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8
9 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11
12 SIERRA CLUB, AMERICAN LUNG)
ASSOCIATION, ENVIROMENTAL DEFENSE)
13 FUND, and NATURAL RESOURCES DEFENSE)
14 COUNCIL)
15 Plaintiffs,)
v.)
16 UNITED STATES ENVIRONMENTAL)
17 PROTECTION AGENCY; GINA McCARTHY, in)
her official capacity as Administrator of the United)
18 States Environmental Protection Agency,)
19 Defendants.)

Case No: 4:13-cv-02809-YGR

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

AND

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

Date: April 8, 2014
Time: 2:00 p.m.
Place: Courtroom 5, 2nd Fl.
Judge: Hon. Yvonne Gonzalez Rogers

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1 **NOTICE OF MOTION**

2 Please take notice that the following Motion for Summary Judgment will be heard by the
3 Honorable Yvonne Gonzalez Rogers, United States District Judge, on April 1, 2014 at 2:00 p.m. in
4 Courtroom 5, 2nd Floor, Ronald V. Dellums Federal Building, 1301 Clay Street, Oakland, CA 94612.

5 **MOTION FOR SUMMARY JUDGMENT**

6 Plaintiffs Sierra Club, American Lung Association, Environmental Defense Fund, and the
7 Natural Resources Defense Council, hereby move for summary judgment pursuant to Fed. R. Civ. P.
8 56, Local Rule 56, and Judge Rogers’ Standing Order in Civil Cases.

9 Plaintiffs are entitled to summary judgment as a matter of law because Defendants, United
10 States Environmental Protection Agency (“EPA”), and Gina McCarthy, Administrator,
11 have failed to fulfill their duty under 42 U.S.C. § 7409(d)(1) to review the national ambient air
12 quality standards for ozone within five years of their last promulgation date, March 12, 2008.

13 Accordingly, Plaintiffs respectfully request that this Court grant their Motion for Summary
14 Judgment and order EPA to complete its long-overdue review of the national ambient air quality
15 standards for ozone by signing a notice of proposed rulemaking by December 1, 2014 and a final
16 rulemaking by October 1, 2015.

17 In support of this Motion, Plaintiffs submit a Memorandum of Points and Authorities,
18 accompanying Declarations and Exhibits, a Supporting Separate Statement, and a Proposed Order.

19
20 DATED: January 21, 2014

Respectfully submitted,

21 /s/ Irene V. Gutierrez
22 PAUL R. CORT
23 IRENE V. GUTIERREZ
24
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Plaintiffs the Sierra Club, American Lung Association, Environmental Defense Fund and Natural Resources Defense Council (“Plaintiffs”) seek to compel the United States Environmental Protection Agency (“EPA”) and its Administrator Gina McCarthy, to take actions required by the Clean Air Act to protect the public from the effects of ozone pollution. Specifically, this lawsuit seeks to compel EPA to complete its long-overdue mandatory review of the national ambient air quality standards for ozone by no later than October 1, 2015.

Ozone pollution poses grave risks to public health, and exposure to ozone pollution is responsible for a host of respiratory and cardiovascular conditions, reproductive and developmental health effects, increases in hospital and emergency room visits, and even premature deaths.

EPA last promulgated national ambient air quality standards for ozone on March 12, 2008. Under the timeline mandated by the Clean Air Act, EPA should have completed its review of these standards by March 12, 2013. The scientific community, and even EPA itself, have recognized that the 2008 standards are inadequate to protect public health, and that revision of these standards is needed.

Because of the urgency of the health threat from ozone pollution, Plaintiffs now move for summary judgment on their claim pursuant to Rule 56 of the Federal Rules of Civil Procedure.¹ EPA’s failure to act constitutes an ongoing violation of the Clean Air Act, and Plaintiffs are entitled to an injunction ordering EPA to perform its non-discretionary duty to review the national ambient air quality standards for ozone.

II. BACKGROUND**A. Ozone Pollution and Effects**

Ground-level ozone, commonly referred to as smog, is a corrosive air pollutant that is harmful to humans and other living organisms. It forms when precursor pollutants, volatile organic compounds (“VOC”) react with nitrogen oxides (“NOx”) in the presence of heat and sunlight.

¹ Rule 56 provides that “[u]nless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.” Fed. R. Civ. P. 56(b).

1 United States Environmental Protection Agency, EPA-452/P-12-002, Policy Assessment for the
2 Review of the Ozone National Ambient Air Quality Standards, First External Review Draft (August
3 2012)(“Policy Assessment”) at 1-10, attached as Exhibit 1 to Plaintiffs’ Request for Judicial Notice
4 (“Plaintiffs’ RJN”); *see also* United States Environmental Protection Agency, Final Integrated
5 Science Assessment (Feb. 2013), [http://www.epa.gov/ttn/naaqs/standards/ozone/
6 s_o3_2008_isa.html](http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_isa.html). These precursor pollutants originate from a wide variety of sources, but the
7 main producers are large industrial sources, mobile sources such as cars and trucks, and the fossil-
8 fueled generation of electric power. *See* 75 Fed. Reg. 2938, 2941 (Jan. 19, 2010). Ozone pollution
9 is present in urban and rural areas, and regional concentrations can vary based on changing weather
10 patterns, as well as variations in an area’s geography and topography. Policy Assessment at 1-11 to
11 1-12.

12 Exposure to ozone causes a number of acute and chronic health effects. Following its own
13 review of available scientific evidence, EPA has concluded that there is a direct connection between
14 exposure to ozone and respiratory health effects, cardiovascular effects, central nervous system
15 effects, reproductive and developmental effects, as well as an increase in premature mortality.
16 Policy Assessment at 2-3 to 2-4.

