthy environments.
11

12 15. Plaintiff ENVIRONMENTAL INTEGRITY PROJECT is a nonpartisan, nonprofit
13 watchdog organization that advocates for effective enforcement of environmental laws. The
14 Environmental Integrity Project has the goals of illustrating through objective facts and figures
15 how the failure to enforce or implement environmental laws increases pollution and harms public
16 health; holding federal and state agencies, as well as individual corporations, accountable for
17 failing to enforce or comply with environmental laws; and helping local communities obtain the
18 protections of environmental laws. The Environmental Integrity Project does this by advocating
19 for fair enforcement of environmental laws and regulations; writing and distributing reports and
20 data; taking legal actions against big polluters and government agencies, when necessary; and by
21 teaching communities how to participate in the public process regarding important state and
22 federal environmental decisions.
23

24 16. Plaintiff WILDEARTH GUARDIANS is a non-profit conservation organization
25 dedicated to protecting and restoring wildlife, wild rivers, wild places, and health in the
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1 American West. Guardians and its members work to reduce harmful air pollution in order to
2 safeguard public health, welfare, and the environment. Guardians has approximately 223,000
3 supporters and members, many of whom live, work, or recreate in the areas affected by the
4 ozone pollution at issue in this case, including in the Denver Metro-North Front Range region of
5 Colorado. These members recreate outdoors frequently, commute to work on bicycle, and
6 depend on clean air for their quality of life. Their ability to fully enjoy the outdoor amenities,
7 particularly in the Denver Metro-North Front Range Area, including hiking, biking, wildlife
8 viewing, camping, picnicking, and outdoor sports, are harmed by the failure of the Administrator
9 to perform his nondiscretionary duty. They are also reasonably concerned regarding the short-
10 and long-term health consequences of repeated exposure to high levels of ozone pollution. This
11 harm stems primarily from the Administrator's failure to ensure that air quality is sufficiently
12 protected in a timely manner, as mandated by the Clean Air Act. This harm would be eliminated
13 or reduced if the Administrator performed his nondiscretionary duty to determine the attainment
14 status of the Denver Metro-North Front Range region and other areas with respect to the 2008
15 ozone NAAQS. Plaintiffs' members live, work, recreate, travel, and engage in other activities
16 throughout the areas at issue in this complaint and will continue to do so on a regular basis.
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20 Pollution in the affected areas threatens and damages, and will continue to threaten and damage,
21 the health and welfare of Plaintiffs' members, as well as their ability to engage in and enjoy their
22 other activities. Pollution diminishes Plaintiffs' members' ability to enjoy the aesthetic qualities
23 and recreational opportunities of the affected areas.

24
25 17. Plaintiffs have a member with family in the Chicago area that she visits frequently and
26 will continue to do so in the future. This member is adversely affected by EPA's failure to issue
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1 a final determination regarding the Chicago-Naperville, Illinois-Indiana-Wisconsin
2 nonattainment area.

3 18. Plaintiffs have a member with family in the Dallas area that he frequently visits with his
4 wife and daughter and tries to return at least once a year. He is harmed by air pollution because
5 several members of his family have medical backgrounds that make them more sensitive to
6 ozone pollution. Also, his daughter has asthma. Poor air quality prevents him from spending
7 time, recreating, and exercising outdoors and negatively affects his physical and emotional
8 health. This member is adversely affected by EPA's failure to issue a final determination for the
9 Dallas-Fort Worth, Texas nonattainment area.
10

11 19. Plaintiffs have a member who has visited several locations in and around western Nevada
12 County, California, and intends to return to the area to hike, bird watch, and otherwise recreate.
13 This member is adversely affected by EPA's failure to issue a final determination regarding the
14 Nevada County (Western part), California nonattainment area.
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16 20. Plaintiffs have a member who resides in the greater metropolitan New York City area
17 who suffers from asthma. This member enjoys spending time outdoors at and around her home.
18 She also frequents areas within the Greater Connecticut, Connecticut nonattainment area. This
19 member is adversely affected by EPA's failure to issue a final determination regarding the New
20 York-North New Jersey-Long Island, New York-New Jersey-Connecticut and Greater
21 Connecticut, Connecticut nonattainment areas.
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23 21. Plaintiffs have a member who resides in Webster, Texas, who is adversely affected by
24 EPA's failure to issue a final determination for the Houston-Galveston-Brazoria, Texas
25 nonattainment area.
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1 22. Plaintiffs have a member who resides in Ojai, California, who is adversely affected by
2 EPA's failure to issue a final determination for Ventura County, California.

