UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA EX REL. SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma, Plaintiff, v. LISA P. JACKSON, ADMINISTRATOR, in her official capacity as Administrator of the United States Environmental Protection Agency, Defendant.	Civil Action No. CIV-11-605-F

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff states the following for its Complaint:

FACTUAL BACKGROUND

1. In Section 169A of the 1977 Amendments to the Clean Air Act ("CAA" or "Act"), Congress enacted a program for protecting the nation's national parks and wilderness areas. Congress added Section 169B to the CAA (42 U.S.C. § 7491) in 1990 to address Regional Haze issues, and the U.S. Environmental Protection Agency ("EPA") promulgated regulations addressing Regional Haze in 1999, which are codified at 40 C.F.R. part 51, subpart P ("Regional Haze

Regulations"). The CAA and Regional Haze Regulations require, in part, that a State balance five factors and make a determination as to the Best Available Retrofit Technology appropriate for each qualifying facility regulated by the State (the "BART determination") and submit those determinations, along with other required elements, as state implementation plan ("SIP") revisions to EPA ("Regional Haze SIPs"). In connection with revisions to its regulations in 2005, EPA extended the deadline for States to submit their Regional Haze SIPs to EPA to December 17, 2007. 70 Fed. Reg. 39104 (July 6, 2005).

2. On January 15, 2009, EPA published in the Federal Register a rule finding that 37 states (including Oklahoma), the District of Columbia, and the U.S. Virgin Islands had failed to submit SIPs for EPA review and approval by the December 17, 2007 deadline. *Finding of Failure To Submit State Implementation Plans Required by the 1999 Regional Haze Rule,* 74 Fed. Reg. 2392 (January 15, 2009). In that published rule, EPA acknowledged that, pursuant to the requirements of 42 U.S.C. § 7410(c), its finding "starts a 'clock' for EPA to promulgate a [F]IP within two years." *Id.* EPA further acknowledged that "[i]f the state fails to submit the required SIPs [within two years] or if they submit SIPs that EPA cannot approve, then EPA will be required to develop the plans in lieu of the states." *Id.*

3. On February 19, 2010, the State of Oklahoma, through the Oklahoma Department of Environmental Quality (ODEQ), submitted to EPA the Oklahoma State Implementation Plan ("Oklahoma's Regional Haze SIP"). As of January 15, 2011, two years after EPA's two-year "clock" to either approve Oklahoma's Regional Haze SIP or promulgate a federal implementation plan ("FIP") in lieu of Oklahoma's Regional Haze SIP began to run, EPA had done neither.

4. Then, on March 22, 2011, more than two years after it acknowledged its two-year "clock" began to run, and more than a year after Oklahoma submitted the Oklahoma State Implementation Plan, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part Oklahoma's Regional Haze SIP. *Approval and Promulgation of Implementation Plans; Oklahoma; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations*, 76 Fed. Reg. 16168 (March 22, 2011). In the same notice, EPA proposed a Federal Implementation Plan for Regional Haze ("Regional Haze FIP") to substitute for those portions of Oklahoma's Regional Haze SIP that EPA proposes to disapprove.

5. Despite the fact that EPA failed to take the action that it acknowledged it was "required" by law to take by January 15, 2011, EPA has nonetheless proceeded with the formal comment period and public hearing with

regard to the above-referenced proposed rule so that it may proceed with issuance of a final rule simultaneously disapproving in part Oklahoma's Regional Haze SIP and approving the Regional Haze FIP.

6. 42 U.S.C. § 7410(c)(1)(B), however, mandates that disapproval of all or part of the proposed Oklahoma Regional Haze SIP is a prerequisite to promulgation of a Regional Haze FIP. No such triggering event has occurred. In any event, EPA's promulgation of the proposed Regional Haze FIP for Oklahoma comes more than two years after its finding in January 2009 that the deadline for Oklahoma's submission of a Regional Haze SIP had passed.

NATURE OF THE ACTION

7. Pursuant to 42 U.S.C. § 7604(b)(2), Plaintiff commences this civil action against defendant Lisa P. Jackson in her official capacity as Administrator of EPA, based on the Administrator's failure to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7410(c) of the CAA. Under the Act, the Administrator has a nondiscretionary duty to take final action on a Regional Haze SIP prior to promulgating a Regional Haze FIP for Oklahoma.

8. EPA and the Administrator also violated a nondiscretionary duty under the Act to honor the time constraints in Section 110(c) of the Act, 42 U.S.C. §7410(c), which limits the authority of EPA to propose a FIP to a two-year period after finding that a state missed the deadline to submit a SIP. On January 15, 2009,

EPA made such a finding with respect to Oklahoma's failure to submit a Regional Haze SIP. By proposing a Regional Haze FIP for Oklahoma on March 22, 2011, EPA acted outside the permissible timeframe established by the Act.

9. Oklahoma brings this civil action pursuant to 42 U.S.C. § 7604(b)(2) to compel the Administrator to perform her nondiscretionary duties. Oklahoma seeks declaratory and injunctive relief. Oklahoma seeks a declaration that EPA is in violation of the Act and an order directing EPA, through the Administrator, to take final action on the Oklahoma Regional Haze SIP or to take the actions necessary to re-open the two-year statutory window under 42 U.S.C. § 7410(c) prior to taking any action on a Regional Haze FIP for Oklahoma.

