IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SIERRA CLUB, Plaintiff, v. GINA McCARTHY, in her official capacity as the Administrator of the United States Environmental Protection Agency, Defendant.	Case No. 4:14-cv-00643-JLH

PLAINTIFF SIERRA CLUB'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Nearly 40 years ago, Congress amended the Clean Air Act ("CAA" or "Act") to address the growing problem of air pollution in national parks and wilderness areas. *See* 42 U.S.C. § 7491(a)(1). After EPA's delays in implementing the program, Congress further amended the Act to require prompt action, with EPA setting a deadline of December 17, 2007 for states to submit the first plans that would reduce air pollution in parks and wilderness areas. *See id.* § 7492(e); *see also* 40 C.F.R. § 51.308(b).

The Act requires each state to submit to EPA a plan for reducing haze. EPA's role is to review each plan, approve those that meet applicable legal requirements, and disapprove plans that do not satisfy all applicable requirements. If EPA disapproves a state plan, the Act requires EPA to issue a federal plan within two years of the disapproval. "The mandate to develop a Federal implementation plan is the single most important enforcement tool in the Clean Air Act. It is what makes the act a national pollution control law."[1]

Both the State of Arkansas and EPA have violated their duties under the Clean Air Act, although only the EPA's violations are at issue in this case. The State of Arkansas missed the 2007 deadline for submitting a haze plan to EPA, and did not submit a regional haze state implementation plan ("SIP") until September 2011.[2] EPA disapproved significant portions of the State's plan on March 12, 2012 (with an effective date of April 11, 2012), because the plan failed to comply with the Clean Air Act.[3]

Having disapproved the State's plan, EPA was obligated to issue a federal implementation plan ("FIP") within two years of the disapproval (*i.e.*, by April, 2014).

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[1] 136 Cong. Rec. S2608, S2610 (daily ed. Mar. 9, 1990).
[2] Approval and Promulgation of Implementation Plans; Arkansas; regional Haze State Implementation Plan; Interstate Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze, 77 Fed. Reg. 14,604 (Mar. 12, 2012).
[3] *Id*. at 14,604.

More than a year after that mandatory deadline, however, EPA has not only failed to issue a final, federal plan, but has suggested that it need not promptly comply with its statutory obligation to issue a federal plan.

It is well established that EPA's obligation to issue a federal plan within two years of disapproving a state plan is a non-discretionary duty under the Clean Air Act. The undisputed facts indicate that EPA violated, and continues to violate, this mandatory, non-discretionary duty. Therefore, Sierra Club is entitled to judgment as a matter of law finding that EPA has violated its statutory obligation to finalize a federal haze plan for the State of Arkansas within two years of disapproving the State's plan. Sierra Club respectfully requests that this Court order EPA to issue a final regional haze rule for Arkansas by April 15, 2016. Absent an order from this Court, EPA's ongoing failure to comply with the law will continue indefinitely.

I. LEGAL FRAMEWORK: THE CLEAN AIR ACT'S REGIONAL HAZE PROGRAM

Recognizing the "intrinsic beauty and historical and archaeological treasures" of national parks and wilderness areas,[4] Congress amended the Clean Air Act to establish "as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). To achieve this national goal, Congress required states to develop regional haze plans in accordance with regulations developed by EPA. *See id*. § 7491(b)(2). If a state's regional haze plan fails to comply with the applicable legal requirements, the Clean Air Act requires EPA to disapprove the state plan and issue a federal plan in its place. *Id.* §§ 7410(c)(1), (k), (l); *North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013); *Oklahoma v. EPA*, 723 F.3d 1201, 1207-10 (10th Cir. 2013).

Congress gave EPA the final say on whether a state's regional haze SIP complies

[4] H.R. Rep. No. 95-294, at 203-04 (1977), *reprinted in* 1977 U.S.C.C.A.N 1077, 1282.

with the Clean Air Act. 42 U.S.C. §§ 7410(c)(1), (k)(3), (l), 7491. EPA has broad oversight authority over the regional haze program and is obligated to disapprove state haze SIPs that fail to comply with the Act. *North Dakota*, 730 F.3d at 761; *Oklahoma v. EPA*, 723 F.3d at 1207-10. Congress gave EPA this broad oversight authority to prevent recalcitrant states from undermining the purposes of the Clean Air Act through inadequate state plans. *See, e.g., Alaska Dep't of Envtl. Conservation v. EPA*, 298 F.3d 814, 819-20 (9th Cir. 2002) (Congress gave EPA oversight authority because of "disappointing state response[s] to air pollution concerns" and its recognition that "states experience[] internal industry 'pressure . . . to relax their standards'"), *aff'd*, 540 U.S. 461 (2004).

In 1990, after finding that EPA and the states had not made adequate progress toward reducing visibility impairment in the nation's national parks and wilderness areas (so-called "Class I areas"),[5] Congress amended the Clean Air Act to expedite implementation of the haze program. 42 U.S.C. § 7492(e).

II. MATERIAL FACTS THAT ARE UNDISPUTED

EPA disapproved Arkansas's regional haze plan with an effective date of April 11, 2012. Compl. ¶ 17; Arkansas Answer ¶ 1; 77 Fed. Reg. at 14,604. EPA has not finalized a federal implementation plan for regional haze for Arkansas. Compl. ¶ 19; EPA Answer ¶ 19; Arkansas Answer ¶ 19. Nor has EPA approved a revised state plan that corrects the deficiencies in the plan that the agency disapproved on April 11, 2012. Compl. ¶ 19; EPA Answer ¶ 19; Arkansas Answer ¶ 1.

