

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

LOUISIANA ENVIRONMENTAL)
ACTION NETWORK,)
)
Plaintiff,)
)
v.)
)
CHRISTINE TODD WHITMAN, in her)
official capacity as Administrator, United)
States Environmental Protection Agency,)
)
Defendant.)

Civ. No. 00CV879-A-M3

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGEMENT**

Plaintiff Louisiana Environmental Action Network (“LEAN”) respectfully submits this memorandum in support of its motion for summary judgment against Defendant Christine Todd Whitman, in her official capacity as Administrator of the U.S. Environmental Protection Agency (“EPA”).

INTRODUCTION

Based on undisputed facts and clear provisions of law, LEAN is entitled to summary judgment ordering EPA to determine that the Baton Rouge Ozone Nonattainment Area, as defined in 56 Fed. Reg. 56,694, 56,768 (Nov. 6, 1991) (“Baton Rouge Area”), failed to comply with federal health standards for ground level ozone by November 15, 1999 – the date prescribed by §181(a) of the Clean Air Act (“the Act”). 42 U.S.C. §7511(a).

It is beyond dispute that:

- As a “serious” ozone nonattainment, the Baton Rouge Area was required to attain federal ozone health standards by November 15, 1999.

- The Baton Rouge Area did not meet the federal ozone health standards by November 15, 1999.
- The Act requires EPA to publish a determination no later than six months after November 15, 1999 as to whether the Baton Rouge Area attained the standard by November 15, 1999.
- EPA has not published the required determination.

Congress designed the Act to require areas with unhealthy levels of ozone in the ambient air to meet federal health standards by specific deadlines. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). When those health standards are not met by the statutory deadline, additional legal safeguards are triggered by operation of law to assist the area in achieving healthy ozone levels and to protect the public. CAA § 181(b)(2), 42 U.S.C. § 7511(b)(2); see CAA § 182(d)), 42 U.S.C. § 7511a(d) (describing additional requirements for “severe” areas). The trigger for these safeguards is EPA’s published determination of whether the area timely met federal health standards. CAA § 181(b)(2), 42 U.S.C. § 7511(b)(2). For Congress’ plan to work, therefore, EPA must timely discharge its duty to publish the required determination. Thus, Congress used mandatory language (“shall”) and a fixed timeframe to require a timely EPA determination.

EPA’s duty is “not simply to determine and publish in the abstract. It is to determine and publish by a date certain.” Sierra Club v. Browner, 130 F.Supp. 2d 78, 95 (D.C. Cir. 2001) (internal quotation marks omitted). In the case of the Baton Rouge Area, EPA’s inaction delays implementation of additional safeguards specifically designed by Congress for “severe” nonattainment areas and intended to be activated immediately upon failure of a serious area to reach attainment. CAA § 182(d)), 42 U.S.C. § 7511a(d). Consequently, these safeguards,

including additional offsets of ozone-causing pollutants and regulation of additional industrial sources, are not being implemented and enforced. Id.

Whenever the EPA fails to perform a nondiscretionary duty, citizens may compel the Agency to act in accordance with the law. CAA § 304(a)(2); 42 U.S.C. § 7604(a)(2). Section 304(a)(2) of the Act confers to “any person” the authority to seek relief when “the Administrator failed to perform a mandatory function.” See Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1353 (9th Cir.1978).

This case is precisely the type of suit Congress envisioned for the mandamus-like remedy provided for by section 304. Now, more than 300 days following EPA’s failure and after first providing notice to EPA, LEAN requests summary judgment ordering EPA to carry out its mandated tasks.

FACTUAL BACKGROUND

Ground-level ozone is the smog that commonly shrouds urban and residential areas endangering public health. 65 Fed. Reg. 16,864 (Mar. 30, 2000). Ozone is created by the interaction of sunlight with volatile organic compounds and nitrogen oxides. Id. When inhaled, even at low levels, ozone produced from these emissions can cause and aggravate respiratory illnesses, including bronchitis and pneumonia. Id. Moreover, children are most at risk from ozone pollution. Id.

