IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-00897-JLK

WILDEARTH GUARDIANS,

Plaintiff,

v.

ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency

Defendant.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Plaintiff WildEarth Guardians ("Guardians") hereby moves for partial summary judgment[1] on the issue of liability against Defendant Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency ("Administrator"). Resolving the issue of Defendant's liability quickly will both serve judicial economy and conserve the parties' resources by focusing this case on the only issue that may

[1] Although the parties have not yet conducted their Rule 26(f) discovery conference or established a briefing schedule, summary judgment as to liability is appropriate at an early stage in this case, as there can be no genuine disputes as to any material fact regarding liability and the Plaintiff is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a) (a party may move for partial summary judgment as to a claim, defense, or part of a claim or defense); Fed. R. Civ. P. 56(b) ("a party may file a motion for summary judgment *at any time* until 30 days after the close of all discovery," "[u]nless a different time is set by local rule or the court orders otherwise." (emphasis added)). The Advisory Committee Notes to Rule 56 acknowledge that a motion for summary judgment may be filed "at the commencement of an action." *See* Fed. R. Civ. P. 56 advisory committee notes to the 2010 amendment. As the only issue is whether the Administrator missed a statutorily mandated deadline, discovery is unnecessary for this Court to grant summary judgment on the issue of liability and enter a declaratory judgment.

genuinely be in dispute – when the Administrator can provide relief redressing his violations of the law. As grounds for this Motion, Guardians states as follows:

INTRODUCTION

Guardians' suit is a straightforward "citizen suit" alleging that EPA has failed to comply with its mandatory statutory deadline for formally determining whether the Denver Metro-North Front Range Area in Colorado complied with the 2008 National Ambient Air Quality Standards for ozone ("2008 Ozone Standard") by the applicable attainment deadline. Pursuant to the Clean Air Act, the Administrator was required to make this determination by January 20, 2019, six months after the Denver Metro-North Front Range Area's July 20, 2018 attainment deadline. 42 U.S.C.A. § 7511(b)(2)(A) (requiring Administrator's attainment determination "[w]ithin 6 months following the applicable attainment date"); Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas for the 2008 Ozone National Ambient Air Quality Standards ("Reclassification Determination"), 81 Fed. Reg. 26,697, 26698 (May 4, 2016) ("The reclassified areas [including the Denver Metro-North Front Range Area] must attain the standard as expeditiously as practicable, but in any event no later than July 20, 2018.") As EPA admitted in its Answer, the agency has yet to do so. Answer ¶ 40, Dkt. 5 (May 28, 2019). Because EPA missed the statutory deadline for making the requisite determination, it has violated a mandatory, non-discretionary duty under the Clean Air Act.

Deadline suits such as this one are Congress' chosen remedy to force EPA to behave in a more timely fashion. It is for this reason that Congress provided the federal courts with jurisdiction to hear suits "against [EPA] where there is alleged a failure of [EPA] to perform any

act or duty … which is *not discretionary* with [EPA].” 42 U.S.C § 7604(a)(2) (emphasis added).

Although this case concerns a missed deadline, this Court should not lose sight of the importance of the underlying decision that EPA must make. Through this action, Guardians seeks to compel EPA to make a determination whether the Denver Metro-North Front Range attained compliance with the 2008 Ozone Standard by the July 20, 2018 attainment deadline. EPA was required to make this determination within six months of the attainment deadline, or by January 20, 2019.

Ground-level ozone, the primary component of smog, is a pollutant harmful to human health. Created when volatile organic compounds (“VOCs”) and nitrogen oxides (“NOx”), emitted from tailpipes, smokestacks, and oil and gas production, react with sunlight, ozone poses numerous adverse health and environmental impacts. Public health impacts from ozone exposure range from respiratory irritation and impairment of breathing to hospitalization and an increased risk of premature death. Ground-level ozone further harms growing plants, causes defoliation of trees and crops, and can impair the healthy functioning of entire ecosystems. Complaint for Declaratory and Injunctive Relief (“Complaint”) ¶ 2, Dkt. 1 (Mar. 26, 2019); Answer ¶ 2 (admitting that ozone is “a pollutant that is harmful to human health” and the environment).