17 Ozone exposure impairs lung function, aggravates asthma, and has been linked with
18 increases in school absences, emergency department visits, and hospital admissions. *See* Policy
19 Assessment at 2-4 to 2-5, 2-19, 2-35, 2-47 to 2-48. Studies have shown that healthy individuals
20 exposed on a short-term basis to ozone levels as low as 0.060 parts per million (“ppm”) will
21 experience a significant decrease in lung function and an increase in lung inflammation. *Id.* at 2-8,
22 2-13. Long-term ozone exposure has also been linked to cardiovascular diseases, reproductive and
23 developmental health effects, and central nervous system effects. *Id.* at 2-48. Exposure to ozone has
24 also been correlated with increased risk of death for those suffering from respiratory conditions. *Id.*
25 at 2-25, 2-27. According to EPA’s preliminary analysis, some 15,000 to 18,000 deaths per year can
26 be attributed to ozone pollution. *Id.* at 3-12.

27 Certain groups are especially vulnerable to ozone exposure, such as those with existing lung
28 diseases, children, the elderly, and outdoor workers and athletes. *See* Policy Assessment at 2-10 to

1 2-11. These vulnerable groups constitute a significant portion of the population, and consequently,
2 the proper and timely review of the health impacts of ozone has significant implications for millions
3 of people throughout the United States. For example, there are some 25 million individuals in the
4 United States suffering from asthma. *Id.* at 2-71. There are approximately 74 million individuals
5 under the age of 18 (24% of the U.S. population), and 40 million individuals who are 65 years of age
6 or older (13% of the U.S. population). *Id.* Some 16.8 million individuals (11.7% of the employed
7 population) work outside at least one day a week. *Id.* at 2-72.

8 Ozone pollution has also been tied to negative impacts on vegetation growth, agricultural
9 yields, ecosystem health, and climate effects such as reduced carbon sequestration. Policy
10 Assessment 5-2 to 5-3.

11 **B. The Clean Air Act's Requirements for National Ambient Air Quality Standards.**

12 The Clean Air Act establishes a comprehensive plan "to protect and enhance the quality of
13 the Nation's air resources so as to promote the public health and welfare and the productive capacity
14 of its population." 42 U.S.C. § 7401(b)(1).

15 As one of its central features, the Act requires the Administrator to set national ambient air
16 quality standards for certain air pollutants. 42 U.S.C. § 7409(a). Under the Act, the Administrator
17 must set primary standards for those pollutants at levels that will protect the public health with an
18 adequate margin of safety, and secondary standards at levels that will "protect the public welfare
19 from any known or anticipated adverse effects associated with the presence of those pollutants in the
20 ambient air." *Id.* §§ 7409(b)(1), (2).

21 The Clean Air Act imposes on EPA a non-discretionary duty to review national ambient air
22 quality standards every five years and "make such revisions in such criteria and standards and
23 promulgate such new standards as may be appropriate" 42 U.S.C. § 7409(d)(1).

24 **C. Recent History of EPA Review of Ozone Standards.**

25 EPA last promulgated national ambient air quality standards for ozone on March 12, 2008.
26 *See* 73 Fed. Reg. 16436 (Mar. 27, 2008). At that time, EPA set the primary standard at 0.075 ppm
27 (averaged over eight hours) and made the secondary standard identical to the primary standard. *Id.*
28

1 Many within the scientific community have stated that these standards are insufficient to
2 protect public health. In fact, shortly after these regulations were promulgated, EPA's Clean Air
3 Scientific Advisory Committee ("CASAC") sent EPA a letter expressing its strong disagreement
4 with EPA's primary and secondary ozone standards, which it contended failed to provide an
5 adequate margin of safety, and were not supported by the best available science. *See* 75 Fed Reg.
6 2938, 2943 (Jan. 19, 2010). Members of the CASAC Ozone Review Panel "unanimously
7 recommended decreasing the primary standard to within the range of 0.060-0.070 parts per million."
8 Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee, to Stephen
9 Johnson, Administrator, U.S. Environmental Protection Agency (Apr. 7, 2008)("2008 Henderson
10 Letter"), attached as Exhibit 2 to Plaintiffs' RJN. It was CASAC's "consensus scientific opinion
11 that [the Administrator's] decision to set the primary ozone standard above this range fails to satisfy
12 the explicit stipulations of the Clean Air Act that [EPA] ensure an adequate margin of safety for all
13 individuals, including sensitive populations." *Id.* CASAC recommended adopting a secondary
14 standard distinct from the primary standard, calculated by taking into account cumulative effects of
15 ozone, as well as distinct seasonal concentrations of ozone. *Id.*

16 In 2010, EPA proposed to revise the national ozone standards to address the deficiencies
17 identified by EPA's Clean Air Scientific Advisory Committee, as well as to incorporate information
18 from recent scientific studies. 75 Fed. Reg. at 2993. The EPA Administrator determined that the
19 2008 primary ozone standard of 0.075 ppm was "not sufficient to provide protection with an
20 adequate margin of safety." *Id.* at 2996. EPA proposed revising the primary ozone standard to
21 within a range of 0.060 to 0.070 ppm. *Id.* at 2998. EPA also proposed that the secondary ozone
22 standard should be set separately from the primary standard, according to a "cumulative, seasonal
23 standard." *Id.* at 2999.

24 In evaluating the effects of setting the primary ozone standard in the range of 0.060 to 0.070
25 ppm, EPA estimated that the incidence of asthma attacks, heart attacks, hospital and emergency
26 room visits could be greatly reduced. United States Environmental Protection Agency, January 2010
27 Proposal to Revise the National Ambient Air Quality Standards for Ground Level Ozone: General
28 Overview at 17 (Jan. 2010), attached as Exhibit 7 to Plaintiffs' RJN. It estimated that if the standard

1 was set to 0.070 ppm, some 1,500 to 4,300 premature deaths would be avoided annually once the
2 nation met that standard, and at 0.060 ppm, some 4,000 to 12,000 deaths would be avoided. *Id.* at
3 17.

