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7  
8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 AMERICAN LUNG ASSOCIATION, )  
12 AMERICAN PUBLIC HEALTH ASSOCIATION, )  
13 AMERICAN THORACIC SOCIETY, )  
14 APPALACHIAN MOUNTAIN CLUB, )  
15 ENVIRONMENTAL DEFENSE FUND, )  
16 ENVIRONMENTAL LAW AND POLICY )  
17 CENTER, NATIONAL PARKS )  
18 CONSERVATION ASSOCIATION, NATURAL )  
19 RESOURCES DEFENSE COUNCIL, SIERRA )  
20 CLUB, and WEST HARLEM ENVIRONMENTAL )  
21 ACTION, )

22 *Plaintiffs,*

23 v.

24 SCOTT PRUITT, in his official capacity as )  
25 Administrator of the United States Environmental )  
26 Protection Agency, )

27 *Defendant.*

Case No: 3:17-cv-06900-MEJ

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

Date: January 25, 2018  
Time: 10:00 a.m.  
Place: Courtroom B, 15th Floor  
Judge: Maria-Elena James

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**NOTICE OF MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that on January 25, 2018, at 10:00 a.m., before the Honorable Maria-Elena James, United States Magistrate Judge, in Courtroom B, 15th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Plaintiffs American Lung Association, American Public Health Association, American Thoracic Society, Appalachian Mountain Club, Environmental Defense Fund, Environmental Law and Policy Center, National Parks Conservation Association, Natural Resources Defense Council (NRDC), Sierra Club, and West Harlem Environmental Action (collectively, “Plaintiffs” or “Health and Environmental Groups”) will and hereby do move for summary judgment in their favor pursuant to Federal Rule of Civil Procedure 56 and Civil L.R. 56-1. This motion is based on the points and authorities below, the attached declarations and exhibits, the record of this action, and argument that may be presented at the hearing on this motion.

**MOTION FOR SUMMARY JUDGMENT**

To begin the process of alleviating elevated levels of ozone—smog—pollution that harms people’s health and the environment, Defendant, the Administrator of the U.S. Environmental Protection Agency (“the Administrator” or “EPA”), had a mandatory duty under the Clean Air Act to promulgate initial area air quality designations under the 2015 national ambient air quality standards (“standards” or “NAAQS”) for ozone for all areas of the country by October 1, 2017. Administrator Pruitt did not fulfill this duty. There is no genuine dispute as to any material fact, and Plaintiffs are entitled to and request summary judgment as a matter of law on the question of liability. Health and Environmental Groups respectfully request that: (1) this Court declare that EPA’s failure to complete its mandatory duty to promulgate those designations constitutes an unlawful failure to perform a nondiscretionary act or duty under the Clean Air Act, 42 U.S.C. § 7604(a)(2); and (2) to effectuate the protections required under the Clean Air Act to limit the serious health harms ozone air pollution causes to their members and the public in numerous highly populated areas of the country, this Court issue a mandatory injunction compelling EPA to complete and publish, within 180 days of the Court’s order, final action promulgating the above-described overdue initial area air quality designations.



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This is a straightforward mandatory duty lawsuit. To activate the Clean Air Act's  
 4 mechanisms for reducing ground-level ozone air pollution, EPA was legally required to  
 5 designate all areas of the country as meeting or not meeting health- and welfare-protective  
 6 standards for ozone pollution (also known as "smog") no later than October 1, 2017. It still has  
 7 not done so. Indeed, it has not designated any of the communities with ozone pollution levels  
 8 violating the standards. Those designations trigger actions at the state level to reduce emissions  
 9 contributing to unhealthy air quality, and therefore EPA's delay seriously endangers the health  
 10 and wellbeing of millions of people who are exposed to unhealthy air. A coalition of 10 Health  
 11 and Environmental Groups respectfully requests that this Court establish an expeditious schedule  
 12 for EPA to do its job.

13  
 14 **STATEMENT OF ISSUES**

15 1. Has EPA failed to promulgate the initial area air quality designations for all areas  
 16 of the country under the 2015 ozone standards by the October 1, 2017, deadline required by 42  
 17 U.S.C. § 7407(d)(1)(B)(i)?