Given continuing high levels of ozone pollution in the region, if the Administrator finalized his determination that the area failed to attain compliance with the 2008 Ozone Standard, this determination would trigger additional pollution abatement requirements for the area. Specifically, the State of Colorado would need to adopt more stringent clean air safeguards to reduce ozone pollution, submit a plan to clean up the region’s unhealthy air, and set a new deadline for the area to finally come into attainment with the 2008 Ozone Standard. The

Administrator's unlawful delay is forcing the Denver Metro-North Front Range Area – including Guardians' staff and members – to endure greater air pollution and public health risks than permitted by the Clean Air Act.

Guardians has brought this Clean Air Act citizen suit to compel EPA to start the clock for air quality improvements in the Denver Metro-North Front Range of Colorado. Guardians asks the Court to grant Plaintiff's Motion for Partial Summary Judgment on the issue of liability and to enter a declaratory judgment that the Administrator has violated and continues to violate the Clean Air Act by failing to make the required attainment determination. Although factual disputes may arise as to the timing of relief,[2] there can be no material factual disputes as to the Administrator's liability for violating a mandatory statutory deadline. Partial summary judgment as to liability is appropriate.

LEGAL BACKGROUND: THE CLEAN AIR ACT

Congress enacted the Clean Air Act to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R. Rep. No. 91-1146, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5356. The Clean Air Act was intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C.A. § 7401(b).

Consistent with these goals, the Act requires EPA to set National Ambient Air Quality Standards for certain pollutants, including ozone, "the attainment and maintenance of which . . .

[2] If the Administrator objects to an expeditious date certain for providing relief due to alleged conflicting priorities or shortage of resources, a factual dispute that warrants discovery may arise; however, discovery is unnecessary for this Court to enter a declaratory judgment on the issue of Defendant's liability.

are requisite to protect the public health" with "an adequate margin of safety," 42 U.S.C.A. §§ 7409(a)-(b), and to designate areas with air pollution levels that exceed the national standards as "nonattainment" areas, 42 U.S.C.A. § 7407(d)(1).

Section 109(d)(1) of the Clean Air Act requires the Administrator to complete a "thorough review" of air quality criteria and the National Ambient Air Quality Standards every five years, and to "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate" under the Act. 42 U.S.C.A. § 7409(d).

After EPA establishes or revises a National Ambient Air Quality Standard, the Clean Air Act "requires EPA and States to begin taking steps to ensure that the new or revised standards are met." National Ambient Air Quality Standards for Ozone ("2008 Ozone Standard"), 73 Fed. Reg. 16,436, 16,503 (Mar. 27, 2008). "The first step is to identify areas of the country that do not attain the new or revised standards, or that contribute to violations of the new or revised standards," and to designate such areas as in a state of "nonattainment." *Id.* The Administrator classifies ozone nonattainment areas as Marginal, Moderate, Serious, Severe, or Extreme, based on the level of ozone pollution monitored in the area. 42 U.S.C.A. § 7511.

States in which ozone nonattainment areas are located are required to adopt State Implementation Plans to reduce ozone pollution to below the applicable National Ambient Air Quality Standards, in this case the 2008 Ozone Standard. *Id.* § 7511a. State and local air quality management agencies develop these plans and submit them to EPA for approval. To receive EPA approval, State Implementation Plans must identify the specific emissions control requirements the state will rely on to attain and/or maintain compliance with the applicable National Ambient Air Quality Standards. *Id*. §§ 7502, 7511a.

Baseline federal regulatory requirements for State Implementation Plans vary depending on the nonattainment area's classification level, mandating that areas experiencing more severe ozone pollution make greater efforts to improve air quality. For example, plans for all ozone nonattainment areas must require any increase in VOC emissions (an ozone precursor) to be "offset" by reductions in VOC emissions, but the offset ratio (emissions reductions to increases) ratchets up for more serious nonattainment classifications. *Id.* § 7511a. For Marginal Areas, the offset ratio is 1.1, which increases to 1.15 for Moderate nonattainment areas, up to 1.2 to 1 for Serious Areas, up to 1.3 to 1 for Severe Areas, and finally up to 1.5 to 1 for Extreme Areas. *Id.*

In Serious Areas, the level of VOC emissions at which a source is treated as a "major source" also drops from 100 to 50 tons per year. *Compare* 40 C.F.R. § 70.2 (generally defining "major source") *with* 42 U.S.C.A. § 7511a(c) (defining "major source" for Serious Areas). Thus, unlike in Marginal and Moderate Areas, existing sources in Serious Areas with the potential to emit between 50 and 100 tons of VOCs per year must apply for a Title V operating permit as a major source, 40 C.F.R. § 70.3(a)(1), and new or modified major sources with potential emissions between 50 and 100 tons per year also face stringent preconstruction New Source Review permitting requirements. 42 U.S.C.A. § 7502(c)(5).