4 These revisions were whole-heartedly supported by CASAC based on “the large body of data
5 and risk analyses demonstrating that retention of the current standard would leave large numbers of
6 individuals at risk for respiratory effects and/or other significant health impacts including asthma
7 exacerbations, emergency room visits, hospital admissions and mortality.” Letter from Dr. Jonathan
8 M. Samet, Chair, Clean Air Scientific Advisory Committee, to Lisa P. Jackson, Administrator, U.S.
9 Environmental Protection Agency (Feb. 19, 2010), attached as Exhibit 3 to Plaintiffs’ RJN; *see also*
10 Letter from Dr. Jonathan Samet, Chair, Clean Air Scientific Advisory Committee, to Lisa Jackson,
11 Administrator, U.S. Environmental Protection Agency (Mar. 30, 2011), attached as Exhibit 6 to
12 Plaintiffs’ RJN (supporting standard between 0.060 ppm and 0.070 ppm to “be confident of public
13 health benefits and additional protection for susceptible groups”).

14 Despite the Administrator’s conclusion that the 2008 ozone standards were inadequate to
15 protect public health and welfare, in 2011, the President directed EPA to set aside the 2010 proposed
16 rule, and withhold completing its review of the 2008 standards until 2013 – the five-year deadline
17 for completing review of the national ambient air quality standards under 42 U.S.C. § 7409(d)(1).
18 Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011),
19 attached as Exhibit 4 to Plaintiffs’ RJN.

20 As a result of the President’s decision, EPA announced a new plan for completing the review
21 of the 2008 ozone standards. *See* United States Environmental Protection Agency, EPA 452/R-11-
22 006, Integrated Review Plan for the National Ambient Air Quality Standards (April
23 2011)(“Integrated Review Plan”) at 1-1, attached as Exhibit 5 to Plaintiffs’ RJN. The 2011
24 Integrated Review Plan contained EPA’s first adopted schedule for this review and a schedule that
25 acknowledged that EPA could not meet the five-year deadline for completion, which was March
26 2013. *Id.* at 2-2. Instead, EPA stated it would issue a proposed rule-making in September 2013, and
27 a final rulemaking in June 2014. *Id.*

1 In the intervening months, EPA missed most of the interim dates for key documents. In
2 September 2012, EPA provided a new “Anticipated Schedule” that showed it planned to issue a
3 proposed rule in December 2013 and a final rule in September 2014. *See* Environmental Protection
4 Agency, Review of the Ozone NAAQS: Schedule and Process, Clean Air Scientific Advisory
5 Committee Meeting, CASAC Ozone Panel (Sept. 11-13, 2012)(“Ozone NAAQS Schedule 2012”).

6 That second schedule is now woefully out of date. Not only did EPA fail to issue the
7 proposed rule in December 2013, EPA has held no meetings of the CASAC panel reviewing the
8 ozone standards since November 2012. EPA failed to issue revised versions of the Policy
9 Assessment and the Risk Exposure Assessment that it had announced would be ready for public
10 review in 2013. EPA did issue the final Integrated Science Assessment for Ozone and other
11 Photochemical Oxidants in February 2013, three months later than promised. Ozone NAAQS
12 Schedule 2012.

13 **D. EPA’s Current Review Shows New Ozone Standards Are Still Necessary**

14 In reviewing the most recent scientific evidence, EPA staff has made the preliminary
15 conclusion that revisions to the current ozone standards are needed, given that serious health effects
16 occur from ozone exposure at levels well below the current standards:

17 In looking broadly at the available evidence from controlled human exposure,
18 epidemiologic, and animal toxicological studies, we note that the controlled human
19 exposure studies have reported a variety of health effects, including lung function
20 decrements, respiratory symptoms and pulmonary inflammation in healthy subjects,
21 following exposures to [ozone] concentrations (i.e., [0.060 – 0.070 ppm]) below the
22 level of the current [ozone] standard.

23 Policy Assessment at 4-28. EPA staff further found that:

24 [The] broad array of health effects reported following short-term exposures to [ozone]
25 concentrations below those allowed by the current standard (i.e., respiratory effects
26 and mortality), combined with the plausible linkages between these effects and the
27 much larger body of epidemiologic and controlled human exposure evidence at
28 higher [ozone] concentrations, supports the appropriateness of revising the current
[ozone] standard in order to increase public health protection, particularly for people
with asthma, children and other at-risk groups.

Policy Assessment at 4-30; *see also Id.* at 4-45. EPA has also made the preliminary conclusion that
the current 8-hour secondary standard should be revised “so as to afford greater and more

1 appropriate public welfare protection by selecting a different form, averaging time and level than
2 that of the primary standard.” Policy Assessment at 7-19.

3 EPA’s failure to complete its review of the 2008 ozone standards in a timely manner means
4 that millions of people face continued, recognized risk of harm and even premature death because
5 the existing standard fails to protect their health. Absent an order from this court, EPA is likely to
6 continue its delay in completing the review.

7 **III. STANDARD OF REVIEW**

8 The Clean Air Act authorizes “any person” to commence a civil action against the EPA
9 Administrator where there is an alleged “failure to perform any act or duty . . . which is not
10 discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). In such cases, district courts “shall
11 have jurisdiction . . . to order the Administrator to perform such act or duty.” *Id.* § 7604(a). In this
12 case, the Court must resolve two key questions: (1) whether EPA is liable under the Clean Air Act
13 for failing to perform a mandatory duty under the Act; and (2) if so, what is the appropriate remedy.

14 Summary judgment must be granted “if the movant shows that there is no genuine dispute as
15 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);
16 *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Atchison, Topeka and Santa*
17 *Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 365 (9th Cir. 1998). The moving party bears the
18 burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*,
19 477 U.S. 317, 322 (1986).

20 In this case, the only issue of fact is whether the EPA completed review of the ozone
21 standards by the statutorily-mandated deadline. Should the Court find that EPA has failed to comply
22 with such deadline, “[s]ummary judgment is appropriate where, as here, it remains only for the
23 Court, acting in its discretion to fashion an equitable remedy.” *Am. Lung Ass’n v. Browner*, 884
24 F.Supp. 345, 346 (D. Ariz. 1994)(*citing Sierra Club v. Ruckelshaus*, 602 F.Supp 892, 898 n.9 (N.D.
25 Cal. 1984)).