3 23. Plaintiffs have two members, one who resides in Denver, Colorado, and one who resides
4 in Boulder County, Colorado, and they recreate in and around these areas. Both members suffer
5 from asthma, which requires them to plan around bad air quality days and forego recreational
6 activities they would participate in otherwise. They have also incurred a variety of expenses,
7 including costs for doctors' visits and medication, to avoid or mitigate negative symptoms. These
8 members are adversely affected by EPA's failure to issue a final determination regarding the
9 Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado nonattainment area.
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11 24. The acts and omissions of EPA alleged here harm Plaintiffs' members by prolonging
12 poor air quality conditions that adversely affect or threaten their health, and by nullifying or
13 delaying measures and procedures mandated by the Act to protect their health from ozone
14 pollution in places where they live, work, travel, and recreate.
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16 25. The acts and omissions of EPA alleged here further harm Plaintiffs' members' welfare
17 interest in using and enjoying the natural environment. Elevated levels of ozone damage plant
18 life, aquatic life, and natural ecosystems, thus harming Plaintiffs' members' recreational and
19 aesthetic interests.
20

21 26. 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 protections and
23 opportunities, as well as information that they are entitled to under the Clean Air Act.
24

25 27. The above injuries will continue until the Court grants the relief requested herein. A court
26 order requiring EPA to promptly undertake its mandatory duties would redress Plaintiffs' and
27 Plaintiffs' members' injuries.
28

1 28. Defendant MICHAEL S. REGAN is the Administrator of the EPA. Administrator Regan
2 is charged with the duty to implement the Clean Air Act and to take required regulatory actions
3 according to the schedules established by the Act, including the mandatory duties at issue in this
4 case. Administrator Regan is sued in his official capacity.
5

6 **LEGAL BACKGROUND AND FACTS**

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

14 30. Each National Ambient Air Quality Standard is supposed to be stringent enough to
15 protect public health and welfare. Effects on welfare include, but are not limited to, effects on
16 soils, water, vegetation, manmade materials, wildlife, visibility (*i.e.*, haze), climate, damage to
17 property, economic impacts, and effects on personal comfort and well-being.
18

19 31. In 2008, EPA strengthened the primary and secondary ozone NAAQS from 0.08 to 0.075
20 parts per million. 73 Fed. Reg. 16,436 (Mar. 27, 2008).

21 32. After EPA promulgates a National Ambient Air Quality Standard, the Clean Air Act
22 requires that EPA designate each area of the country as either a clean air area for that standard,
23 which is known as “attainment” in Clean Air Act jargon, or a dirty air area, which is known as
24 “nonattainment” in Clean Air Act jargon. *See* 42 U.S.C. § 7407(d).
25

26 33. At the time of designation, nonattainment areas are classified by operation of law as
27 marginal, moderate, serious, severe, or extreme based on the severity of the area’s air pollution
28

1 problem. 42 U.S.C. § 7511(a)(1). This classification can change over time as the area’s air
2 quality improves, worsens, or remains the same. *Id.*

3 34. Serious nonattainment areas for the 2008 ozone NAAQS had an attainment date of July
4 20, 2021. 84 Fed. Reg. 44,238, 44,421 (Aug. 23, 2019).