State implementation plans for ozone nonattainment areas are generally due within 3 years of EPA's nonattainment designation. 42 U.S.C.A. § 7502(b).

EPA promulgated the 2008 Ozone Standard on March 27, 2008, setting a limit on ozone concentrations in the air of no more than 0.075 ppm on an eight-hour basis. 2008 Ozone Standard, 73 Fed. Reg. at 16,483. A violation occurs at a monitoring site when the three-year average of the annual fourth highest eight-hour ozone concentration exceeds 0.075 ppm, or 75

ppb. 40 C.F.R. § 50.15(b). The 2008 Ozone Standard provided a higher level of air quality protection than the [superseded] 1997 Ozone Standard, based on EPA's determination of public health requirements.[3]

Congress set forth a precise schedule for implementation of the Clean Air Act and mandatory remedies for delays to ensure that public health would be protected. By statute, Congress established specific deadlines for designated nonattainment areas to attain compliance with applicable ozone standards. 42 U.S.C.A. § 7511(a)(1). Initial nonattainment areas were given between three years (for Marginal Areas) up to twenty years (for Severe Areas) to meet ozone standards. *Id.* When new nonattainment areas are designated, they are given similar time periods for attaining compliance, running from the date of the nonattainment designation. *Id.* § 7511 (b)(1).

After the Administrator's initial 2012 designation of nonattainment areas for the 2008 Ozone Standard, Marginal Areas were given three years to sufficiently improve air quality to meet the new ozone limits. For these Marginal Areas, the attainment deadline was set for July 20, 2015. *Id.* §§ 7511(a)(1) (setting three year period for attainment after designation of Marginal Area nonattainment), (b)(1) (applying compliance timeline from § 7511(a)(1) to later-designated nonattainment areas based on date of nonattainment classification); Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards ("Air Quality Designations"), 77 Fed. Reg. 30,088, 30,110 n. 1 (May 21, 2012) (noting nonattainment designation date of July 20,

[3] Note that although EPA finalized a new, even stricter ozone NAAQS in 2015, limiting concentrations to no more than 0.070 ppm over an eight-hour period, *see* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015), EPA has retained the 2008 Ozone Standards in addition to the new 2015 standard. Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements, 83 Fed. Reg. 62,998, 63,000 (Dec. 6, 2018).

2012); Reclassification Determination, 81 Fed. Reg. at 26,699 (noting areas, including the Denver Metro-North Front Range Area, which "failed to attain the [2008 Ozone Standard] by the applicable attainment date of July 20, 2015").

Moderate Areas were given six years to comply with the 2008 Ozone Standard, and the attainment deadline for such areas was set for July 20, 2018. *Id.* Within six months after the July 20, 2018 attainment deadline, or by January 20, 2019, the Administrator was then required to determine whether Moderate Areas attained compliance with the 2008 Ozone Standard. 42 U.S.C.A. § 7511(b)(2)(A).

The Clean Air Act requires that where an ozone nonattainment area fails to attain compliance with ozone standards by the applicable attainment date, the nonattainment area shall be "reclassified" to a higher, more stringent nonattainment classification. 42 U.S.C.A. § 7511(b)(2)(A). As the D.C. Circuit has explained, "[i]f the EPA finds a nonattainment area has not met its attainment deadline, the EPA must reclassify, or 'bump up', the area." *Sierra Club v. Johnson*, 374 F. Supp. 2d 30, 31 (D.D.C. 2005). Once bumped up, a nonattainment area is generally treated as if it had been initially classified at the higher level, and it must meet deadlines applicable to this new classification. 42 U.S.C.A. § 7511(b)(1).

If EPA fails to comply with a nondiscretionary duty, including performing its duty to make a timely determination whether a nonattainment area has attained compliance with an applicable NAAQS by the attainment deadline, the Clean Air Act allows any person to bring suit to compel EPA to perform its duty. *See id.* § 7604(a)(2).

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Denver Metro-North Front Range nonattainment area includes the entirety of the counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson, and portions of the counties of Larimer and Weld. *See* 40 C.F.R. § 81.306.