18 2. By when must EPA take final action to complete that overdue mandatory duty?  
 19

20 **STATEMENT OF FACTS AND LEGAL FRAMEWORK**

21 **I. OZONE SERIOUSLY HARMS HUMAN HEALTH.**

22 Ozone, the main component of smog, is a corrosive air pollutant that inflames the lungs  
 23 and constricts breathing. *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 359 (D.C. Cir. 2002)  
 24 ("ATA"); EPA-HQ-OAR-2008-0699-0405 ("ISA") 2-20 to -23 tbl.2-1, Ex.1. It causes asthma  
 25 attacks, emergency room visits, hospitalizations, and other serious health harms, and it likely  
 26 causes premature death. *E.g.*, 80 FR 65,292, 65,308/3-09/1 (Oct. 26, 2015); EPA-HQ-OAR-  
 27 2008-0699-0404 ("PA") 3-18, 3-26 to -29, 3-32, Ex.2; ISA 2-16 to -18, 2-20 to -24 tbl.2-1.  
 28 Ozone can harm healthy adults, but others are more vulnerable. *See* 80 FR 65,310/1-3. Because

1 their respiratory tracts are not fully developed, children are especially vulnerable to ozone  
2 pollution, particularly when they have elevated respiratory rates, as when playing outdoors. *E.g.*,  
3 PA 3-81 to -82. People with lung disease and the elderly also have heightened vulnerability. *See*  
4 80 FR 65,310/3. People with asthma suffer more severe impacts from ozone exposure than  
5 healthy individuals do and are more vulnerable at lower levels of exposure. *Id.* 65,311/1 n.37,  
6 65,322/3.

7  
8 **II. THE CLEAN AIR ACT PRESCRIBES A CAREFULLY-DESIGNED PROGRAM**  
9 **FOR CONTROLLING OZONE POLLUTION.**

10 At the “heart” of the Clean Air Act is the requirement that the entire country come  
11 expeditiously into compliance with health- and welfare-protective air quality standards. *Alabama*  
12 *Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1980). EPA must set “primary” and  
13 “secondary” standards for certain pervasive pollutants, like ozone, to protect public health and  
14 welfare, respectively. 42 U.S.C. §§ 7408(a), 7409(a)-(b). It must review and, as appropriate,  
15 revise these standards at least every five years. *Id.* § 7409(d)(1). In setting and revising them,  
16 EPA is barred from considering the costs and technological feasibility of implementing the  
17 standards. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 471 & n.4 (2001); *Am. Petroleum*  
18 *Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981).

19 After EPA sets a standard, the implementation process begins, which, as relevant to this  
20 case, starts with initial area air quality designations. *See ATA*, 283 F.3d at 358-59. States and  
21 Tribes first submit recommended designations to EPA, and then, “as expeditiously as  
22 practicable,” but no later than two years after promulgating a standard, EPA “shall promulgate  
23 the designations of all areas (or portions thereof) submitted” by states and Tribes as either  
24 violating the standard (“nonattainment” areas) or meeting the standard (“attainment” areas). 42  
25 U.S.C. § 7407(d)(1)(A)-(B); *see also id.* §§ 7601(d)(1), 7602(d).<sup>1</sup> The Act specifies the relevant  
26

27 <sup>1</sup> There is a third designation—an “unclassifiable” area, which is “any area that cannot be  
28 classified on the basis of available information as meeting or not meeting” the standard—which  
is treated for regulatory purposes as an attainment area. 42 U.S.C. §§ 7407(d)(1)(A)(iii), 7471;

1 considerations for making designations by specifically defining each type of area. For example, a  
2 nonattainment area is one that “does not meet (or that contributes to ambient air quality in a  
3 nearby area that does not meet)” a standard for a pollutant. *Id.* § 7407(d)(1)(A)(i). The Act  
4 provides only one condition under which EPA may extend its deadline for promulgating  
5 designations—when it “has insufficient information to promulgate the designations.” *Id.*  
6 § 7407(d)(1)(B)(i) (“Such period may be extended for up to one year in the event the  
7 Administrator has insufficient information to promulgate the designations.”).

8 For nonattainment areas, Congress created a detailed program to ensure that air quality  
9 will attain ozone standards by specified deadlines (“attainment deadlines”). *Id.* §§ 7410(a), (c),  
10 7502; *see also id.* §§ 7511-7511f (provisions specific to ozone nonattainment areas). Each state  
11 must adopt a “state implementation plan” that, for nonattainment areas, includes all the  
12 requirements Congress crafted for such areas and any specific measures the state determines  
13 should be implemented to address local sources of air pollution contributing to elevated ozone  
14 levels. *Id.* § 7410(a)(2)(I).