Based on ozone measurements, EPA designated the Baton Rouge Area as a “serious” ozone nonattainment area in 1991.¹ 56 Fed. Reg. 56,694, 56,699 (Nov. 6, 1991). The Act

¹ Areas determined to be in nonattainment of the federal health standard for ozone are classified, in increasing order of severity, as: (1) marginal; (2) moderate; (3) serious; (4) severe; and (5) extreme. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1).

requires that all “serious” nonattainment areas reduce ozone pollution in the ambient air to within federal safety limits by November 15, 1999. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1).

The Baton Rouge Area failed to meet this deadline. In fact, Governor Foster clearly stated in a May 10, 2000 letter to EPA that “the Baton Rouge ozone attainment area failed to attain the 1-hour ozone standard by the required date of November 15, 1999.” Ex. A, Plaintiff’s Exhibits (Certified Copy of Letter from Louisiana Governor Mike Foster to EPA, May 10, 2000). The state agency primarily responsible for ozone attainment, the Louisiana Department of Environmental Quality (LDEQ), also conceded that the “five parish Baton Rouge area failed to meet the November 15, 1999 deadline to comply with the National Ambient Air Quality Standard (NAAQS) for ozone.” LDEQ, Ozone Task Force Support Group, [available at http://www.deq.state.la.us/evaluation/ozone/otf/otfsupport.htm](http://www.deq.state.la.us/evaluation/ozone/otf/otfsupport.htm).

Data from the ten air quality monitors in the Baton Rouge Area confirm that the area does not meet EPA’s definition of “attainment.” For an area to be classified attainment, each monitoring station in the area must have no more than three exceedances of the ozone standard in a consecutive three-year period. 40 C.F.R. §50, App. H; 40 C.F.R. §50.9. The Baton Rouge Area failed to meet this test because five of the ten monitors in the area recorded more than three violations during the three-year period prior to 1999. LDEQ, Test for Louisiana Compliance, [available at http://www.deq.state.la.us/evaluation/ozone/o3test.htm](http://www.deq.state.la.us/evaluation/ozone/o3test.htm) (last modified Sept. 2000).

Although it is indisputable that the Baton Rouge Area missed its attainment date, EPA has failed to make its statutorily mandated determination of the Baton Rouge Area's attainment status.

STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). EPA “may not rest upon mere allegations or denials” but rather must set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Taita Chemical Co. v. Westlake Styrene Corp., No. 00-30020, 2001 U.S. App. LEXIS 4516 at *17 (5th Cir. Mar. 23, 2001). Otherwise, summary judgment, if appropriate, shall be entered. O’Hare v. Global Natural Resources, Inc., 898 F.2d 1015, 1017 (5th Cir. 1990).

Under this standard, several courts have issued summary judgments ordering EPA to carry out duties under the Act upon finding those duties to be nondiscretionary. See e.g., Sierra Club v. Browner, 130 F. Supp. 2d 78 (D.C. Cir. 2001); NRDC v. Train, 545 F.2d 320, 327-28 (2nd Cir. 1976); American Lung Ass’n v. Browner, 884 F. Supp. 345, 346 (D. Ariz. 1994); Sierra Club v. Ruckelshaus, 602 F. Supp. 892, 898 -900 (N.D. Cal. 1984).

LEGAL ARGUMENTS

I. LEAN has standing to prosecute this action.

Under section 304(a)(2) of the Act, any person may commence a civil action on his own behalf against the Administrator “where there is alleged a failure of the Administrator to perform any act or duty that is not discretionary.” 42 U.S.C. § 7604(a)(2). In its organizational capacity, LEAN has standing to seek summary judgment on behalf of its individual members because: (1) LEAN’s members would otherwise have standing to sue in their own right; (2) the interests LEAN seeks to protect are germane to the organization's purpose; and (3) neither the claim

asserted nor the relief requested requires the participation of individual members. Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000).