[5] Areas designated as mandatory Class I Federal areas (or Class I for short) consist of national parks exceeding 6,000 acres, national wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. *See* 42 U.S.C. § 7472(a).

III. JURISDICTION

This Court has jurisdiction over this case under the Clean Air Act's citizen suit provision, which authorizes district courts to hear actions brought by "any person" to compel EPA's performance of "any act or duty" under the Act "which is not discretionary with [EPA]." 42 U.S.C. § 7604(a)(2). EPA's duty to promulgate a federal plan within two years of disapproving Arkansas's SIP for regional haze is a non-discretionary duty. *See* 42 U.S.C. § 7410(c)(1)(B).

Sierra Club satisfied the notice requirements for bringing this action under the Clean Air Act. EPA Answer ¶ 3. Venue is proper in this Court because some of the omissions giving rise to this claim occurred here. *See* 28 U.S.C. § 1391(e)(1).

IV. STANDING

Sierra Club has associational standing to bring this suit. An organization has standing to bring an action on behalf of its members if (1) its members would have standing to sue individually, (2) it is seeking to protect interests that are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires its members to participate directly in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). Sierra Club satisfies all three requirements for associational standing.

A. Sierra Clubs Members Would Have Standing to Sue Individually.

First, Sierra Club members would have standing to sue individually. Sierra Club's members satisfy the three elements of Article III standing: (1) injury in fact that is (2) fairly traceable to EPA's illegal conduct, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Sierra Club members suffer an injury in fact due to EPA's failure to finalize a

federal plan that must reduce the haze pollution that harms members' use and enjoyment of Caney Creek and Upper Buffalo Wilderness Areas as well as other areas. For example, Sierra Club member Glen Hooks grew up hiking and camping throughout Arkansas, including at Upper Buffalo Wilderness Area. Ex. A, Declaration of Glen Hooks ¶¶ 5-6 ("Hooks Decl."). He has taken his sons to Upper Buffalo and visited the area with his church. *Id.* ¶ 6. Haze pollution harms Mr. Hooks's use of Upper Buffalo, as he describes:

> An important part of the experience of visiting Upper Buffalo Wilderness Area is to view the magnificent mountains and forests of this part of the state. Haze decreases visibility and therefore lessens my enjoyment of that hike and others in the Ozarks. In particular, Whitaker Point is one of the most beautiful and most scenic places in the state. My enjoyment of the panoramic views from Whitaker Point is diminished on hazy days.

Id. ¶ 7.

One of Sierra Club member Robert Allen's favorite things to do is hiking and recreating in the Upper Buffalo Wilderness Area and other areas throughout Arkansas. Ex. B, Declaration of Robert Allen ¶¶ 4-5 ("Allen Decl."). Mr. Allen believes that an "important part of the experience of visiting Upper Buffalo Wilderness Area is to stand on Hawksbill Crag and admire the magnificent surrounding mountains and forests." *Id.* ¶ 6. Mr. Allen's use of Upper Buffalo is harmed by the air pollution that obscures views and lessens his enjoyment of the Wilderness Area. *Id.*

Sierra Club member Tom McKinney grew up fishing and hiking in the Ozarks with his grandfather. Ex. C, Declaration of Thomas McKinney ¶ 4 ("McKinney Decl."). For more than 30 years, Mr. McKinney has hiked, canoed, and practiced nature photography throughout Arkansas, including at Upper Buffalo. *Id.* ¶¶ 4-7. Haze pollution, caused by emissions from Arkansas sources, harms Mr. McKinney's use of Caney Creek and Upper Buffalo:

> Haze pollution has diminished my enjoyment of the Upper Buffalo

> Wilderness Area and other natural areas in this the state. I enjoy the views and vistas of these wild places in Arkansas, particularly Whittaker Point (Hawksbill Crag) in the Upper Buffalo Wilderness Area. There is nothing more dispiriting to me than traveling to a place like Whitaker Point (Hawksbill Crag) and finding the view ruined by haze. That has happened to me several times over the years, unfortunately.

Id. ¶ 10.

These harms to Sierra Club's members' recreational and aesthetic interests in using Caney Creek and Upper Buffalo qualify as injuries for purposes of Article III standing. *See Friends of the Earth*, 528 U.S. at 181-84 (members' reasonable concerns about the effects of pollutant discharges on their recreational and aesthetic interests are sufficient to confer standing on environmental group); *see also Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 989 (8th Cir. 2011) (concluding that organizational plaintiff members' concerns about the "increase in dust," as well as noise and light pollution, coming from a power plant and the impacts to their enjoyment from taking pictures, hunting, and studying the history and archaeology of the area were sufficient to demonstrate standing to challenge the power plant's permit).