26 In fashioning appropriate equitable relief, the Court should use its authority “to set
27 enforceable deadlines” to obtain “expeditious compliance” with the Congressional deadlines that
28 EPA has ignored. *Natural Res. Def. Council v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974). “The

1 court's injunction should serve like adrenalin, to heighten the response and to stimulate the fullest
2 use of resources." *Id.* at 712. The standard for reviewing proposed timetables is not how long such
3 rulemakings might take in the normal course, but what the agency is capable of achieving. The
4 agency carries a "heavy burden" to demonstrate that more expeditious compliance is impossible or
5 infeasible. *Am. Lung Ass'n*, 884 F.Supp. at 347 ("Excuses for delay must go beyond the general
6 proposition that further study and analysis of materials will make final agency action better, because
7 . . . it is always easier to do something with more rather than less time."); *see also Sierra Club v.*
8 *Johnson*, 444 F. Supp. 2d 46, 53, 58 (D.D.C. 2006) (noting "heavy burden" to demonstrate
9 "impossibility"). As the *Train* court warned: "An equity court can never exclude claims of inability
10 to render absolute performance, but it must scrutinize such claims carefully since officials may seize
11 on a remedy made available for extreme illness and promote it into the daily bread of convenience."
12 *Train*, 510 F.2d at 713. Unlike other challenges to EPA decision-making, where "the Court defers to
13 agency expertise about appropriate rulemaking procedures, such deference is inappropriate where
14 Congress has unambiguously expressed its intent that these regulations be promulgated by a date
15 certain and the agency manifestly has failed to fulfill this statutory obligation." *Sierra Club*, 444 F.
16 Supp. 2d at 56.

17 **IV. ARGUMENT**

18 The material facts of this case are not in dispute – EPA has failed to complete its review of
19 the national ambient air quality standards for ozone under 42 U.S.C. § 7409(d)(1) by March 12,
20 2013, the timeframe mandated by Congress. Because EPA's failure to perform its non-discretionary
21 duty violates the Clean Air Act, Plaintiffs are entitled to summary judgment on the claims set forth
22 in their complaint, and to an injunction ordering EPA to complete its review of the national ambient
23 air quality standards according to the timeframe set forth below.

24 **A. This Court Has Jurisdiction to Resolve This Matter.**

25 **1. The Clean Air Act Provides the Court Subject Matter Jurisdiction.**

26 Section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), provides district courts with
27 jurisdiction to compel EPA action where there is a "failure of the Administrator to perform any act
28 or duty under [the Clean Air Act] which is not discretionary with the Administrator" The Act

1 requires Plaintiffs, before commencing legal action, to provide 60-days' notice of their intent to file
 2 such action. 42 U.S.C. § 7604(b). In accordance with 42 U.S.C. § 7604(b)(2), Plaintiffs provided
 3 notice to the Administrator by letters dated March 13, 2013 and March 28, 2013, of Plaintiffs' intent
 4 to sue the Administrator to enforce the nondiscretionary duties described herein. *See* Letters from
 5 Paul Cort, Earthjustice, to Bob Perciasepe, Acting Administrator, EPA (Mar. 13, 2013 and Mar. 28,
 6 2013), attached as Exhibits 1-2 to the Declaration of Paul Cort In Support of Plaintiffs' Motion for
 7 Summary Judgment ("Cort Decl."). More than 60 days have passed since EPA received those
 8 letters, and EPA has still not performed the relevant duties. Accordingly, this Court has jurisdiction
 9 pursuant to 42 U.S.C. § 7604(a)(2).

10 **2. Plaintiffs Have Standing to Bring This Action.**

11 Plaintiff organizations have standing to bring this action because: (1) at least one of their
 12 members has suffered an "injury in fact;" (2) the injury is "fairly traceable" to the challenged illegal
 13 conduct; and (3) it is "likely," as opposed to merely "speculative," that the injury will be redressed
 14 by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-
 15 81 (2000); *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000).¹

16 Individual members of Plaintiff organizations are suffering injuries as a result of the current
 17 ozone standards. Here, individual members of the Plaintiff organizations have alleged concrete
 18 injuries to their physical well-being and their aesthetic and recreational interests stemming from their
 19 ongoing exposure to ozone pollution. *See Laidlaw*, 528 U.S. at 184-85 (members' concerns about

21 ¹ In addition, Plaintiffs have standing to represent the interests of their members in this lawsuit
 22 because: (1) neither the claim asserted nor the relief requested requires their members to participate
 23 directly in the lawsuit; (2) each Plaintiff organization is seeking to protect interests that are germane
 24 to its purposes; and (3) at least one individual member of each Plaintiff organization would have
 25 standing to sue individually, as demonstrated herein. *See Hunt v. Washington State Apple*
 26 *Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Ecological Rights Found.*, 230 F.3d at 1147. *See*
 27 Declaration of Harold Wimmer in Support of Plaintiffs' Motion for Summary Judgment ¶¶ 3-6
 28 (American Lung Association seeks to improve lung health, prevent lung disease and promote
 implementation of the Clean Air Act, and has numerous members affected by current ozone
 standards); Declaration of John Stith in Support of Plaintiffs' Motion for Summary Judgment ¶¶ 4-5,
 7 (EDF is dedicated to reducing ozone pollution, and has members affected by ozone pollution);
 Declaration of Linda Lopez In Support of Plaintiffs' Motion for Summary Judgment ¶¶ 4, 6-10
 (Natural Resources Defense Council seeks to "safeguard the Earth" and has numerous members
 affected by failure to review ozone standards); Declaration of Yolanda Andersen in Support of
 Plaintiffs' Motion for Summary Judgment ¶¶ 4, 6-10 (Sierra Club's work involves enforcement of
 the Clean Air Act, and has hundreds of thousands of members affected by ozone pollution).

1 the effects of illegal discharges of pollutants on recreational and aesthetic and economic interests are
2 sufficient to confer standing); *see also Natural Res. Def. Council v. EPA*, 507 F.2d 905, 910 (9th Cir.
3 2004) (holding that a plaintiff “suffer[s] injury if compelled to breathe air less pure than that
4 mandated by the Clean Air Act”).