15 Crucially, the Act-required attainment deadlines are keyed to the date of designation. *See*  
16 *NRDC v. EPA*, 777 F.3d 456, 465-69 (D.C. Cir. 2014). The requirements—and deadlines—for  
17 states to adopt the specific programs Congress mandated to control harmful emissions in  
18 nonattainment areas similarly depend on the areas being designated nonattainment. *See, e.g.*, 42  
19 U.S.C. §§ 7502(b), (c), 7503 (general planning requirements for nonattainment areas kick in  
20 when area is designated nonattainment), 7511a(a)(2)(C) (requiring “new source review”  
21 permitting programs that require new and modified major factories and power plants in  
22 nonattainment areas to install state-of-the-art emission controls and compensate for emission  
23 increases with greater offsetting reductions), 7511a(b)(2) (requiring emission control on certain  
24 types of existing sources in certain nonattainment areas), 7511a(c)(2)(A) (for certain

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*see also Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 145 (D.C. Cir. 2015) (describing  
“unclassifiable” designation).

1 nonattainment areas, requiring plans demonstrating attainment of standard by applicable  
2 attainment deadline).

3 Simultaneously with their designation, ozone nonattainment areas must be classified  
4 based on the severity of their ozone pollution levels. *Id.* § 7511(a)(1) tbl.1. The higher the  
5 classification, the longer the area has to come into attainment, but the more stringent the controls  
6 it must adopt. *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 887 (D.C. Cir. 2006),  
7 *amended in other parts* 489 F.3d 1245 (D.C. Cir. 2007). If an area fails to attain timely, EPA  
8 must reclassify it to a higher classification, triggering stronger pollution control requirements. *Id.*  
9 887-88.

10 The designations are relevant to other Clean Air Act protections, too. For example, they  
11 affect the timing of emission reductions required by rules implementing the Act's "Good  
12 Neighbor Provision," which requires states (or, if a state fails to act on time, EPA) to prohibit  
13 emissions that "contribute to nonattainment in" downwind states. 42 U.S.C. § 7410(a)(2)(D)(i),  
14 (c); *see North Carolina v. EPA*, 531 F.3d 896, 911-12, *amended in other part on reh'g*, 550 F.3d  
15 1176 (D.C. Cir. 2008).

16 EPA's promulgation of nonattainment designations is thus essential to triggering the  
17 Act's nonattainment provisions and bringing about the attendant health and environmental  
18 benefits. Simply put, delay of designations delays the stronger pollution controls Congress  
19 mandated to protect people in communities with unhealthy air.

### 21 **III. EPA FINDS THE 2008 STANDARDS INADEQUATE AND PROMULGATES** 22 **STRONGER STANDARDS.**

23 EPA revised the ozone standards most recently on October 1, 2015, strengthening them  
24 by tightening the maximum 8-hour level of ozone allowed in the ambient air to 70 parts per  
25 billion (ppb), down from the 75 ppb allowed under the 2008 standards. 80 FR 65,292/1,  
26 65,452/2; 73 FR 16,436, 16,436/1 (2008). After a lengthy and detailed review of an extensive  
27 scientific record, with multiple opportunities for public input, EPA determined that the 2008  
28 standards were inadequate to protect public health and welfare. 80 FR 65,342/2-47/1, 65,389/1-

1 90/2. Important parts of the extensive record showed that healthy young adults experienced  
2 adverse health effects with ozone exposures at levels allowed by the 2008 standards and linked  
3 ozone levels allowed by those standards to hospital visits, deaths, and other serious health harms.  
4 *Id.* 65,343/1-44/3, 65,346/2-3. In a 15-city study, EPA estimated that tens of thousands of  
5 children would still face dangerous ozone exposures even after the 2008 standards were met. *Id.*  
6 65,344/3-47/1. EPA’s independent scientific advisors likewise unanimously found the 2008  
7 standards were not strong enough to protect public health and welfare. *Id.* 65,346/2, 65,381/3.

8 EPA projects that compliance with the 2015 standards will realize significant public  
9 health benefits. Outside of California, EPA estimates that compliance with the standards will  
10 result in upwards of 600 lives saved, over 250 heart attacks avoided, about 1,000 hospital  
11 admissions or emergency room visits prevented, 230,000 asthma attacks in children prevented,  
12 and 160,000 school loss days for children averted each year. EPA, EPA-452/R-15-007,  
13 *Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality*  
14 *Standards for Ground-Level Ozone* at ES-16, tbl.ES- 6 (2015), Ex.3 (“RIA”). EPA expects  
15 compliance within California to occur on a different timeframe, with that compliance estimated  
16 to save upwards of 200 lives, avoid more than 50 heart attacks, prevent over 500 hospital  
17 admissions or emergency room visits for all ages and 160,000 asthma attacks in children, and  
18 avert 120,000 school loss days for children nationwide. *Id.* at ES-18 tbl.ES-10. The economic  
19 value of these benefits substantially outweighs the costs of achieving them. *Id.* ES-15 tbl.ES-5,  
20 ES-18 tbl.ES-9. In making its estimate of public health benefits, EPA assumed the designations  
21 that drive compliance would be completed in late 2017. *See id.* ES-2 to -3. These health benefits  
22 would come on top of the public health gains from achieving the 2008 standards and from  
23 several other pollution reduction requirements EPA put in place around the time it finalized the  
24 2015 standards. *Id.* 6-1 (“The benefits...are estimated as being incremental to attaining the  
25 existing standard of 75 ppb. These estimated benefits are incremental to the benefits estimated  
26 for several recent rules....” (footnote omitted)).