Sierra Club's members' injuries are fairly traceable to EPA's failure to finalize a federal haze plan for Arkansas. If EPA had acted as required under the Clean Air Act and finalized a federal plan, air quality and visibility in the Caney Creek and Upper Buffalo Wilderness Areas would be better than it is today. That is because the overarching requirement of each plan is to make reasonable progress toward restoring natural visibility conditions. *See* 42 U.S.C. § 7491(b)(2); *see also* 40 C.F.R. § 51.308(d)(1) (the plan "must provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period"). Further, if EPA had acted promptly to comply with the Act, certain major sources of haze pollution in Arkansas would have been required to install best available retrofit technology that would improve visibility at

Caney Creek and Upper Buffalo Wilderness Areas. EPA's violation of the Clean Air Act has meant that there is no enforceable haze plan that compels sources in Arkansas to reduce their emissions which contribute to haze. As a result, the improvements to Class I visibility that required by the Clean Air Act have not and will not occur unless EPA is compelled to satisfy its mandatory obligation.

Both the State of Arkansas's initial plan, and EPA's proposed federal plan, concluded that multiple sources in Arkansas cause or contribute to haze in the Arkansas areas that Sierra Club's members use and enjoy. *See generally* 77 Fed. Reg. 14,604 (EPA partial approval and disapproval of Arkansas SIP); 80 Fed. Reg. 18,944 (Apr. 8, 2015) (proposed FIP). EPA's proposed federal plan concludes that there are cost-effective, available controls that could be installed at Arkansas sources that would significantly reduce haze in Caney Creek, Upper Buffalo, and other areas. *See generally* 80 Fed. Reg. 18,944. EPA's failure to finalize a federal plan means that controls such as those that EPA has proposed have not been required, which has caused a continuation of the haze that impairs Sierra Club members' use and enjoyment of Caney Creek, Upper Buffalo, and other areas. Thus, Sierra Club members' injuries are fairly traceable to EPA's violation of its non-discretionary duty to finalize a federal haze plan for the State of Arkansas.

Moreover, where, as here, the violation of a procedural requirement is at issue, Sierra Club and its members have standing to bring this suit by showing that there is "some possibility that the requested relief," namely, an order directing EPA to finalize a haze plan, would protect its members' health, recreational, aesthetic, and other interests. *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 870-71 (8th Cir. 2013) (concluding that plaintiff cities demonstrated standing based on injury resulting from EPA's alleged failure to follow Clean Water Act procedural requirements in effectively promulgating new regulatory requirements). Moreover, a plaintiff's burden of showing "causation" and

"redressability" requirements is diminished when seeking to vindicate a procedural right conferred by statute. *Id*. (quoting *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012) ("Having shown its members' redressable concrete interest, [a petitioner association] can assert violation of the APA's notice-and-comment requirements, as those procedures are plainly designed to protect the sort of interest alleged. As to such requirements, [the petitioner association] enjoys some slack in showing a causal relation between its members' injury and the legal violation claimed."); *see also Lujan v. Defenders of Wildlife*, 504 U.S. at 572 n.7 (1992)("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

The relief requested in this lawsuit would redress Sierra Club members' injuries by requiring EPA to timely issue a FIP that improves visibility in Caney Creek, Upper Buffalo, and other areas. As with causation, two lines of evidence support redressability. First, the statute requires each haze plan to require the best available retrofit technology and make reasonable progress toward eliminating haze. *See* 42 U.S.C. § 7491(b)(2). Thus, a lawful federal haze plan would have to require the best controls on certain sources for reducing air pollution and, overall, would have to make reasonable progress toward eliminating haze at Caney Creek, Upper Buffalo, and other areas. *See id.* Such reductions in haze would redress Sierra Club members' injuries caused by haze pollution.

Furthermore, EPA's proposed federal haze plan for Arkansas would significantly reduce haze at Caney Creek, Upper Buffalo, and other areas. *See* 80 Fed. Reg. 18,944. Even if EPA's final rule includes only some of the proposed controls, the final rule would redress members' injuries by reducing haze in the areas in which they recreate, such as Caney Creek and Upper Buffalo.

B. The Interests Sierra Club Seeks to Protect Are Germane to Sierra Club's Mission.

Second, the interests Sierra Club seeks to advance in this litigation fall squarely within its environmental-protection mission. In this case, Sierra Club seeks to protect its members' interests in timely reducing the air pollution that harms their use and enjoyment of public lands. *See* Ex. B, Allen Decl. ¶¶ 6, 10; Ex. A Hooks Decl. ¶¶ 11-12 ; Ex. C, McKinney Decl. ¶ 12. These interests are germane to the purposes of the Sierra Club, which include enjoying and exploring wild places and protecting and restoring the environment. *See* Ex. D, Declaration of Yolanda Anderson ¶ 4.

C. The Participation of Individual Members of Sierra Club is Unnecessary.

Third, neither the claim nor the nature of the relief requires the participation of individual members of Sierra Club. *Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. v. Brock,* 477 U.S. 274, 287-88 (1986) (holding union workers had associational standing where lawsuit raised a "pure question of law: whether the Secretary properly interpreted the Trade Act's" requirements and did not require evaluation of any of the "unique facts" personal to the union's members). As Sierra Club satisfies all three requirements for associational standing, Sierra Club has standing to bring this lawsuit.

V. ARGUMENT

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to cite "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *accord* Fed.