5 Plaintiffs have members residing in counties just below the current primary standard of 0.075
6 ppm. *See* Declaration of Susan Griffin in Support of Plaintiffs’ Motion for Summary Judgment
7 (“Griffin Decl.”); Declaration of Joseph B. Chaiklin in Support of Plaintiffs’ Motion for Summary
8 Judgment (“Chaiklin Decl.”); Declaration of Mary Hsia-Coron in Support of Plaintiffs’ Motion for
9 Summary Judgment (“Coron Decl.”). The health of these individuals is impacted by ozone
10 pollution, since ozone pollution exacerbates their asthma, allergies and other respiratory conditions.
11 Griffin Decl. ¶7; Chaiklin Decl. ¶¶ 4-6. These individuals also have loved ones whose health is
12 affected by ozone pollution. Griffin Decl. ¶¶3, 5-6; Coron Decl. ¶6. Ozone pollution also makes it
13 difficult for individuals to enjoy the outdoors. Griffin Decl. ¶7; Chaiklin Decl. ¶5; Coron Decl. ¶¶4-
14 5, 7.

15 Plaintiffs also have members residing in counties that are not in attainment with current
16 ozone standards. Declaration of Marilyn Marsh Robinson in Support of Plaintiffs’ Motion for
17 Summary Judgment (“Marsh Decl.”); Andersen Decl. ¶8; Lopez Decl. ¶7; Wimmer Decl. ¶5. These
18 individuals suffer health effects from ozone pollution, and also are forced to limit their recreational
19 interests because of ozone pollution. Marsh Decl. ¶2.

20 Plaintiffs can also show that their injuries are “traceable” to EPA’s failure to review and
21 revise the ambient air quality standards for ozone, and that their injuries would be “redressed” by an
22 order requiring EPA to review the standards. *See Natural Res. Def. Council v. EPA*, 542 F.3d 1235,
23 1245-46 (9th Cir. 2008)(plaintiffs had standing since they could show agency regulations would
24 likely address their injuries); *see also Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir.
25 2001)(noting that when plaintiff seeks to vindicate a procedural right conferred by statute, plaintiff’s
26 burden of showing “causation” and “redressability” requirements is diminished); *Covington v.*
27 *Jefferson County*, 358 F.3d 626, 641 (9th Cir. 2004)(applying *Cantrell* to analyze standing for claims
28 arising out of Clean Air Act).

1 The injuries inflicted on Plaintiffs' members are "fairly traceable" to EPA's illegal conduct
2 challenged in this case because each month of delay in EPA's review of the ozone standards extends
3 the health and welfare impacts associated with ozone pollution in the areas where Plaintiffs'
4 members live. *See Ecological Rights Found.*, 230 F.3d at 1152 (defendants' violations of Clean
5 Water Act met "traceability" requirement, since "alleged injury can be traced to the defendant's
6 challenged conduct"); *Natural Res. Def. Council*, 542 F.3d at 1245-46 ("traceability" requirement
7 met where injuries suffered by plaintiffs due to unregulated discharges would "likely" be addressed
8 by EPA action); Griffin Decl. ¶8; Chaiklin Decl. ¶¶7-8; Coron Decl. ¶7; Grossman Decl. ¶5; Marsh
9 Decl. ¶¶4-6.

10 Finally, this Court may redress Plaintiffs' asserted injuries by issuing an order compelling
11 EPA to expedite its overdue review of the national ambient air quality standards for ozone. *See*
12 *Natural Res. Def. Council*, 542 F.3d at 1245-46 (EPA's promulgation of regulations would redress
13 plaintiffs' injuries); *Covington*, 358 F.3d at 639-40 (statutory violations could be redressed by
14 county compliance with statute); Griffin Decl. ¶8; Chaiklin Decl. ¶¶7-8; Coron Decl. ¶7; Grossman
15 Decl. ¶5; Marsh Decl. ¶¶4-6.

16 For the foregoing reasons, Plaintiffs have standing to challenge EPA's failure to comply with
17 the Clean Air Act's mandatory deadline.

18 **B. Plaintiffs Are Entitled To Summary Judgment Because EPA Failed to Perform**
19 **its Mandatory Duty to Review the National Ambient Air Quality Standards for**
Ozone by March 12, 2013.

20 The Clean Air Act provides that EPA, "at five-year intervals[,] . . . shall complete a thorough
21 review of . . . the national ambient air quality standards . . . and shall make such revisions in . . .
22 standards and promulgate such new standards as may be appropriate . . ." 42 U.S.C. § 7409(d)(1).

23 EPA last promulgated national ambient air quality standards for ozone on March 12, 2008.
24 *See* 73 Fed. Reg. at 16436. In accordance with 42 U.S.C. § 7409(d)(1), EPA was required to
25 complete its review and promulgate appropriate revisions to the standards no later than March 12,
26 2013. To date, however, EPA has failed to complete its review of the national ambient air quality
27 standards for ozone in compliance with 42 U.S.C. § 7409(d)(1). Defendants' Answer to Complaint
28 for Declaratory and Injunctive Relief ("Answer") ¶¶ 5, 29, 35, 37 (Dkt. No. 33).

1 The Clean Air Act's requirements that the Administrator review national ambient air quality
 2 standards are unambiguous and mandatory. *See American Lung Ass'n v. Reilly*, 962 F.2d 258, 260
 3 (2d Cir. 1992)(Clean Air Act imposes upon EPA a non-discretionary, statutory duty to review ozone
 4 ambient air quality standards at five-year intervals); *Natural Res. Def. Council*, 542 F.3d at 1251
 5 (use of the word "shall" in the statute required EPA to issue regulations); *Natural Res. Def. Council*
 6 *v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993)(Clean Air Act requirement that Administrator "shall"
 7 promulgate standards "manifestly obliges" EPA to issue regulations); *Sierra Club v. Leavitt*, 355 F.
 8 Supp. 2d 544, 549 (D.D.C. 2005)("the word 'shall' [] sets forth a mandatory duty"). Indeed, EPA
 9 does not dispute that the Clean Air Act imposes a mandatory duty to review the national ambient air
 10 quality standards for ozone every five years. Answer ¶¶ 3, 27, 28. Nor does EPA dispute that it has
 11 failed to complete review of the national ambient air quality standards for ozone. *Id.* ¶ 5, 29, 35, 37.
 12 Plaintiffs are therefore entitled to summary judgment.