1 **IV. EPA, STATES, AND TRIBES TAKE THE NECESSARY STEPS TO MAKE**  
2 **TIMELY DESIGNATIONS.**

3 EPA's revision of the standards on October 1, 2015, means its mandatory deadline for  
4 issuing designations was October 1, 2017. *See* 42 U.S.C. § 7407(d)(1)(B)(i). The Act prescribes a  
5 step-by-step process for promulgating designations. States must first submit recommended  
6 designations to EPA within one year of standards' promulgation. *Id.* § 7407(d)(1)(A). EPA may  
7 modify a recommended designation, but must first provide the state 120 days' notice and give  
8 the state an opportunity to rebut the proposed modification. *Id.* § 7407(d)(1)(B)(ii).

9 EPA, states, and Tribes have already undertaken the steps that have enabled EPA to meet  
10 prior designation deadlines. Every state and several Tribes submitted designation  
11 recommendations to EPA.<sup>2</sup> The states and Tribes formulated these recommendations with  
12 guidance from EPA regarding what kind of information the agency needed to make the final  
13 designations. For example, drawing on its experience with past ozone standards, EPA  
14 promulgated a memorandum further describing the process for developing designations.  
15 Memorandum on Area Designations for the 2015 Ozone National Ambient Air Quality  
16 Standards, from Janet McCabe, Acting Ass't Adm'r, to Reg'l Adm'rs (Feb. 25, 2016), Ex.4  
17 ("Memorandum").<sup>3</sup> Among other things, EPA explained that it bases designations on air quality  
18 monitoring data—measurements of the amount of ozone actually present in the air at stations that  
19 sample the ambient air in locations consistent with EPA regulations. Memorandum 3; *see Miss.*  
20 *Comm'n*, 790 F.3d at 147 (upholding designations that used this approach for 2008 ozone  
21 standards). "After identifying each monitor that indicates a violation of the 2015 ozone NAAQS  
22 in an area, the EPA will determine which nearby areas contribute to the violation(s)" based on  
23 five factors used in prior designations. Memorandum 5-7 (factors are "air quality data, emissions

24 \_\_\_\_\_  
25 <sup>2</sup> <https://www.epa.gov/ozone-designations/2015-ozone-standards-state-recommendations>;  
<https://www.epa.gov/ozone-designations/2015-ozone-standards-tribal-recommendations>.

26 <sup>3</sup> EPA also proposed a rule that would govern implementation of the 2015 standards, including  
27 establishing thresholds for classifying nonattainment areas. 81 FR 81,276 (Nov. 17, 2016). The  
28 comment period on that rule closed February 13, 2017. 81 FR 91,894, 91,894/1-2 (Dec. 19,  
2016).

1 and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries,”  
 2 with other factors potentially relevant for specific areas); *see Miss. Comm’n*, 790 F.3d at 149,  
 3 158-59 (same factors applied for initial area designations for 2008 standards).

4 EPA explained that states would base designation recommendations on certified, quality-  
 5 assured air quality monitoring data for 2013-15 (the years needed to calculate the official air  
 6 quality statistic—“design value”—to assess compliance with the standards for 2015), with  
 7 preliminary data for 2016 perhaps factoring in. Memorandum 2-4. EPA expected to base  
 8 designations on the 2016 design values, which use 2014-16 data. *Id.* The 2015 design values, as  
 9 measured at every air quality monitor in the country, were available in July 2016,<sup>4</sup> and EPA  
 10 regulations required full, accurate, and quality-assured data for 2016 by May 1, 2017. 40 C.F.R.  
 11 § 58.15; *see also* Memorandum 3 (explaining regulations). EPA made 2016 design values  
 12 publicly available in late July 2017.