R. Civ. P. 56(c)(1)(A); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011).

In ordering appropriate relief, a district court should compel EPA to correct its statutory violations as soon as possible. *Natural Res. Def. Council v. Train*, 510 F.2d 692, 705, 712-13 (D.C. Cir. 1974). Where there is a clear statutory deadline, EPA bears the especially "heavy" burden of proving that expeditious compliance would be "impossible." *Sierra Club v. Thomas*, 658 F. Supp. 165, 170-72 (N.D. Cal. 1987) (citing *Train*); *see also Sierra Club v. Johnson*, 444 F. Supp.2d 46, 52 (D.D.C. 2006) (explaining that courts may decline to impose an "immediate" deadline only if it is impossible for the agency to meet).

A. EPA Violated and Continues to Violate Its Non-Discretionary Duty to Finalize a Federal Implementation Plan Within Two Years of Disapproving Arkansas's Haze Plan.

Pursuant to the Clean Air Act, EPA has a non-discretionary duty to promulgate a federal implementation plan within two years of disapproving a state implementation plan. The statute provides:

> The Administrator *shall* promulgate a Federal implementation plan at any time within 2 years after the Administrator –
>
> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or
>
> (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1) (emphasis added).

Courts interpreting this provision have concluded that EPA's duty to issue a federal plan is non-discretionary. *See, e.g., Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1124, 1127 (D.C. Cir. 1995) (FIP promulgation mandatory); *Coal. for Clean Air v.*

S. Cal. Edison, 971 F.2d 219, 224-25 (9th Cir. 1992) (plain language of statute supports mandatory duty); *Delaney v. EPA*, 898 F.2d 687, 695 (9th Cir. 1990) (directing EPA to promulgate FIP upon court's vacating EPA's approval of SIPs); *San Francisco BayKeeper v. Browner*, 147 F.Supp.2d 991, 1001 (N.D. Cal. 2001) (same).

There is no genuine issue of material fact regarding EPA's violation of this non-discretionary duty. EPA disapproved the State of Arkansas's regional haze implementation plan on March 12, 2012, with an effective date of April 11, 2012. 77 Fed. Reg. at 14,604; Arkansas Answer ¶ 17. The state has not submitted a revised plan that corrects the deficiency. EPA Answer ¶ 19; Arkansas Answer ¶ 19. EPA has not approved a revised state plan that corrects the deficiencies in the plan EPA disapproved in 2012, EPA Answer ¶ 19; Arkansas Answer ¶ 19. EPA has not issued a final, federal implementation plan. EPA Answer ¶ 19.

In light of these undisputed facts, EPA has conceded liability:

> Liability is not in dispute. EPA concedes that more than two years have passed since it partially disapproved the Arkansas submission and that is has not yet issued a Federal implementation plan ("FIP"). The only issue remaining before the Court is remedy; that is, the deadline by which EPA will comply with its mandatory duty to promulgate a FIP (or approve a revised SIP if submitted by Arkansas that meets the relevant statutory and regulatory requirements).

EPA's Opp. to Nucor's Motion to Intervene at 1 (ECF Doc. No. 35); *see also* EPA Answer ¶ 19 (admitting that "EPA has failed to issue a FIP by the two-year deadline").

B. The Court Should Order EPA to Fulfill Its Non-Discretionary Duty by April 15, 2016.

Where, as here, EPA has violated a non-discretionary duty, the Clean Air Act authorizes district courts "to order the Administrator to perform" the required act or duty. 42 U.S.C. § 7604(a). In view of EPA's statutory violations, Sierra Club respectfully request that this Court order EPA to comply with its duty by April 15, 2016.

Courts routinely enter such remedial orders in cases where EPA has failed to

finalize a FIP within two years of disapproving a state plan. *See, e.g., Coal. for Clean Air*, 971 F.2d at 229 (instructing district court to "establish an expeditious schedule" for FIP promulgation); *Natural Res. Def Council v. EPA*, 475 F.2d 968, 971 (D.C. Cir. 1973) (ordering EPA to promulgate a FIP within four months of the date state plans were due); *Delaney*, 898 F.2d at 695 (EPA must promulgate attainment FIP within six months).

Where Congress has established a clear statutory deadline for completing a non-discretionary duty, courts place a "heavy burden" on the agency to demonstrate that compliance with that deadline is "an impossibility." *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1980) (citing *Train*, 510 F.2d at 713) (rejecting EPA's request for prospective exemption from a statutory deadline to promulgate NPDES regulations). In so doing, courts have refused to allow an agency to take an approach that is "contrary to the explicit statutory design" without closely scrutinizing an agency's efforts to comply and its claims of infeasibility. *Alabama Power*, 636 F.2d at 359.[6]

Applying the same reasoning, district courts have repeatedly held agencies to this impossibility standard in devising remedial relief for delinquent agency action. In *Sierra Club v. Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1984), for example, the court rejected EPA's proposed remedial deadline for promulgating national emission standards for radi-

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[6] In *Train*, the D.C. Circuit recognized two possible legitimate constraints on the agency's prospective ability to meet a statutory deadline:

> First, it is possible that budgetary commitments and manpower demands required to complete the guidelines by [the existing deadline] are beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs. Second, EPA may be unable to conduct sufficient evaluation of available control technology to determine which is the best practicable or may confront problems in determining the components of particular industrial discharges.