2. In May 2012, the Administrator officially designated the Denver Metro-North Front Range Area of Colorado as in marginal nonattainment with the 2008 Ozone Standard, effective July 20, 2012. Air Quality Designations, 77 Fed. Reg. at 30,088 & 30,110 n.1.

3. After this nonattainment designation, Colorado was required to adopt and implement air quality regulations to bring the Denver Metro-North Front Range Area into attainment with the 2008 Ozone Standard by July 20, 2015. 42 U.S.C.A. § 7511(a)(1) (establishing 3-year period for marginal areas to come into attainment); Air Quality Designations, 77 Fed. Reg. 30,088, 30,110 n. 1 (noting the nonattainment designation date of July 20, 2012); Reclassification Determination, 81 Fed. Reg. at 26,699 & tbl. 3 (determining that 11 areas, including the Denver Metro-North Front Range Area "failed to attain the [2008 Ozone Standard] by the applicable attainment date of July 20, 2015").

4. The State of Colorado, however, failed to take sufficient action between 2012 and 2015 to improve air quality as needed to protect public health and welfare in the Denver Metro-North Front Range area, and air quality in the Denver Metro-North Front Range Area failed to meet the 2008 Ozone Standard by the July 20, 2015 attainment deadline. Reclassification Determination, 81 Fed. Reg. at 26,699 & tbl. 3.

5. Because of this continued nonattainment, the Administrator was legally required to reclassify the region and "bump up" its nonattainment status from Marginal to Moderate,

which then-Administrator McCarthy did by rule on May 4, 2016, effective June 3, 2016. *See id.* at 26,699.

6. After the 2016 Moderate nonattainment designation, the State of Colorado was then required to bring the Denver Metro-North Front Range Area into compliance with the 2008 Ozone Standard within six years after the effective date of EPA's initial designation of nonattainment, or by July 20, 2018. *See* 42 U.S.C.A. § 7511(a)(1) (setting 6-year period for attainment in Moderate nonattainment areas); Reclassification Determination, 81 Fed. Reg. at 26698 (stating "[t]he reclassified areas must attain the standard as expeditiously as practicable, but in any event no later than July 20, 2018.").

7. Within six months after the July 20, 2018 attainment deadline, or by January 20, 2019, the Administrator was then required to determine whether the area attained the NAAQS. 42 U.S.C.A. § 7511(b)(2)(A).

8. As of the date of this motion, the Administrator has yet to make such a determination. Answer ¶ 40; Declaration of Jeremy Nichols ("Nichols Decl.") ¶ 15 (Exhibit A).

9. In 2018, EPA proposed to grant the State of Colorado a one-year extension to demonstrate attainment. *See* Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality Standards ("Extension Proposal"), 83 Fed. Reg. 56,781, 56,786 (Nov. 14, 2018).

10. EPA has not finalized this rule to extend the attainment date for the Denver Metro-North Front Range Area. Answer ¶ 33 (admitting identical allegations in Guardians' complaint, Complaint ¶ 33 (Mar. 26, 2019)); Nichols Decl. ¶ 16 (Exhibit A); U.S. Envtl. Prot.

Agency, 8-Hour Ozone (2008) Attainment Date Extensions, https://www3.epa.gov/airquality/greenbook/hfr2rpt1.html (last accessed June 20, 2019).

11. On March 26, 2019, the State of Colorado formally withdrew its request for an extension of its ozone attainment deadline. *See* Letter from Gov. Jared Polis, State of Colorado, to Doug Benevento, Regional Administrator, USEPA Region VIII (Mar. 26, 2019) (attached as Exhibit B). As Governor Polis articulated, "given the vital importance of coming into compliance with the [2008 Ozone Standard] to protect the health of our communities, we believe that the interests of our citizens are best served by moving aggressively forward and without delay in our efforts to reduce ground level ozone concentrations in the Denver Metro/North Front Range nonattainment area." *Id.*

12. Thus, by January 20, 2019, the Administrator was required to make a formal determination as to whether the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the July 20, 2018 attainment date. Reclassification Determination, 81 Fed. Reg. at 26,698; 42 U.S.C.A. § 7511(b)(2)(A).

13. The Administrator failed to do so by the January 20, 2019, deadline, and has not done so since. *See* Answer ¶ 10 (admitting that "the Administrator has not yet made a determination regarding the attainment of the 2008 Ozone NAAQS for the Denver Area").