5 35. The Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas; Greater
6 Connecticut, Connecticut; Houston-Galveston-Brazoria, Texas; Nevada County (Western part),
7 California; New York-North New Jersey-Long Island, New York-New Jersey-Connecticut;
8 Ventura County, CA; and Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado
9 nonattainment areas are serious nonattainment areas for the 2008 ozone NAAQS.
10

11 36. EPA must determine by no later than 6 months after the attainment date whether a
12 nonattainment area has attained the NAAQS by its attainment date. 42 U.S.C. §§ 7509(c)(1),
13 7511(b)(2)(A).
14

15 37. For each area that failed to attain by its attainment date, it will be reclassified by
16 operation of law to the next higher classification. 42 U.S.C. § 7511(b)(2)(A).
17

18 38. No later than 6 months following the attainment date, EPA is required to publish notice in
19 the Federal Register of its determinations regarding whether a nonattainment area has attained
20 the NAAQS by its attainment date and, if not, identify its reclassification. 42 U.S.C. §§
21 7509(c)(2), 7511(b)(2)(B).
22

23 39. Six months after the attainment date of July 20, 2021, was January 20, 2022, but EPA has
24 not made or published a determination of whether the aforementioned serious nonattainment
25 areas attained by the attainment date.

26 CLAIM ONE

27 (Failure to make “bump up” determinations for the nonattainment areas)

28 40. Plaintiffs incorporate by reference all paragraphs listed above.

1 41. Pursuant to 42 U.S.C. §§ 7509(c)(1) and 7511(b)(2)(A), EPA had a nondiscretionary duty
2 to make final determinations by no later than 6 months after the attainment date, that is, by
3 January 20, 2022, as to whether the Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort
4 Worth, Texas; Greater Connecticut, Connecticut; Houston-Galveston-Brazoria, Texas; Nevada
5 County (Western part), California; New York-North New Jersey-Long Island, New York-New
6 Jersey-Connecticut; Ventura County, CA; and Denver-Boulder-Greeley-Ft. Collins-Loveland,
7 Colorado serious nonattainment areas attained the 2008 ozone NAAQS by their July 20, 2021
8 attainment date.
9

10 42. EPA failed to make such final determinations.

11 43. Furthermore, pursuant to 42 U.S.C. §§ 7509(c)(2) and 7511(b)(2)(B), EPA had a
12 nondiscretionary duty to publish a final notice in the Federal Register no later than January 20,
13 2022, identifying whether the Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort
14 Worth, Texas; Greater Connecticut, Connecticut; Houston-Galveston-Brazoria, Texas; Nevada
15 County (Western part), California; New York-North New Jersey-Long Island, New York-New
16 Jersey-Connecticut; Ventura County, CA; and Denver-Boulder-Greeley-Ft. Collins-Loveland,
17 Colorado serious nonattainment areas attained the 2008 ozone NAAQS by their attainment date.
18

19 44. EPA has failed to publish such notice.

20 45. Accordingly, EPA is in violation of its mandatory duties under 42 U.S.C. §§ 7509(c)(1),
21 7511(b)(2)(A), as well as 42 U.S.C. §§ 7509(c)(2) and 7511(b)(2)(B), to determine whether the
22 Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas; Greater Connecticut,
23 Connecticut; Houston-Galveston-Brazoria, Texas; Nevada County (Western part), California;
24 New York-North New Jersey-Long Island, New York-New Jersey-Connecticut; Ventura County,
25 CA; and Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado serious 2008 ozone NAAQS
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1 nonattainment areas attained the 2008 ozone NAAQS by their attainment date and publish notice
2 of such determinations.

3 **RELIEF REQUESTED**

4 Plaintiffs respectfully request that the Court:

- 5 (A) Declare that the Administrator is in violation of the Clean Air Act with regard to his
6 failure to perform each mandatory duty listed above;
- 7 (B) Issue a mandatory injunction requiring the Administrator to perform his mandatory duties
8 by certain dates;
- 9 (C) Retain jurisdiction of this matter for purposes of enforcing and effectuating the Court's
10 order;
- 11 (D) Grant Plaintiffs their reasonable costs of litigation, including attorneys' and expert fees;
12 and
- 13 (E) Grant such further relief as the Court deems just and proper.
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16

17 Respectfully Submitted,

18 /s/ Hollin Kretzmann

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