Train, 510 F.2d at 712. However, courts routinely reject agency claims that additional time is needed simply to improve the regulation. *See, e.g., Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 899 (N.D. Ca. 1984) (rejecting defendant's justification that regulations would be improved by further study).

onucleotides that were already three years overdue, holding that EPA's proposal, "without a more convincing demonstration of impossibility, would. . . repeal the Congressional mandate." *Id*. at 789. The court instead adopted the far shorter schedule proposed by the plaintiffs. *Id*.

Similarly, in *Sierra Club v. Ruckelshaus*, the court rejected EPA's argument that further study justified an extended remedial schedule, holding that such excuse does not satisfy the agency's "burden of proving that compliance with the statutory deadline is impossible." 602 F. Supp. at 898. Other district courts are in accord. *See, e.g., Natural Res. Def. Council v. EPA*, 797 F. Supp. 194, 198 (E.D.N.Y. 1992) (ordering EPA to comply with plaintiffs' four-month proposed schedule where EPA could not give any reasons why plaintiffs' schedule would be impossible to implement); *State of New York v. Ruckelshaus*, 14 Envt'l L. Rep. 20,873 (D.D.C. 1984) (holding that EPA's claims concerning technical complexity and public significance of the rule failed to satisfy the impossibility test and ordering EPA to comply with plaintiffs' proposed schedule).

Additionally, in fashioning a FIP-compliance timetable under circumstances similar to those at issue here, courts have considered several factors, such as the agency's diligence (or lack thereof) in meeting the mandatory deadline, the role of the specific deadline in effectuating the purposes of the statute, and the public's interest in the prompt satisfaction of the statutory directive. *See, e.g., Sierra Club v. Johnson*, 444 F.Supp.2d 46, 53 (D. D.C. 2006). As discussed more fully below, each of these factors favors Sierra Club's proposed deadline. Because "EPA has already missed the deadline to meet its statutory obligations," and because the agency cannot demonstrate impossibility, the promulgation of a FIP "should be done with all practical expediency." *WildEarth Guardians v. Jackson*, No. 11-CV-00001-CMA-MEH, 2011 WL 4485964, at *10 (D. Colo. Sept. 27, 2011); *Coal. for Clean Air*, 971 F.2d at 221 (remanding to district court to "es-

tablish an expeditious schedule for EPA to promulgate final implementation plans" for the affected area).

1. An Accelerated Schedule Is Warranted Because A Final Haze Plan for Arkansas is Long Overdue.

An agency's failure to meet an express statutory deadline is itself reason for prompt remedial action. "When Congress has explicitly set an absolute deadline, congressional intent is clear . . . . The EPA cannot extract leeway from a statute that Congress explicitly intended to be strict." *Delaney v. EPA*, 898 F.2d at 691.

The case for prompt remediation is especially compelling where, as here, the deadline for agency action has long passed. *See Sierra Club v. Johnson*, 444 F.Supp.2d at 53 (D. D.C. 2006) (noting that the government's burden is "especially heavy" where the agency has failed to diligently discharge its duty and "has in fact ignored that duty for several years.") (quoting *Sierra Club v. Thomas*, 658 F. Supp. at 172). In *Coalition for Clean Air*, the Ninth Circuit instructed the district court to "establish an *expeditious schedule* for the promulgation of final FIPs" for the local area, and ordered that "[i]n establishing the schedule, the district court should bear in mind that promulgation of these FIPs *has already been delayed far beyond the statutory deadline*." 971 F.2d at 229 (emphasis added).

Other courts have similarly imposed expedited compliance schedules when confronted with EPA's violation of statutory deadlines. For example, faced with EPA delay in promulgating guidance that was needed by states for purposes of providing for more stringent "inspection and maintenance" ("I/M") of cars and trucks in their SIPs, the D.C. Circuit held:

> [B]ecause the EPA, by ignoring the statutory deadline for promulgating guidance, was responsible for the tardy submission of enhanced I/M SIPs, we conclude that the EPA should be required to compensate for the delays it caused by accelerating its reviews of those submittals.

Natural Res. Def. Council v. EPA, 22 F.3d 1125, 1136 (D.C. Cir. 1994).

Here, the State violated its December 2007 deadline for submitting a plan to EPA, and EPA then missed its April 2014 deadline for issuing a federal plan. All the while, sources in Arkansas that emit harmful air pollution have not been subject to an enforceable plan that would require emissions reductions. EPA's federal haze plan is overdue and the Court should use its remedial power to order prompt compliance with the Clean Air Act.

2. An Accelerated Schedule is Warranted Because a Final Plan is An Integral Part of the Statutory Scheme.

Prompt EPA compliance is particularly appropriate where, as here, the specific deadline at issue is of great importance to the statutory scheme. One of the most important elements of the Clean Air Act's framework is the requirement that EPA step in on a timely basis to develop an air pollution control plan if a state's plan is inadequate. As the D.C. Circuit has found:

> The FIP provides an additional incentive for state compliance because it rescinds state authority to make the many sensitive technical and political choices that a pollution control regime demands. The FIP provision also ensures that progress toward . . . attainment [of national air quality standards] will proceed notwithstanding inadequate action at the state level.

Natural Res. Def. Council v. Browner, 57 F.3d at 1124..