13 **C. The Court Should Order EPA to Complete its Review of the National Ambient**
 14 **Air Quality Standards By Signing a Proposed Rulemaking no later than**
 15 **December 1, 2014 and a Final Rulemaking no later than October 1, 2015.**

16 **1. This Court Has the Authority to Set Mandatory Deadlines for EPA to**
 17 **Comply With the Clean Air Act.**

18 Where, as here, EPA has acted in direct conflict with mandatory statutory deadlines, it is
 19 well-established that courts have the authority to order EPA to perform its mandatory duty. *See* 42
 20 U.S.C. § 7604(a) (giving district courts jurisdiction to order the Administrator to perform such
 21 mandatory acts or duties under the statute); *Sierra Club*, 602 F.Supp. at 898 (holding courts have the
 22 authority to require EPA to comply with statutory deadlines for issuing regulations); *see also Train*,
 23 510 F.2d at 705 (finding "[t]he authority to set enforceable deadlines both of an ultimate and
 24 intermediate nature is an appropriate procedure for exercise of the court's equity powers to vindicate
 25 the public interest").

26 **2. EPA Can Propose Rulemaking by December 1, 2014 and Finalize its**
 27 **Review of the National Ambient Air Quality Standard for Ozone by**
 28 **October 1, 2015.**

Plaintiffs respectfully request that the Court order EPA to comply with its non-discretionary
 duty under 42 U.S.C. § 7409(d)(1) to complete the review of the national ambient air quality

1 standards for ozone by signing a proposed rule no later than December 1, 2014, and a final rule no
2 later than October 1, 2015. EPA carries a heavy burden to demonstrate that more expeditious
3 compliance is impossible. *See, e.g., Sierra Club*, 602 F. Supp. at 898-99 (noting that the desire for
4 “further study” of an issue insufficient to show “impossibility”); *Sierra Club v. Thomas*, 658 F.
5 Supp. 165, 171-72 (N.D. Cal. 1987)(noting that burden of showing “impossibility” is a heavy one,
6 particularly where “agency has failed to demonstrate any diligence whatever in discharging its
7 statutory duty”).

8 EPA has reviewed and revised the national ambient air quality standards for ozone and other
9 pollutants on many occasions. The process for this review is now well-established, with a discrete
10 set of steps required to complete these reviews. While the particular technical issues may vary from
11 review to review, there is no serious question as to the steps involved or the general timeframes
12 associated with those steps. Repeatedly EPA has sought to extend the timing of these reviews, and
13 repeatedly EPA has demonstrated that when forced to complete its review in accordance with a
14 court-ordered schedule, expeditious compliance is possible.

15 Based on EPA’s own projections for the time needed to review the national ambient air
16 quality standards for ozone, as well as the time taken by EPA to review other national ambient air
17 quality standards, it is eminently possible for EPA to issue a Proposed Rule on the ozone standards
18 by December 1, 2014 and a Final Rule by October 1, 2015.

19 As set forth in greater detail below, because EPA cannot show that it would be “impossible”
20 to comply with the rulemaking timelines requested by Plaintiffs, the Court should issue an order in
21 Plaintiffs’ favor.

22 **a. The Deadlines Sought By Plaintiffs Are Consistent with EPA’s**
23 **Own Assumptions Regarding the Ozone Rulemaking Timeframes.**

24 Plaintiffs have requested a rulemaking timeline that is in line with the timeframes proposed
25 by EPA itself for the review of the national ambient air quality standards for ozone.

26 ***Steps Involved in Reviewing National Ambient Air Quality Standards for Ozone.*** In a 2012
27 presentation about the ozone standards at issue in this case, EPA staff outlined the basic steps
28 involved in the review of a national ambient air quality standard. *See* Environmental Protection

1 Agency, Review of the Ozone NAAQS: Schedule and Process, Clean Air Scientific Advisory
2 Committee Meeting, CASAC Ozone Panel (Sept. 11-13, 2012)(“Ozone NAAQS Schedule 2012”) at
3 3, attached as Exhibit 8 to Plaintiffs’ RJN (reprinted as Figure 1 below).