13 [https://web.archive.org/web/20170815014556/https://www.epa.gov/air-trends/air-quality-design-](https://web.archive.org/web/20170815014556/https://www.epa.gov/air-trends/air-quality-design-values#report)  
 14 [values#report](https://web.archive.org/web/20170815014556/https://www.epa.gov/air-trends/air-quality-design-values#report), Ex.5.<sup>5</sup>

15  
 16 **V. EPA EXTENDS THE DESIGNATIONS DEADLINE, WITHDRAWS THE**  
 17 **EXTENSION, AND ULTIMATELY FAILS TO PROMULGATE ALL THE**  
 18 **LEGALLY REQUIRED DESIGNATIONS.**

19 In summer 2017, without notice or public input, EPA abruptly extended its deadlines for  
 20 promulgating designations by a year, to October 1, 2018. First, on June 6, 2017, it sent identical  
 21 four-paragraph letters to state governors so informing them. Exs.6-9. EPA subsequently  
 22 announced its delay action in the Federal Register. 82 FR 29,246 (June 28, 2017). At base, EPA  
 23 premised the delay on its ongoing review of the standards and on vaguely described “issues  
 24

25 <sup>4</sup> [https://www.epa.gov/sites/production/files/2016-](https://www.epa.gov/sites/production/files/2016-07/ozone_designvalues_20132015_final_07_29_16.xlsx)  
 26 [07/ozone\\_designvalues\\_20132015\\_final\\_07\\_29\\_16.xlsx](https://www.epa.gov/sites/production/files/2016-07/ozone_designvalues_20132015_final_07_29_16.xlsx).

27 <sup>5</sup> EPA subsequently made minor revisions to them in October 2017.  
 28 [https://www.epa.gov/sites/production/files/2017-](https://www.epa.gov/sites/production/files/2017-10/ozone_designvalues_20142016_final_10_02_17_0.xlsx)  
[10/ozone\\_designvalues\\_20142016\\_final\\_10\\_02\\_17\\_0.xlsx](https://www.epa.gov/sites/production/files/2017-10/ozone_designvalues_20142016_final_10_02_17_0.xlsx).

1 regarding the 2015 ozone NAAQS and its implementation,” particularly those touching on  
2 “compliance efforts.” 82 FR 29,247/2-3; *e.g.*, Ex.6 at 1.

3         Joined by others, Health and Environmental Groups challenged EPA’s delay action in the  
4 D.C. Circuit and sought immediate relief. *American Lung Ass’n v. EPA*, No. 17-1172 (D.C. Cir.  
5 July 12, 2017). EPA responded by signing a rule withdrawing the delay action on the eve of the  
6 deadline for EPA’s response to the petitioners’ motion for immediate relief. *Compare* 82 FR  
7 37,318, 37,319/3 (Aug. 10, 2017) (signature date is August 2), *with* Order, *American Lung*, No.  
8 17-1172 (D.C. Cir. July 19, 2017) (EPA’s response to petitioners’ motion for summary relief is  
9 due August 3), Ex.10. Thus, the deadline for EPA to promulgate area designations was once  
10 again October 1, 2017. 82 FR 37,218/3.

11         October 1 came and went without EPA promulgating any designations under the 2015  
12 ozone standards. More than a month later, on November 6, EPA promulgated attainment and  
13 unclassifiable designations for many counties, but no nonattainment designations. 82 FR 54,232,  
14 54,232/2, 54,235-87 (Nov. 16, 2017). EPA left hundreds of counties undesignated. These  
15 counties include nearly all of California, including the Bay Area and Southern California; all of  
16 New Jersey and Connecticut; the New York City metropolitan area; the Baltimore-Washington  
17 metropolitan area; the Philadelphia metropolitan area; the Chicago metropolitan area; the  
18 Cleveland metropolitan area; the Atlanta metropolitan area; the Phoenix metropolitan area; the  
19 Dallas-Fort Worth metropolitan area; the San Antonio metropolitan area; and the Houston  
20 metropolitan area. *See id.* 54,235-87. In total, at least 165 million people live in the areas that  
21 EPA continues to leave undesignated. *Compare* <https://tinyurl.com/yb6pfuks> (U.S. Census  
22 website list of population of all U.S. counties by population), *with* 82 FR 54,235-87 (listing  
23 counties for which EPA promulgated designation). Ozone pollution levels in many of the  
24 undesignated areas exceed the 2015 standards. *Compare* 82 FR 54,235-87, *with*  
25 [https://www.epa.gov/sites/production/files/2017-](https://www.epa.gov/sites/production/files/2017-10/ozone_designvalues_20142016_final_10_02_17_0.xlsx)  
26 [10/ozone\\_designvalues\\_20142016\\_final\\_10\\_02\\_17\\_0.xlsx](https://www.epa.gov/sites/production/files/2017-10/ozone_designvalues_20142016_final_10_02_17_0.xlsx) tbl.4 (giving county-level design  
27 values). Some of the undesignated areas contribute to violations of the 2015 standards in other  
28 areas. EPA’s delay in promulgating designations, however, means that the people living,



1 working, and enjoying outdoor activities in these areas are deprived of the Clean Air Act's  
2 protections designed to lower ozone pollution and protect their health.