Congress viewed the FIP provision as a "backstop to state planning." *Id.* at 1127 n.8. In the 1990 Amendments, Congress enacted statutory requirements for EPA to take specific actions by firm deadlines to "force[] regulatory action." S. Rep. No. 101-228, at 128, 156 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3541; *see also id.* at 127-33, 1990 U.S.C.C.A.N. at 3512-18; Hon. Henry A. Waxman, An Overview of the Clean Air Act Amendments of 1990, 21 Envtl. L. 1721, 1742 (1991) ("To an extent unprecedented . . ., the pollution control programs of the 1990 Amendments include very detailed mandatory

directives to EPA, rather than more general mandates or broad grants of authority that would allow for wide latitude in EPA's implementation of the [Clean Air Act's] programs.").

3. Prompt Action is Particularly Appropriate Because a Final Haze Plan Will Improve Public Health.

In deciding upon an appropriate remedy for EPA's failure to comply with its non-discretionary duty under the Clean Air Act, the Court should consider the harm to the public interest that would result from further delay. "Delays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake." *Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983). While EPA's obligation to impose a federal plan stems from the Clean Air Act's provisions designed to improve visibility in national parks and wilderness areas, this Court has authority to consider the harm to public health from EPA's continued delay in issuing a federal plan.

In fashioning a remedy for an agency's failure to fulfill a non-discretionary obligation, the Court should consider the public's interest in the timely discharge of that duty, except in the rare circumstance where Congress has clearly directed otherwise. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) (noting that courts should "not lightly assume that Congress has intended to depart from the established" and traditional practices in granting injunctive relief). No such exceptional circumstances exist here. To the contrary, the primary purpose of the Clean Air Act is to protect public health. 42 U.S.C. § 7401(b)(1) (the purposes of this subchapter are to "promote the public health and welfare"); *see also* 42 U.S.C. § 7410(a)(2) (requiring all implementation plans to contain measures necessary and appropriate to meet the applicable requirements of the Act). Accordingly, the Court has broad equitable authority to consider the illnesses, loss of life, and other adverse public health impacts that will

result from further delay in issuing the federal haze plan. *See Train*, 510 F.2d at 704-05 (When EPA has failed to discharge a nondiscretionary duty under the Clean Air Act, the court has equitable "authority to set enforceable deadlines both of an ultimate and an intermediate nature" to "vindicate the public interest.").

Here, EPA's delay has already prolonged public exposure to harmful air pollution. By EPA's own estimate, the Regional Haze program will improve public health by significantly reducing harmful sulfur dioxide ("SO_2"), nitrogen oxides ("NO_x"), and particulate matter emissions.[7] EPA's proposed haze plan for Arkansas would result in public health benefits—especially for vulnerable and disadvantaged populations, such as children, asthmatics, the elderly, and low-income populations—by significantly reducing SO_2 and NO_x from power plants and other pollution sources in Arkansas. *See* 80 Fed. Reg. at 19,000 (noting that proposed FIP for Arkansas will have a beneficial effect on the health of children and minority and low-income populations). That is because the same pollutants that cause haze—SO_2, NO_x, and particulates—cause asthma, respiratory problems, heart attacks, and a wide variety of other health problems.[8] Thus, even though

[7] In its 2005 amendments to the Regional Haze Rule, EPA estimated that by 2015, the final rule would result in health benefits valued at $8.4 to $9.8 billion *annually*, and would prevent 1,600 premature deaths, 2,200 non-fatal heart attacks, 960 hospital admissions, and over 1 million lost school and work days each year. Fact Sheet - Final Amendments to the Regional Haze Rule and Guidelines for Best Available Retrofit Technology (BART) Determinations, at http://www.epa.gov/visibility/fs_2005_6_15.html. For a detailed analysis of the health benefits associated with EPA's Regional Haze regulations, *see* EPA, Regional Haze Regulations and Guidelines for Best Available Retrofit Technology Determinations, 69 Fed. Reg. 25,184, 25,204-208 (May 5, 2004) (proposed rule).

[8] SO_2 and NO_x emissions that cause visibility impairment are both harmful to human health on their own, and contribute to the formation of fine particulate matter, which is especially dangerous because it evades the body's filtering mechanisms and lodges deep inside the lungs, contributing to increased heart attacks, cardiopulmonary and lung cancer mortality, decreased lung function, and increased risk of asthma and respiratory illness, even at low concentrations. *See, e.g.*, National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 2620, 2626 (Jan. 17, 2006); National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed Reg. 35,520, 35,526 (June 22, 2010) (finding that exposure to SO_2 on time scales as short as five minutes can cause

EPA's objective in issuing a haze plan is to improve visibility, the practical effect of improving visibility is to also improve public health.

As a result of EPA's continuing failure to timely issue a lawful regional haze plan, the public has been and will be exposed to additional, harmful pollution from Arkansas sources. Delaying the finalization of a federal haze plan for even a few months will substantially and irreparably harm public health.

4. The Clean Air Act Forbids EPA From Refusing to Issue a FIP Within Two Years Merely Because EPA Wants to Wait For a State to Revise its SIP.