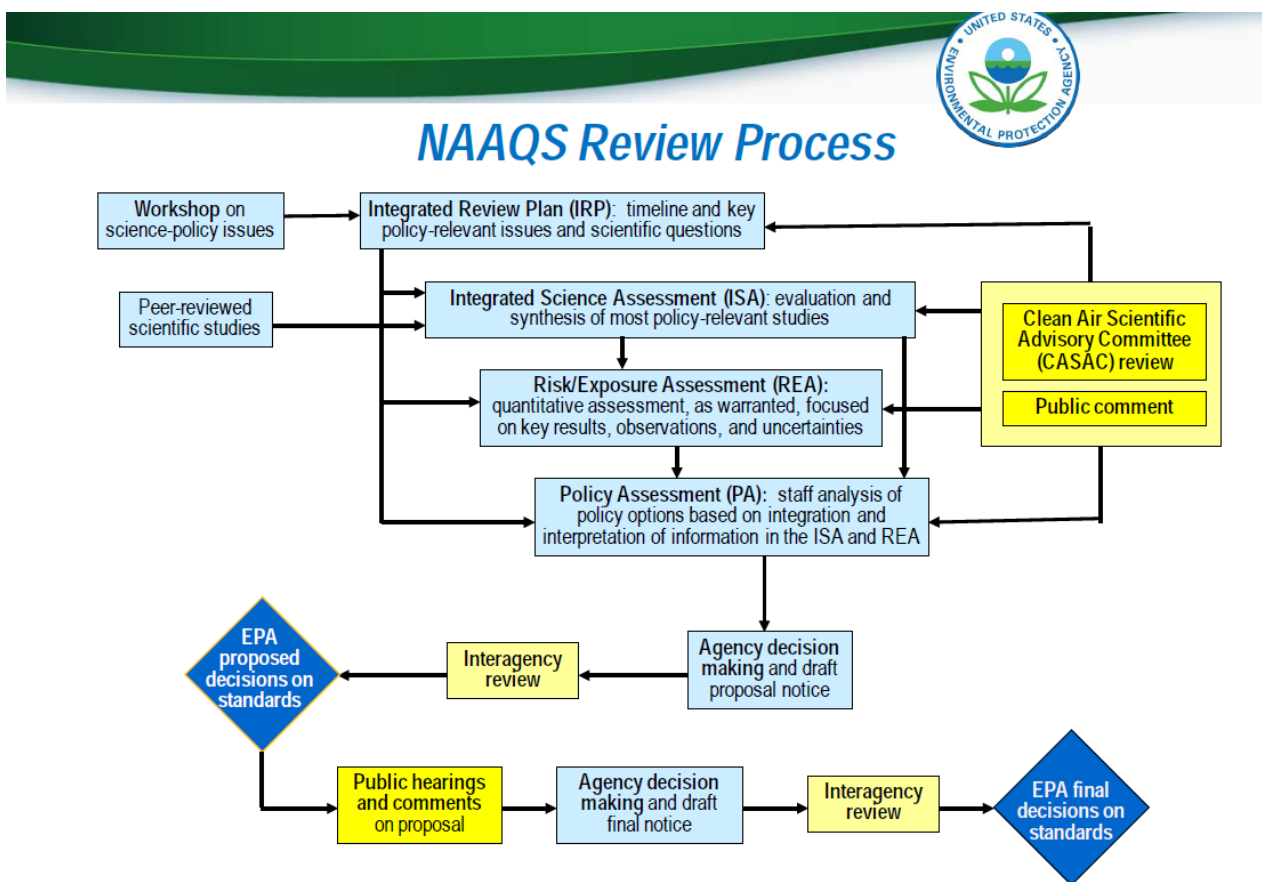
4 In reviewing a national ambient air quality standard, EPA first develops its plan for
5 conducting the review and shares that with its Clean Air Scientific Advisory Panel. In accordance
6 with that plan, EPA develops a series of assessments that will inform the final rule: (1) an
7 “Integrated Science Assessment” (“ISA”), which evaluates and synthesizes recent scientific studies
8 related to ozone pollution; (2) a “Risk/Exposure Assessment” (“REA”), which provides a
9 quantitative analysis of the health and welfare risks associated with ozone pollution; and (3) a
10 “Policy Assessment,” which provides EPA staff’s analysis of policy options based on the integration
11 and interpretation of information from the ISA and REA. *See* Ozone NAAQS Schedule 2012 at 3;
12 Integrated Review Plan at 1-4 to 1-6. Each of these assessments go through draft and final revisions,
13 and will also be subject to review by CASAC and the public. Ozone NAAQS Schedule 2012 at 3.

14 Once the final Policy Assessment is completed, EPA issues a proposed rule based on that
15 assessment. *Id.* In EPA’s traditional review process, the proposed rule is subject to interagency
16 review by the Office of Management and Budget (“OMB”).¹ *Id.* The proposed rule is then released
17 for public hearing and comment. *Id.* The input collected during this public process is taken into
18 account, and EPA develops the final rule. *Id.* Traditionally, this final rule is again reviewed by
19 OMB and other interested agencies before it is finally signed. *Id.*

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¹ While EPA budgets time for interagency review as part of its rulemaking schedule, it has no legal entitlement to this time, and it may not use interagency review as a means of delaying the rulemaking process. *See, e.g., Env’tl Def. Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986)(OMB cannot use review process to delay promulgation of regulations “beyond the date of a statutory deadline”); *Am. Lung Ass’n*, 884 F. Supp. at 349 (OMB review “serves no congressional purpose and is wholly discretionary”); *see also* Exec. Order No. 12866 § 6(a)(3)(D), 58 Fed. Reg. 51735, 51741 (Oct. 4, 1993)(interagency review can be shortened or waived “for regulatory actions that are governed by a statutory or court-imposed deadline”).

Figure 1 - EPA's NAAQS Review Process



EPA's Time Estimates For Review of Ozone Standards. EPA has been fairly consistent in estimating the timeframes associated with each of these steps. In its most recent review of the current ozone rulemaking process and schedule, EPA estimated that CASAC would review the final draft ISA and first drafts of the REA and Policy Assessment in September 2012. Ozone NAAQS Schedule 2012 at 2. EPA would issue the final ISA three months later in December 2012. *Id.* In Spring 2013, CASAC would meet to review the second drafts of the REA and Policy Assessment. *Id.* Again, roughly three months later, in Summer 2013, EPA would issue the final REA and Policy Assessment. *Id.* The Proposed Rule would then follow roughly four to six months after the final Policy Assessment (including 90 days of review at OMB), and be signed in December 2013. The Final Rule, after public comment and 90 days of OMB review, would be signed in September 2014. *Id.*

1 The relative times associated with each step in this timetable are consistent with EPA's prior
 2 estimates of the time needed to complete the review of ozone standards. *See* Integrated Review Plan
 3 at 2-2; United States Environmental Protection Agency, Clean Air Scientific Advisory Committee
 4 Ozone Review Panel, Public Meeting (May 19-20, 2011) at 6, attached as Exhibit 9 to Plaintiffs'
 5 RJN; United States Environmental Protection Agency, Review of the Ozone NAAQS: Schedule and
 6 Preview of the REA and PA, Presentation to the CASAC Ozone Panel (Jan. 9, 2012) at 2, attached
 7 as Exhibit 10 to Plaintiffs' RJN. Table 1 below summarizes the various schedules EPA has
 8 announced for completing this ozone rulemaking. While EPA has made certain choices that have
 9 resulted in its failure to act in concert with these schedules, it has never wavered in its estimates of
 10 the time associated with the specific steps, or suggested that these timeframes were somehow
 11 "impossible."