### 4 **JURISDICTION, NOTICE, VENUE, AND STANDING**

5 This Court has jurisdiction under the Clean Air Act's citizen suit provision, which  
6 authorizes district courts to hear actions brought by "any person" to compel EPA to perform  
7 "any act or duty" under the Act "which is not discretionary with [EPA]." 42 U.S.C. § 7604(a),  
8 (a)(2). EPA's failure to promulgate initial area air quality designations under the 2015 standards  
9 for all areas of the country by October 1, 2017, is a failure to perform an action that is not  
10 discretionary, as explained herein.

11 Health and Environmental Groups satisfied the notice requirements for bringing this  
12 action. *See* Letter from Earthjustice, Environmental Defense Fund, and Environmental Law and  
13 Policy Center to EPA Administrator Scott Pruitt (Oct. 3, 2017), Ex.11. More than 60 days have  
14 passed since the notice was provided, *see* 40 C.F.R. § 54.2(d), and EPA has continued its failure  
15 to fulfill its mandatory duty.

16 Venue is proper in this Court because Plaintiff Sierra Club is headquartered in Oakland  
17 and thus resides in this district; Plaintiffs American Lung Association, Environmental Defense  
18 Fund, National Parks Conservation Association, and NRDC have offices in this district; and this  
19 district is one in which EPA resides and performs its official duties. 28 U.S.C. § 1391(e)(1)(A),  
20 (C). Venue is also proper because (1) a substantial part of the events and omissions giving rise to  
21 this claim occurred and is occurring in this district because EPA failed to promulgate all  
22 designations for this district; (2) the health and welfare of district residents, including members  
23 of Health and Environmental Groups, *Fashho Decl.* ¶ 5(c), (e), Ex.30; *Stith Dec.* ¶ 10, Ex.42, are  
24 threatened by EPA's failure to make designations; and (3) EPA's Regional Office in San  
25 Francisco, California, has a substantial role in implementing the duty at issue. 28 U.S.C.  
26 § 1391(e)(1)(B); *see* <https://www3.epa.gov/region9/air/aboutus.html> (listing "NAAQS  
27 Designations" as one responsibility of EPA's San Francisco Office's Air Program).

1 Health and Environmental Groups have standing to bring this suit because their members  
2 would have standing to sue in their own right, Health and Environmental Groups' interest in  
3 safeguarding public health and the environment is germane to their organizational purposes,  
4 Exs.15-46, and this suit will not require individual participation of members. *Hunt v. Wash. State*  
5 *Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). As discussed more fully below, at pp.16-19  
6 Health and Environmental Groups have members who live, work, recreate, and carry out other  
7 activities in areas where EPA has not yet promulgated designations, but that have harmful levels  
8 of ozone pollution. *See* Declarations, Exs.15-46. Such ozone pollution endangers their members'  
9 and their members' families' health and diminishes their enjoyment of their outdoor activities by  
10 causing them to limit the time they spend outdoors. *See id.* Promulgation of designations is  
11 necessary to start the process of bringing ozone pollution levels down to comply with the  
12 standards EPA says are necessary to protect public health and welfare. *See supra* pp.3-5.  
13 Accordingly, Health and Environmental Groups have standing to bring this suit. *E.g., Friends of*  
14 *the Earth v. Laidlaw Env'tl. Servs. (TOC)*, 528 U.S. 167, 181-84 (2000) (environmental group has  
15 standing where members use area impacted by pollutant discharges and aver reasonable concerns  
16 about the effects of those discharges on their recreational, aesthetic, and economic interests);  
17 *Hall v. Norton*, 266 F.3d 969, 973-74, 976 (9th Cir. 2001) (individual has standing where he  
18 faces a threat of harm from air pollution when traveling, shopping, and carrying out other  
19 activities in polluted area).