After conceding liability in this case, EPA agreed to a December 15, 2015 deadline for final action—an agreement the agency itself characterized as "equitable." *See* Proposed Consent Decree at 3 (ECF Doc. No. 30-1) (lodged Feb. 11, 2015). EPA has since changed course. *See* EPA Resp. to Order at 2 (ECF Doc. No. 57) ("EPA now has determined that it can no longer meet the agreed deadline to promulgate a final FIP"). Based on EPA's and Arkansas's representations to the Court, EPA apparently intends to allow the state more time to prepare and submit a revised state plan. *Id.* at 2 (noting that the agency expects to include Arkansas in discussions regarding a new deadline "[i]n light of the State of Arkansas' representations regarding the State's interest in submitting a revised State implementation plan"); *see also* Arkansas Mot. to Intervene ¶ 17 (ECF Doc. No. 44); Ex. 1 to Arkansas Motion to Intervene at 3 (Arkansas describing interest in working with EPA to "develop an approvable SIP").

However, EPA has no discretion to ignore the "bright-line" deadlines for agency action under the Clean Air Act. *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir.

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decrements in lung function, asthma attacks, and respiratory and cardiovascular morbidity); National Ambient Air Quality Standard for Ozone, 73 Fed. Reg. 16,436, 16,436 (Mar. 27, 2008) (Ozone, which is formed when NOx reacts in the atmosphere, can cause adverse health effects that range from decreased lung function and increased respiratory symptoms to serious indicators of respiratory morbidity).

1992) (holding that where a "statute sets forth a bright line rule for agency action . . . there is no room for debate—congress has prescribed a categorical mandate that deprives EPA of all discretion over the timing of its work."). Nor can the agency defer its obligation to finalize its FIP in order to give Arkansas more than the two years specified in the statute for a state to revise a plan that has been disapproved. *See* 42 U.S.C. § 7410(c)(1); *cf. Coal. for Clean Air*, 971 F.2d at 228 (rejecting EPA's argument that the "federal-state partnership" contemplated under the Clean Air Act relieves the agency of its obligation to impose a FIP "before the states have had a chance to meet their new obligations" under the 1990 amendments, and ordering EPA to promulgate an overdue FIP as expeditiously as possible).

The plain langue of the statute is clear: once EPA disapproves a state plan, it must issue a federal plan "unless the State corrects the deficiency, and the Administrator approves the plan or plan revision." 42 U.S.C. § 7410(c)(1). EPA has no authority to rewrite the statute to delay issuing a federal plan longer than two years. Congress decided that states have no more than two years to submit and have EPA approve a revised plan before EPA must issue a federal plan. EPA's apparent intention to delay finalizing a federal plan to give Arkansas more time than the two years allowed by statute is patently unlawful.

5. The Court Should Afford the Agency No More Time Than Has Been Needed to Finalize Other Regional Haze Plans.

Under the proposed Consent Decree EPA lodged with the Court, EPA's final agency action in this case would be due December 15, 2015. Sierra Club does not believe that EPA should be further rewarded for its delay. Nor should the agency be relieved of its mandatory obligation under the Act while Arkansas takes another belated bite at the apple. At the same time, however, Sierra Club recognizes that EPA must respond appropriately to public comment, and that the agency may be unable to

promulgate a final federal plan by December 2015. Accordingly, Sierra Club respectfully urges the Court to extend the deadline for the final promulgation of a Regional Haze FIP by an additional four months, until April 15, 2016.

Based on the law, the representations contained in the proposed complaint, and the relevant equitable considerations, Sierra Club submits that this revised deadline is more than reasonable. In setting a deadline for EPA to comply with the statute, the Court would not be requiring EPA to start a rulemaking from scratch. EPA has already proposed a federal implementation plan. *See* 80 Fed. Reg. 18,944. EPA provided an extended, 120-day public comment period on the proposal, and received public comments by August 7, 2015. 80 Fed. Reg. 18,944; *see also* 80 Fed. Reg. 43,661 (July 23, 2015) (extending the comment period).

An April 15, 2016 deadline for final EPA action would allow EPA just over one year from the date of its proposed plan to finalize the rule. Courts have routinely ordered EPA to complete federal plans in much shorter timeframes. *See, e.g., Coal. for Clean Air*, 971 F.2d at 229 (instructing district court to "establish an expeditious schedule" for FIP promulgation); *Natural Res. Def. Council v. EPA*, 475 F.2d at 971 (ordering EPA to promulgate a FIP within four months of the date state plans were due); Second Modified Consent Decree entered on March 25, 1997 in *Ober v. Browner*, No. CIV 94-1318-PHX-PGR (D. Ariz.) (Ex. E) (requiring EPA to promulgate a PM-10 FIP within approximately 11 months of disapproval of state's submission); *Delaney*, 898 F.2d at 695 (EPA must promulgate attainment FIP within six months)[9]; *Med. Advocates for Healthy Air v. Whitman*, No. C 02-05102 CRB (N.D. Cal.) (Mar. 26, 2003 Report and

[9] *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990) involved a remedial order entered before the 1990 Clean Air Act amendments. Although Congress extended the timetable for EPA to issue its FIPs to two years (as opposed to six months), the basic substantive and procedural requirements of the Act's FIP previsions remained unchanged. Moreover, Congress flatly rejected EPA's efforts to eliminate the FIP provisions altogether.

Recommendation; N.D. Cal. ECF Doc. No. 62) (allowing EPA five months to prepare proposed particulate matter FIP, and another three months to finalize) (Ex. F)[10]; *see also* Consent Decree, *Nat'l Parks Ass'n v. Jackson*, No. 1:11-cv-01548-ABJ (D. D.C. order entered Mar. 30, 2012) (requiring EPA to promulgate final Regional Haze FIPs (or finalize approvals of state plans) for 34 states within 6 months of proposed rules) (Ex. G).