For LEAN's individual members to demonstrate standing in their own right they must demonstrate that: (a) they have suffered an actual or threatened injury-in-fact; (b) the injury is "fairly traceable" to the defendant's action; and (c) the injury will likely be redressed if the plaintiffs prevail in the lawsuit. Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 180-181 (2000).

In ascertaining whether injury-in-fact has been demonstrated in suits brought under the Clean Air Act, the Fifth Circuit has adopted the Ninth Circuit's holding "that breathing and smelling polluted air is sufficient to demonstrate injury-in-fact and thus confer standing under the CAA" and that "there is no doubt that a plaintiff will suffer injury if compelled to breath air less pure than that mandated by the Clean Air Act." Texans United, 207 F.3d at 792 (citing NRDC v. EPA, 507 F.2d 905, 910 (9th Cir. 1974)); see also, Laidlaw, 528 U.S. at 181-84 (holding that "affidavits and testimony presented by FOE" and the "members' reasonable concerns about the effects of [Laidlaw's] discharges, directly affected those affiants' recreational, aesthetic, and economic interests" and "adequately documented injury in fact").

In the instant matter, members of LEAN own and rent homes throughout Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge Parishes. Ex. B-C, Plaintiff's Exhibits (Declarations of Marylee Orr and Florence Robinson). Thus, they breathe air that is less pure than that mandated by the Clean Air Act. They are concerned that existing ozone levels jeopardize their health and impair their recreational activities in the area. Some members of LEAN already suffer from lung impairment and must significantly curtail their outdoor activities

during days with unhealthy ozone levels. Ex. B, Plaintiff's Exhibits (Declaration of Florence Robinson).

Second, the plaintiff's injury must be "fairly traceable" to the defendant's acts or omissions. Laidlaw, 528 U.S. at 180-81. In this matter, LEAN's members' breathing of air less pure than that mandated by the Clean Air Act is prolonged because of EPA inaction. EPA's continued failure to issue the required determination delays implementation of the Act's safeguards designed specifically for problem ozone areas such as the Baton Rouge Area. CAA § 181(b)(2)(A); 42 U.S.C. § 7511(b)(2)(A).

Third, LEAN's member's injuries can be redressed because this court has the jurisdiction to order EPA to make the determination that would triggering the Act's additional clean air safeguards for ozone nonattainment areas that fail to improve. CAA § 304(a); 42 U.S.C. § 7604(a).

This suit is germane to LEAN's purposes. As an umbrella organization for local environmental and citizen groups, LEAN's purpose is to preserve and protect the state's land, air, water, and other natural resources, as well as to protect the organization's members and other residents of the state from particular threats of pollution such as severe regional ozone levels. Ex. B, Plaintiff's Exhibits (Declaration of Marylee Orr, Executive Director, LEAN).

Finally, this matter does not require the individual involvement of LEAN's members. "If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." Warth v. Seldin, 422 U.S. 490, 515 (1975). In the instant matter, LEAN seeks only to compel EPA to conduct its nondiscretionary duties. This is

precisely the type of procedural relief that member organizations such as LEAN can pursue on behalf of their members.

II. This Court has subject matter jurisdiction.

Jurisdiction is conferred to federal district courts for citizen suits alleging that the Administrator has failed “to perform any act or duty that is not discretionary.” CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2). Moreover, given that the Clean Air Act confers jurisdiction expressly, and that the claim is an interpretive issue of EPA's duty under section 181(b)(2) of the Act, the matter is clearly within the federal question jurisdiction of the District Court. 28 U.S.C. § 1331. Plaintiff provided proper pre-filing notice of this lawsuit to EPA consistent with 42 U.S.C. § 7604(b)(2) and 40 C.F.R. § 54. Ex. D, Plaintiff's Exhibits (Declaration of Suzanne S. Dickey).