20 EPA's failure to timely promulgate designations further causes procedural injury to  
21 Plaintiffs and their members. The Act's procedure for promulgating all area designations by a  
22 fixed deadline is designed to protect Plaintiffs' members' concrete interests in breathing clean  
23 air. *See Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225-26 (9th Cir.  
24 2008) (environmental group had standing where agency violated procedural requirement  
25 designed to protect group's concrete interests in welfare of endangered species). As described  
26 above, promulgation of nonattainment designations triggers deadlines for adoption of measures  
27 to curb ozone pollution and for attainment of the more protective revised ozone standard, but  
28 EPA's continuing failure to complete designations delays this process, postponing required steps

1 to reduce unsafe levels of ozone pollution, and thereby prolonging Plaintiffs' members' exposure  
2 to harmful ozone pollution. Moreover, EPA's failure to complete the designations process  
3 deprives Plaintiffs and their members of their procedural right to judicially challenge final  
4 designations that they contend are unlawful or arbitrary, as well as their procedural rights to  
5 enforce the Act's requirements for preparation and implementation of plans to remedy violations  
6 of the standards, to participate in rulemakings to develop such plans, and to judicially challenge  
7 such plans. An order compelling EPA to make the designations by a date certain will redress the  
8 foregoing injuries.

## 10 ARGUMENT

### 11 I. LEGAL STANDARD

12 Under Federal Rule of Civil Procedure 56, summary judgment must be granted when,  
13 viewing the facts in the light most favorable to the nonmoving party, the record shows that "there  
14 is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of  
15 law." Fed. R. Civ. P. 56(a). Once the moving party has satisfied its burden, it is entitled to  
16 summary judgment if the non-moving party fails to cite "specific facts showing that there is a  
17 genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); accord Fed. R. Civ.  
18 P. 56(c)(1)(A).

19 In ordering appropriate relief, a district court should compel EPA to correct its statutory  
20 violations as soon as possible. *NRDC v. Train*, 510 F.2d 692, 705, 712-13 (D.C. Cir. 1974).  
21 Where there is a clear statutory deadline, EPA bears the especially "heavy" burden of proving  
22 that expeditious compliance would be "impossible." *Sierra Club v. Thomas*, 658 F. Supp. 165,  
23 170-71 (N.D. Cal. 1987) (citing *Train*).

1 **II. EPA HAS FAILED TO PERFORM ITS MANDATORY CLEAN AIR ACT DUTY**  
2 **TO PROMULGATE DESIGNATIONS.**

3 EPA had a mandatory duty under the Clean Air Act to promulgate and publish  
4 designations of all areas in each state for the standard by the statutory deadline, and it failed to  
5 do so.

6 Congress commanded that, upon revision of a national ambient air quality standard, EPA  
7 “shall promulgate the designations of all areas (or portions thereof) [in each state] as  
8 expeditiously as practicable, but in no case later than 2 years from the date of promulgation of  
9 the new or revised national ambient air quality standard,” permitting up to a one-year extension  
10 only “in the event the Administrator has insufficient information to promulgate the  
11 designations.” 42 U.S.C. § 7407(d)(1)(B)(i); *see also* 82 FR 37,319/2 (EPA acknowledgment of  
12 this statutory requirement). On its face, the duty to promulgate all designations by the precise  
13 schedules set forth in the Act is non-discretionary. *See NRDC v. Train*, 545 F.2d 320, 324-25,  
14 327 (2d Cir. 1976) (holding that EPA had non-discretionary duty under Clean Air Act where  
15 statute used the “mandatory” term “shall” and included “a specific timetable” for attainment of  
16 air quality standards). Moreover, EPA has conceded through its own public statements that it was  
17 required to promulgate the designations by the deadline. *See* 82 FR 37,318/3 (“The deadline for  
18 the EPA to promulgate initial designations for the 2015 ozone NAAQS is October 1, 2017.”);  
19 *NRDC v. N.Y. State Dep’t of Env’tl. Conservation*, 700 F. Supp. 173, 178 (S.D.N.Y. 1988) (EPA  
20 statement implicitly conceded EPA’s duty to act).

21 The mandatory designations for the standard are overdue. EPA adopted the standard on  
22 October 1, 2015, which made the promulgation of all area designations due no later than two  
23 years from that date, on October 1, 2017. *See* 42 U.S.C. § 7407(d)(1)(B)(i); 80 FR 65,452/2.  
24 Though EPA initially sought to extend that deadline by a year, it later withdrew the extension,  
25 thus reinstating the October 1, 2017, deadline. *See* 82 FR 37,318/3. Yet EPA did not take any  
26 action until November 6, and then it promulgated only attainment designations for only some  
27 geographic areas, leaving much of the country—and well over 100 million of its residents—  
28

1 without designations and in limbo. *See* 82 FR 54,235-87. EPA’s failure to complete all area  
2 designations is continuing. These facts are beyond dispute.