Moreover, an examination of other haze rulemakings indicates that EPA is capable of finalizing a regional haze FIP within one year of the proposal and eight months after submission of public comments.

State	**FIP Proposed**	**FIP Finalized**	**Time between proposal and final rule**	**Time between close of comment period and final rule**
AZ	79 Fed. Reg. 9318 (Feb. 18, 2014)	79 Fed. Reg. 52420 (Sept. 3, 2014)	7 months	5 months
AZ	77 Fed. Reg. 42834 (July 20, 2012)	77 Fed. Reg. 72512 (December 5, 2012)	5 months	3 months
AZ[11]	78 Fed. Reg. 8274 (Feb. 5, 2013)	79 Fed. Reg. 46513 (August 8, 2014)	18 months	7 months
HI	77 Fed. Reg. 31692 (May 29, 2012)	77 Fed. Reg. 61478 (Oct. 9, 2012)	4 months	3 months
MI, MN	77 Fed. Reg. 49308 (Aug. 15, 2012)	78 Fed. Reg. 8705 (Feb. 6, 2013)	6 months	4 months
MI	77 Fed. Reg. 46912 (Aug. 6, 2012)	77 Fed. Reg. 71533 (Dec. 3, 2012)	4 months	3 months
MT	77 Fed. Reg. 23988 (Apr. 20, 2012)	77 Fed. Reg. 57864 (Sept. 18, 2012)	6 months	3 months
ND	76 Fed. Reg. 58570 (Sept. 21, 2011)	77 Fed. Reg. 20,894 (Apr. 6, 2012)	7 months	5 months
NE	77 Fed. Reg. 12770 (March 2, 2012)	77 Fed. Reg. 40150 (July 6, 2012)	4 months	3 months
NM	76 Fed. Reg. 491 (Jan. 5, 2011)	76 Fed. Reg. 52388 (Aug.22, 2011)	7 months	5 months
NV	77 Fed. Reg. 21896 (Apr. 12, 2012)	77 Fed. Reg. 50936 (Aug. 23, 2012)	5 months	3 months

[10] The parties to *Medical Advocates* ultimately agreed to a somewhat extended Consent Decree deadline.

[11] EPA initially proposed this FIP on February 5, 2013, but then re-proposed an alternative plan based on an agreement developed by a group of stakeholders.

NY	77 Fed. Reg. 24794 (Apr. 25, 2012)	77 Fed. Reg. 51915 (Aug. 28, 2012)	5 months	3 months
OK	79 Fed. Reg. 74818 (Dec. 16, 2014)	Due Dec. 9, 2015[12]	12 months	8 months
TX	79 Fed. Reg. 74818 (Dec. 16, 2014)	Due Dec. 9, 2015[13]	12 months	8 months
Virgin Islands	77 Fed. Reg. 37842 (June 25, 2012)	77 Fed. Reg. 64414 (Oct. 22, 2012)	4 months	2 months
WA	77 Fed. Reg. 76174 (Dec. 26, 2012)	79 Fed. Reg. 33438 (June 11, 2014)	5 months	4 months
WY[14]	78 Fed. Reg. 34738 (June 10, 2013)	79 Fed. Reg. 5032 (Jan. 30, 2014)	8 months	5 months

An April 15, 2016 deadline is undeniably generous in light of the fact that the Arkansas Department of Environmental Quality already submitted a plan, EPA reviewed that plan, and EPA has proposed a federal plan. Thus, the only remaining work for EPA is to respond to public comments and make any necessary changes to the proposal. EPA received all public comments on the Arkansas proposal by August 7, 2015. If the Court ordered EPA to meet a deadline of April 15, 2016, EPA would have more than eight months to finalize the rule after EPA received all public comments. As the chart above indicates, EPA has routinely finalized a FIP in less than eight months following the submission of public comments. The extended schedule now requested by Sierra Club affords EPA more than adequate time to consider and respond to public comments and issue a final haze plan.

CONCLUSION

As EPA has already conceded, there is no genuine issue of material fact regarding EPA's continued violation of its non-discretionary duty to finalize a federal implementation within two years of disapproving the State or Arkansas's regional haze plan. Accordingly, Sierra Club is entitled to judgment as a matter of law. The Court should grant

[12] *Nat'l Parks Ass'n v. Jackson*, No. 1:11-cv-01548-ABJ (D. D.C.) (June 23, 2015 Order).
[13] *Id.*
[14] EPA first proposed a FIP for Wyoming on May 15, 2012, then re-proposed a FIP based on data generated after the conclusion of the original comment period. 79 Fed. Reg. 5,031, 5,037 n.12 (Jan. 30, 2014).

Sierra Club's motion for summary judgment, declare that EPA has failed to perform a non-discretionary duty, and order EPA to promulgate a federal implementation plan for Arkansas by April 15, 2016.

Dated: September 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Sierra Club's Brief in Support of its Motion for Summary Judgment, including attachments thereto, was filed on this day through the Court's electronic filing system with notice of this filing sent to all registered users.

/s/ Richard H. Mays
Richard H. Mays (AR Bar #61043)

Dated: September 8, 2015