12 Table 1 – Schedules Proposed by EPA for Current Ozone Rulemaking

EPA Document Outlining Ozone Review Schedule	Predicted Final CASAC Meeting	Predicted Final Policy Assessment	Predicted Notice of Proposed Rulemaking	Predicted Final Rulemaking	Time Intervals Between Rulemaking Stages
Integrated Review Plan for the Ozone National Ambient Air Quality Standards Review, External Draft (September 2009)	May 2012	October 2012	May 2013	February 2014	5 months/ 7 months/ 9 months
Integrated Review Plan for the National Ambient Air Quality Standards (April 2011)	January 2013	March 2013	September 2013	June 2014	2 months/ 6 months/ 9 months
CASAC Ozone Review Panel Public Meeting (May 19-20, 2011)	December/Jan uary 2013	March 2013	September 2013	June 2014	3 months/ 6 months/ 9 months
Review of the Ozone NAAQS Schedule and Preview of the REA and PA (January 9, 2012)	January/ February 2013	May 2013	October 2013	July 2014	4 months/ 5 months/ 9 months
Review of the Ozone NAAQS: Schedule and Process (September 11, 2012)	Spring 2013	Summer 2013	December 2013	September 2014	3 months/ 4-6 months/ 9 months

1 **Current Status of EPA's Review of Ozone Standards.** EPA has now completed several key
 2 steps in its review of the national ambient air quality standards for ozone. EPA released first drafts
 3 of the REA and Policy Assessment in August 2012. See <http://www.epa.gov/ttn/naaqs/standards/>
 4 [ozone/s_o3_2008_rea.html](http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_rea.html). EPA issued the Final Integrated Science Assessment in February 2013.
 5 See http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_2008_isa.html. EPA has prepared the
 6 second drafts of the REA and the Policy Assessment, and has scheduled a final meeting with
 7 CASAC to review these drafts in March 2014. Memorandum from Lydia Wegman, Director Health
 8 and Environmental Impacts Division, Office of Air Quality Planning and Standards, to Holly
 9 Stallworth, Designated Federal Officer, Clean Air Scientific Advisory Committee (June 2013),
 10 attached as Exhibit 11 to Plaintiffs' RJN.

11 Following EPA's projected timetable, this would mean that: the final Policy Assessment
 12 should be issued approximately three months later, in June or July of 2014; the Proposed Rule
 13 should be completed four to six months after that (i.e., sometime between October 2014 and January
 14 2015); and the Final Rule should be issued sometime between July 2015 and October 2015.

15 Thus, the timeline proposed by Plaintiffs – signing the Proposed Rule by December 1, 2014
 16 and the Final Rule by October 1, 2015 – is possible, even based on the timelines projected by EPA.

17 **b. The Proposed Timeline Is Consistent With the Schedules EPA Has**
 18 **Met in Previous NAAQS Rulemakings.**

19 The timelines proposed by Plaintiffs for review of the national ambient air quality standards
 20 for ozone are also consistent with the timelines EPA has successfully complied with in prior
 21 rulemakings for national ambient air quality standards. Table 2 outlines the schedules EPA has
 22 followed in recent major national ambient air quality standard review rulemakings.

23 Table 2 – Schedules for Prior NAAQS Rulemakings

National Standard	Final CASAC Meeting	Final Policy Assessment/ Recommendations	Signature Date of Notice of Proposed Rulemaking	Signature Date of Final Rulemaking	Time Intervals Between Rulemaking Stages
Particulate Matter (1997)	May 1996	July 1996	November 27, 1996 (61 Fed. Reg. 65638)	July 16, 1997 (62 Fed. Reg. 38652)	2 months/ 4 months/ 8 months

National Standard	Final CASAC Meeting	Final Policy Assessment/ Recommendations	Signature Date of Notice of Proposed Rulemaking	Signature Date of Final Rulemaking	Time Intervals Between Rulemaking Stages
Particulate Matter (2006)	May 2005	June 2005	December 20, 2005 (71 Fed. Reg. 2620)	September 21, 2006 (71 Fed. Reg. 61144)	1 month/ 6 months/ 9 months
Ozone (1997)	March 1996	June 1996	November 27, 1996 (61 Fed. Reg. 65716)	July 16, 1997 (62 Fed. Reg. 38856)	3 months/ 5 months/ 8 months
Ozone (2008)	August 2006	January 2007	June 20, 2007 (72 Fed. Reg. 37818)	March 12, 2008 (73 Fed. Reg. 16436)	5 months/ 5 months/ 9 months
Nitrogen Oxides (2010)	December 2008	N/A	June 26, 2009 (74 Fed. Reg. 34404)	January 22, 2010 (75 Fed. Reg. 6474)	NA/ NA/ 7 months
Lead (2009)	August 2007	November 2007	May 1, 2008 (73 Fed. Reg. 29184)	October 15, 2008 (73 Fed. Reg. 66964)	3 months/ 6 months/ 5 months

These prior rulemakings also involved complex scientific analysis. As in the present rulemaking, EPA was required to evaluate new scientific data, as well as the human health and welfare effects of the proposed national ambient air quality standards, and incorporate comments from CASAC and the public. All these rulemakings were completed within timeframes similar to the ones requested by Plaintiffs. Therefore, the schedule requested by Plaintiffs is eminently reasonable and feasible for EPA to attain.

V. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and find that EPA has failed to perform its non-discretionary duty required by 42 U.S.C. § 7409(d)(1). To remedy EPA's clear legal violations, Plaintiffs respectfully request that the Court order EPA to sign a Proposed Rule by no later than December 1, 2014 and a Final Rule by no later than October 1, 2015. A proposed form of order is provided herewith.

DATED: January 21, 2014

Respectfully submitted,

/s/ Irene V. Gutierrez
PAUL R. CORT
IRENE V. GUTIERREZ