STANDARD OF REVIEW

A court shall render summary judgment "if the movant 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). "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 670 (10th Cir.

1998). The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986). Summary judgment is not treated as "a disfavored procedural shortcut," but as "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corporation v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

This is a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a) (Motion for Summary Judgment or Partial Summary Judgment), which allows a party to move for summary judgment, "not only as to an entire case but also as to a claim, defense, or part of a claim or defense." *See* Fed. R. Civ. P. 56 Advisory Committee Notes to the 2010 amendments. Fed. R. Civ. P. 56(b) also provides that a party may "file a motion for summary judgment *at any time* until 30 days after the close of all discovery," "[u]nless a different time is set by local rule or the court orders otherwise." (emphasis added). The Advisory Committee Notes to Rule 56 acknowledge that a motion for summary judgment may be filed "at the commencement of an action." *Id.*

Summary judgment as to liability is appropriate, as there can be no genuine disputes as to any material fact regarding the Administrator's liability and Guardians is entitled to judgment as a matter of law. The issue presented herein is whether the Administrator missed a statutorily mandated deadline under the Clean Air Act to make an ozone attainment determination for the Denver Metro-North Front Range Area. The Administrator has admitted that he "has not yet made a determination regarding the attainment of the 2008 Ozone NAAQS for the Denver Area," Answer ¶ 10, so the only issue before the court is the legal question of whether the

Administrator was required to make such an attainment determination by January 20, 2019. This legal question is easily resolved, as EPA itself has publicly acknowledged the January 20, 2019 attainment determination deadline. Extension Proposal, 83 Fed. Reg. at 56,785 (acknowledging that the Clean Air Act, 42 U.S.C.A. § 7511(b)(2)(B) "requires the EPA to publish the determination of failure to attain and accompanying reclassification in the Federal Register no later than 6 months after the attainment date, which in the case of the Moderate nonattainment areas considered in this proposal [including the Denver Metro-North Front Range Area] would be no later than January 20, 2019"). Therefore, discovery is unnecessary. If factual disputes arise as to when the Administrator can provide relief for these violations of the law, the parties may conduct discovery on that issue before briefing the issue of relief to this Court.

In reviewing this failure by EPA, this Court is governed by the standard of review in the Administrative Procedure Act ("APA"), which controls in the absence of an internal standard of review in the Clean Air Act. *See Arizona Pub. Serv. Co. v. United States EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003). Under the APA, the reviewing court is directed to "compel agency action unlawfully withheld or unreasonably delayed . . . ." 5 U.S.C.A. § 706(1).

ARGUMENT

I. Guardians Has Standing to Advance Its Claim

Because Guardians bears the burden of proving its standing as part of its affirmative case, it briefly sets forth the necessary facts and argument here to establish standing. Guardians has standing to bring this suit on behalf of its members because: (1) its members have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3)

neither the claim asserted, nor the relief sought requires Guardians' members to participate directly in this lawsuit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

Guardians' members have standing to sue in their own right. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the Supreme Court held the "irreducible constitutional minimum" for Article III standing requires a party to show that it has suffered an injury in fact, that there exists a causal connection between that injury and the conduct complained of, and that a favorable decision on the merits will likely redress the injury. Here, Guardians' members have suffered an injury. *See* Nichols Decl. ¶ 6-11, 18-20. (Exhibit A). Guardians members live, work, and recreate in the Denver Metro-North Front Range Area. *Id*. § 2, 4, 6, 8. Members' health and well-being are negatively impacted by harmful ozone pollution, and their quality of life and enjoyment of outdoor recreational activities is further impaired by ozone pollution, causing members to avoid or limit outdoor activities on high ozone days. *Id*. ¶ 8–11. These injuries are caused by the Administrator's conduct and would be redressed by a favorable decision. *See* id. ¶¶ 12–22.

Because Guardians' members have standing to sue in their own right, the Organization satisfies the first element of the Supreme Court's *Hunt* test. Guardians also easily satisfies the second and third *Hunt* requirements, because the interests of Guardians' members at stake are germane to the Organization's purpose, *see* Nichols Decl. ¶¶ 2-3, and none of the claims Guardians asserts requires its members to participate as individuals in this litigation. Further, Guardians seeks only declaratory and injunctive relief, not monetary damages based on injury to

its individual members, so individual participation is unnecessary beyond the standing inquiry. Accordingly, Guardians has standing to bring this action. *Hunt*, 432 U.S. at 343.