JURISDICTION AND VENUE

10. This is a citizen suit to enforce the Clean Air Act. Thus, this Court has jurisdiction over the subject matter of this action pursuant 42 U.S.C. § 7604(a)(2). The Clean Air Act is a federal statute, and defendant is an agent of the government of the United States. Thus, this Court also has subject matter jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question) and § 1346 (United States as a defendant). The Court is authorized to enter a declaratory judgment pursuant to 28 U.S.C. § 2201 and to grant injunctive relief pursuant to 28 U.S.C. § 2202.

11. Pursuant to 42 U.S.C. § 7604, plaintiff served timely prior notice on the Administrator of the acts and omissions complained of herein and of the State of Oklahoma's intent to bring the present action. Said notice was accomplished by certified letter addressed to the Administrator dated March 23, 2011, and a certified return receipt dated March 28, 2011.

12. Venue is proper in this district under 28 U.S.C. § 1391(e)(3) because no real property is involved in this action to compel the Administrator to perform a nondiscretionary duty.

PARTIES

13. The State of Oklahoma is a State of the United States of America with all rights and powers of a State under the United States Constitution.

14. E. Scott Pruitt, in his official capacity as Attorney General, brings this action on behalf of the State of Oklahoma as the chief law officer for the State of Oklahoma. In that capacity, he has a statutory duty to prosecute and defend all actions and proceedings in any federal court in which the State of Oklahoma is interested as a party. 74 O.S. § 18b(A)(I).

15. Defendant Lisa Jackson, in her official capacity as Administrator of EPA, is responsible for administering and enforcing the Act.

CLAIMS FOR RELIEF

CLAIM ONE

(Declaratory Judgment and Injunctive Relief)

16. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

17. Pursuant to 42 U.S.C. 7604(a)(2), any person may bring suit in federal district court against the Administrator of EPA "where there is alleged a failure of the Administrator to perform any act or duty which is not discretionary." 42 U.S.C. § 7602(e) defines "person" to include, *inter alia*, a State or political subdivision of a State."

18. An actual and justiciable controversy exists between the parties in this case. A declaratory judgment would serve a useful purpose in determining the parties' rights under the Act, while an injunction enforcing that declaratory relief would prevent the ongoing harm suffered by the State of Oklahoma as a result of EPA's failure to take final action on Oklahoma's Regional Haze SIP prior to promulgating a proposed Regional Haze FIP, which final action provides an important procedural safeguard to the State of Oklahoma by allowing for a comment period and public hearing on the disapproval of Oklahoma's Regional Haze SIP *prior* to the similar process which must be undertaken with regard to adoption of the Regional Haze FIP. EPA's deprivation of that procedural safeguard has injured the State of Oklahoma, and continues to injure the State of Oklahoma.

19. EPA has violated, and remains in violation of the Act, because it has promulgated a proposed Regional Haze FIP for Oklahoma prior to a final

determination disapproving all or a portion of the Oklahoma Regional Haze SIP. Such action by EPA is particularly improper here where EPA's proposed disapproval rests on EPA's attempt to usurp the authority granted to States by the CAA to make BART determinations. EPA should be enjoined from taking any further action with respect to the proposed Regional Haze FIP unless and until its proposed disapproval of portions of the Oklahoma Regional Haze SIP becomes final.

CLAIM TWO

(Declaratory Judgment and Injunctive Relief)

20. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

21. Pursuant to 42 U.S.C. 7604(a)(2), any person may bring suit in federal district court against the Administrator of EPA "where there is alleged a failure of the Administrator to perform any act or duty which is not discretionary." 42 U.S.C. § 7602(e) defines "person" to include, *inter alia*, a State or political subdivision of a State."

22. An actual and justiciable controversy exists between the parties in this case. A declaratory judgment would serve a useful purpose in determining the parties' rights under the Act, while an injunction enforcing that declaratory relief would prevent the ongoing harm suffered by the State of Oklahoma as a result of

EPA's promulgation of a Regional Haze FIP after the date on which it was required by law to do so. The State of Oklahoma has been injured, and continues to be injured by EPA's unlawful action, in that the EPA purports to displace Oklahoma's Regional Haze SIP with the untimely Regional Haze FIP.

23. EPA has violated, and remains in violations of, the Act because it has promulgated the proposed Regional Haze FIP for Oklahoma after the two-year deadline for it to do so under the CAA. As a result, EPA's proposed Regional Haze FIP for Oklahoma should be declared void, and EPA should be enjoined from taking any further action with respect to the proposed Regional Haze FIP for Oklahoma until it takes whatever actions are necessary to re-open the two-year statutory window for it to promulgate such a FIP.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests that the Court:

(a) Declare that EPA and the Administrator have failed to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7410(c)(1)(A) and 42 U.S.C. § 7410(c)(1)(B);

(b) Enjoin EPA and the Administrator from taking any further action on the Regional Haze's FIP prior to taking final action with respect to Oklahoma's SIP;

(c) Enjoin EPA and the Administrator from taking any further action on the Regional Haze FIP prior to taking such action as necessary to re-open the two-year statutory window for EPA to promulgate such a FIP;

(d) Award Plaintiff its costs and reasonable attorneys' fees; and

(e) Grant all other appropriate relief.

Date: May 31, 2011

Respectfully submitted,

s/ E. Scott Pruitt

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