III. EPA's duty to determine and publish by May 15, 2000 that the Baton Rouge Area failed to attain federal ozone health standards by November 15, 1999 is not discretionary.

A. The Plain Language of §181(b)(2) of the Act requires timely action.

Resolution of this matter turns solely on whether EPA had discretion to ignore the May 15, 2000 deadline. The Act's plain language, however, leaves EPA no discretion to ignore this statutory deadline. Specifically, section 181(b)(2)(A) of the Act states “[w]ithin six months following the applicable attainment date...the Administrator *shall determine*...whether the area attained the standard by that date...” 42 U.S.C. § 7511(b)(2)(A) (emphasis added). Similarly, section 181(b)(2)(B) of the Act states that “[t]he Administrator *shall publish* a notice in the Federal Register, *no later than 6 months following the attainment date*, identifying each area that the Administrator has determined...as having failed to attain...” 42 U.S.C. § 7511(b)(2)(B)

(emphasis added). Use of the command word “shall” indicates a mandatory intent. Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977). EPA has recognized that it “must determine within 6 months after the attainment date whether an area has attained.” General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13,498, 13,506 (Apr. 16, 1992).

In a similar case, the D.C. District Court determined that EPA had a nondiscretionary duty to determine and publish the attainment status of the St. Louis Ozone Nonattainment Area by May 15, 1997. See Sierra Club v. Browner, 130 F. Supp. 2d 78 (D.C. Cir. 2001). The court held that “the statutory duty is not simply to determine and publish in the abstract. It is to determine and publish by a date certain.” Id. at 95 (internal quotation marks omitted) (citing Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987)). Indeed, EPA conceded that its duties under section 181(b)(2) of the Act are nondiscretionary. Browner, 130 F.Supp. 2d at 87. In rejecting EPA’s request for more time to fulfill its mandatory duties, the court stated that “allowing for the flexible schedule with alternative deadlines that EPA proposes would effectively amount to condoning a fully discretionary approach to a nondiscretionary duty.” Id. at 95. Thus, the court entered summary judgment ordering EPA to publish the required determination. Id. at 96.

Finally, the nondiscretionary nature of EPA’s duty to publish a determination is consistent with the legislative purpose of the Act’s ozone provisions. Congress designed the Act’s attainment deadlines to avoid “gaming by the States, industry, and others” and to “assure that State and EPA resources are devoted to efforts to attain the standard, and not to changes in the classification of areas.” H.R. Rep. No. 490(I), pt. 20 (1990); 1990 WL 258792. In essence, EPA’s determination and publication under section 181(b)(2) of the Act is the key to Congress’

scheme to implement additional safeguards by operation of law when a nonattainment area fails to attain federal standards. The fixed schedule attached to attainment and the automatic triggering of reclassification would be futile if the EPA were allowed to derail the congressional process by refusing to determine and publish an area's attainment status. See NRDC v. Train 545 F.2d 320, 327-28 (2nd Cir. 1976) (Congress' establishment of attainment timetables would be "an exercise in futility" if EPA could avoid timetables simply by failing to take necessary administrative action).

B. The Baton Rouge Area failed to attain the federal ozone health standards established for "serious" nonattainment areas by the required deadline of November 15, 1999.

Governor Foster declared in a May 10, 2000 letter to EPA that "the Baton Rouge ozone attainment area failed to attain the 1-hour ozone standard by the required date of November 15, 1999." Ex. A, Plaintiff's Exhibits (Certified Copy of Letter from Louisiana Governor Mike Foster to EPA, May 10, 2000). The Louisiana Department of Environmental Quality has also conceded that the Baton Rouge Area failed to meet the November 15, 1999 deadline to comply with the ozone standard. LDEQ, Ozone Task Force Support Group, available at <http://www.deq.state.la.us/evaluation/ozone/otf/otfsupport.htm>.