II. Guardians Is Entitled to Summary Judgment

There are no genuine disputes as to any material facts. Following EPA's promulgation of the 2008 Ozone Standard, EPA initially designated the Denver Metro-North Front Range area as in a state of marginal nonattainment with the 2008 Ozone Standard effective July 20, 2012. EPA, Air Quality Designations, 77 Fed. Reg. 30,088, 30,110 (May 21, 2012).

After this initial nonattainment designation, the Denver Metro-North Front Range Area again failed to attain compliance with the 2008 Ozone Standard by its new July 20, 2015 deadline. Answer ¶ 36. Accordingly, as required by the Clean Air Act, EPA "bumped up" the classification of the Denver Metro-North Front Range area's nonattainment with the 2008 Ozone Standard from Marginal to Moderate, effective June 3, 2016. *See* Reclassification Determination, 81 Fed. Reg. at 26,699 tbl. 3 (listing Denver Metro-North Front Range Area among "Marginal NonAttainment Areas to Be Reclassified as Moderate Because They Did Not Attain the [2008 Ozone Standard] by the July 20, 2015 Attainment Date").

After being 'bumped up' to a Moderate Area, the Denver Metro-North Front Range Area was legally required to attain compliance with the 2008 Ozone Standard by the attainment deadline of July 20, 2018. 42 U.S.C.A. § 7511(a)(1), (b)(1); Reclassification Determination, 81 Fed. Reg. at 26,698. As EPA articulated, "The reclassified areas must attain the standard as expeditiously as practicable, but in any event no later than July 20, 2018." Reclassification Determination, 81 Fed. Reg. at 26,698.

EPA has not extended Denver's attainment date beyond July 20, 2018. Answer ¶ 38; Nichols Decl. ¶ 16.

Within six months of the July 20, 2018 attainment deadline, or by January 20, 2019, the Administrator was required by the Clean Air Act to make a formal determination as to whether the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the attainment date. 42 U.S.C.A. § 7511(b)(2)(A). In proposing a one-year extension of the attainment deadline for the Denver Metro-North Front Range Area, EPA admitted its "statutory obligation to determine whether ozone nonattainment areas attained the NAAQS by the attainment date, and, within 6 months of the attainment date, publish a notice in the Federal Register identifying each area that is determined as having failed to attain and identifying the reclassification." Extension Proposal, 83 Fed. Reg. at 56,782. *See also id*. at 56,783 ("The EPA Administrator is required to determine whether areas designated nonattainment for an ozone NAAQS attained the standard by the applicable attainment date, and to take certain steps for areas that failed to attain." (citing 42 U.S.C.A. § 7511(b)(2)).

Hence, in the absence of an approved extension of the July 20, 2018 attainment date, EPA was legally obligated to make an attainment determination within six months of that date, or by January 20, 2019. *See* 42 U.S.C.A. § 7511(b)(2)(A) ("Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date.").

The Administrator's failure to make this legally-required determination is delaying clean air for the Denver Metro-North Front Range Area. Existing publicly-available EPA data

indicates that the Denver Metro-North Front Range Area likely failed to meet the 2008 Ozone Standard by the attainment date. If the Administrator finalized his determination that the area failed to attain compliance with the 2008 Ozone Standard, EPA would be required as a matter of law to "bump up" the classification of the area from Moderate to Serious. *See* 42 U.S.C.A. § 7511(b)(2)(A)(i). This change in classification would require the State of Colorado to adopt more stringent clean air safeguards to reduce ozone pollution and to submit a revised State Implementation Plan to clean up the region's unhealthy air, and would set a new deadline for the area to finally come into attainment with the 2008 Ozone Standard. In essence, the Administrator's delay is forcing the residents of and visitors to the Denver Metro-North Front Range Area to endure greater air pollution and public health risks than the law allows.

Where, as here, Congress has "directly spoken" to the issues at hand, the court must give effect to that plain intent without affording any deference to a contrary agency interpretation.[4] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *See also Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) ("If the statute is clear and unambiguous, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Section 181 of the Clean Air Act states, in material part:

> *Within 6 months* following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator *shall* determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date.

42 U.S.C.A. § 7511(b)(2) (emphasis added). Congress's use of the word "shall" in Section 181 of the Act establishes that EPA had a mandatory duty to determine whether the Denver Metro-

[4] However, there is no contrary agency interpretation at issue here, as EPA has acknowledged that this statute requires EPA to make an attainment determination within six months of an applicable attainment deadline. Extension Proposal, 83 Fed. Reg. at 56,785.