The Act states that "serious" ozone nonattainment areas shall attain federal health standards for ozone by November 15, 1999. When an air monitor records that a given day's "maximum hourly average ozone concentration" has exceeded 0.12 parts per million during any 1-hour time period, an "exceedance" of the 1-hour federal ozone health standard has occurred. 40 C.F.R. § 50, App. H; 40 C.F.R. § 50.9. To be in attainment of federal health standards by November 15, 1999, an area must have an average of no more than one exceedance each year over a three-year period prior to the deadline. 57 Fed. Reg. 13,498, 13,506 (Apr. 16, 1992). The

Baton Rouge Area did not meet this standard. Instead, five of the ten monitors in the Baton Rouge Area recorded more than three violations during the three-year period prior to 1999. LDEQ, Test for Louisiana Compliance, available at <http://www.deq.state.la.us/evaluation/ozone/o3test.htm> (last modified Sept. 2000). It is beyond dispute, therefore, that the Baton Rouge Area missed its attainment deadline.

C. Louisiana has not requested nor qualified for an extension for the Baton Rouge Area under section 181(a)(5) of the Act.

The Act creates a single narrow ground for extending the November 15, 1999 deadline. Section 181(a)(5) of the Act is the *only* provision that allows EPA to extend an attainment deadline for a nonattainment area. CAA §181(a)(5), 42 U.S.C. § 7511(a)(5). To qualify for this one-year extension, the Act requires: (1) that the State formally request the one-year extension under section 181(a)(5) of the Act; (2) that an EPA-approved State Implementation Plan (SIP) be currently implemented by the State; and (3) that the nonattainment area not have more than one exceedance of the federal ozone health standard during the year prior to the attainment deadline. CAA § 181(a)(5); 42 U.S.C. § 7511(a)(5).

The State of Louisiana did not request a one-year extension under section 181(a)(5) of the Baton Rouge Area's November 15, 1999. Instead – after the deadline for attainment had already passed – Governor Foster made an informal request to the EPA for a deadline extension because of purported ozone contributions from “upwind areas.” Ex. A, Plaintiff's Exhibits (Certified Copy of Letter from Louisiana Governor Mike Foster to EPA, May 10, 2000). This request does not correspond to any grounds for an extension provided by the Act. Furthermore, the Baton Rouge Area recorded three exceedances of the federal ozone health standard during the year prior to the attainment deadline. LDEQ, Pollution Standard Index, Baton Rouge, 1999, available at <http://www.deq.state.la.us/evaluation/airmon/psibc99.txt> (revised Apr. 11, 2000). Thus, even

if Governor Foster's request had been under section 181(a)(5) of the Act, it would not have qualified under the plain language of the statute. Moreover, EPA has not purported to grant Louisiana's extension request.

Clearly, Louisiana was required to demonstrate attainment in the Baton Rouge Area by November 15, 1999 and the EPA, in turn, was obligated to determine the Area's attainment status by May 15, 2000.

IV. Plaintiff is entitled to an injunction.

The "bases for injunctive relief are irreparable injury and inadequacy of legal remedies." Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). This case involves environmental injury which, the Supreme Court has noted, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." Id. at 545. Further, EPA's inaction prolongs violation of federal health protection standards. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1) (Primary national air standards are set at a level "requisite to protect the public health"), see also Whitman v. American Trucking Ass'n, 121 S.Ct. 903, 911-12 (2001). The resulting increased risk to the health of the plaintiff's members and the public as a whole cannot be repaired by money damages, which in any event, are not available. Thus, only injunctive relief will remedy the plaintiff's and public's injuries.

CONCLUSION

For all of the foregoing the reasons, the plaintiff's motion for summary judgment must be granted. A proposed form of order has been submitted contemporaneously with this memorandum.

Respectfully submitted this 7th day of May, 2001,

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