North Front Range Area attained the 2008 Ozone Standard by the July 20, 2018 attainment deadline, such determination to be made within six months of that attainment deadline, or by January 20, 2019.

The use of the word "shall" in the above-cited passage imposes a non-discretionary duty on the Administrator. The Supreme Court has stated, with regard to the use of the word "shall" in establishing deadlines in an environmental statute, that uses of this term "are plainly those of obligation rather than discretion …" *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (finding establishment of mandatory deadlines in Endangered Species Act). The Tenth Circuit has explicitly held that in statutory text "'shall' means shall," imposing a mandatory duty with respect to statutorily imposed deadlines. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) ("[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act.").

Thus, Congress' express use of the word "shall" in Section 181 of the Clean Air Act imposes a non-discretionary duty on the Administrator. *See, e.g., Sierra Club v. Johnson*, 541 F.3d 1257, 1265 (11th Cir. 2008). The plain language of the Clean Air Act leaves no doubt that the Administrator violated, and is continuing to violate, the Act by failing to make the required attainment determination.

EPA's duty and liability in this case cannot be reasonably disputed. The Administrator failed to make the required attainment determination for the Denver Metro-North Front Range Area by the mandatory deadline of January 20, 2019, and the Administrator admits that he has not yet made the required attainment determination. Answer ¶ 40 (admitting that "the

Administrator did not make an attainment determination for the Denver Area by January 20, 2019, and has not made an attainment determination since that date").

EPA has not met the statutory deadline for making the required finding whether the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the applicable attainment deadline, as required by the clear, unambiguous will of Congress expressed in the plain language of the Clean Air Act. In the face of past agency attempts to assert their discretion to extend deadlines clearly mandated by the unambiguous will of Congress, the Tenth Circuit has repeatedly held that such discretion does not exist. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d at 1178, 1187-88 (discussing, in regard to a statutory deadline, numerous cases establishing that "administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform," quoting *Health Sys. Agency of Oklahoma v. Norman*, 589 F.2d 486, 492 (10th Cir. 1978)).

Although its deadline passed five months ago, EPA has not made the required findings regarding whether or not the Denver Metro-North Front Range Area attained compliance with the 2008 Ozone Standard by the applicable attainment deadline. Therefore, EPA has violated and continues to violate its mandatory, non-discretionary duty in 42 U.S.C.A. § 7511(b)(2) by failing to make the attainment determination.

This violation constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act's citizen suit provision. 42 U.S.C.A. § 7604(a)(2). The Administrator's violation is ongoing and will continue unless this Court grants the requested relief. There is no reason for this Court to tolerate further unlawful delay.

CONCLUSION

For the reasons set forth above, Guardians respectfully requests that this Court grant its motion for partial summary judgment on liability and enter a declaratory judgment that the Administrator has violated and continues to violate the Clean Air Act by failing to make the requisite attainment determination for the Denver Metro-North Front Range Area with respect to the 2008 Ozone Standard. Resolving the issue of EPA's liability now, with subsequent briefing on the issue of timing of relief, will provide the most expeditious resolution to this case, which has been delayed long enough by the EPA's refusal to make the requisite findings.

Respectfully Submitted on this 20th day of June, 2019.

/s/ Daniel L. Timmons
Daniel L. Timmons
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
(505) 570-7014
dtimmons@wildearthguardians.org

/s/ Samantha Ruscavage-Barz
Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org

Attorneys for Plaintiff WildEarth Guardians

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this case.

/s/ Daniel L. Timmons
Daniel L. Timmons

Attorney for Plaintiff WildEarth Guardians

CERTIFICATE OF COMPLAINCE WITH LOCAL RULE 7.1

In accordance with D.C.COLO.LCivR 7.1, I hereby certify that I conferred with opposing counsel regarding this motion. Specifically, I spoke with opposing counsel by telephone and conferred regarding this motion on June 11, 2019. On June 18, 2018, I attempted to again confer by telephone. When I was unable to reach opposing counsel, I left a voicemail and sent a follow-up electronic message regarding this motion and possible settlement. To date, I have received no response from opposing counsel regarding these communications.

/s/ Daniel L. Timmons
Daniel L. Timmons

Attorney for Plaintiff WildEarth Guardians