3 EPA’s failure to promulgate designations for all areas in each state thwarts the Clean Air  
4 Act’s mandate to assure the air quality within each state’s entire geographic area will achieve  
5 and maintain the national ambient air quality standards for ozone. *See* 42 U.S.C. § 7407(a); *see*  
6 *supra* pp.3-5.

7 Because it is undisputable that EPA has not promulgated all area designations for the  
8 standard by the statutory deadline or to date—a nondiscretionary duty mandated by the Clean Air  
9 Act—EPA has plainly violated the law, and Health and Environmental Groups are entitled to  
10 summary judgment finding EPA liable for violating the law.

11  
12 **III. THE COURT SHOULD REQUIRE EPA TO COMPLETE ALL DESIGNATIONS**  
13 **WITHIN 180 DAYS OF THE COURT’S ORDER.**

14 **A. A Court Order Compelling EPA to Act Expeditiously Is Necessary and**  
15 **Appropriate.**

16 **1. Such an Order Is Necessary to Effectuate the Clean Air Act.**

17 Because Congress specified precisely what EPA must do and EPA has not done it, this  
18 Court must issue an order requiring EPA to complete its duty forthwith. 42 U.S.C. § 7604(a)  
19 (expressly empowering district courts “to order the Administrator to perform such [an unlawfully  
20 withheld] act or duty”); *see also TVA v. Hill*, 437 U.S. 153, 173 (1978); *United States v.*  
21 *McIntosh*, 833 F.3d 1163, 1172 (9th Cir. 2016). “Once Congress, exercising its delegated  
22 powers, has decided the order of priorities in a given area, it is for the courts to enforce them  
23 when enforcement is sought. Courts of equity cannot, in their discretion, reject the balance that  
24 Congress has struck in a statute.” *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S.  
25 483, 497 (2001) (internal citation and quotation and alteration marks omitted); *see also Horne v.*  
26 *Flores*, 557 U.S. 433, 450 (2009) (“It goes without saying that federal courts must vigilantly  
27 enforce federal law and must not hesitate in awarding necessary relief.”).

1 Such an order is necessary to prevent EPA from thwarting the purpose of the Clean Air  
2 Act. As fully discussed above, Congress has expressly commanded that EPA promulgate initial  
3 area air quality designations as expeditiously as practicable and, at the outside, no later than two  
4 years after promulgating a revised national ambient air quality standard, except, under particular,  
5 limited circumstances, allowing an extension of up to a year, circumstances upon which EPA  
6 does not claim to rely. EPA’s failure to comply with this clear command thwarts the purpose of  
7 the Act. To ensure public health would be protected, Congress laid out a precise system for  
8 implementation of ozone standards. 42 U.S.C. §§ 7511-7511f (provisions specifically for ozone  
9 nonattainment areas). Deadlines—both for adopting the programs Congress specifically required  
10 and for ultimately attaining the standards—all depend on areas’ being designated nonattainment.  
11 *see NRDC*, 777 F.3d at 465-69 (attainment deadlines are keyed to date of designation); *see, e.g.*,  
12 42 U.S.C. §§ 7502(b), (c), 7503 (general planning requirements for nonattainment areas kick in  
13 when area is designated nonattainment), 7511a(a)(2)(C) (requiring “new source review”  
14 permitting programs that require new and modified major factories and power plants in  
15 nonattainment areas to install state-of-the-art emission controls and compensate for emission  
16 increases with greater offsetting reductions), 7511a(b)(2) (requiring emission control on certain  
17 types of existing sources in certain nonattainment areas), 7511a(c)(2)(A) (for certain  
18 nonattainment areas, requiring plans demonstrating attainment of standard by applicable  
19 attainment deadline). Thus, this system for improving air quality and public health begins  
20 operating in earnest—and those deadlines can be determined—only once EPA completes its task  
21 of promulgating initial area air quality designations.

22 By refusing to promulgate those designations, EPA unlawfully nullifies Congress’s  
23 carefully conceived mechanism for improving air quality and public health. *Cf. Whitman*, 531  
24 U.S. at 485 (“EPA may not construe the statute in a way that completely nullifies textually  
25 applicable provisions meant to limit its discretion.”). The Act explicitly gives district courts  
26 authority “to order the Administrator to perform such [an unlawfully withheld] act or duty.” 42  
27 U.S.C. § 7604(a). A court order is thus authorized and needed to prevent Congress’s intent from  
28 being undone.

1                   **2.       Such an Order Serves the Act’s Fundamental Purposes of Protecting**  
2                   **Health and the Environment.**

3                   So long as EPA fails to make designations, it delays pollution controls the Act requires to  
4 curb ozone levels that EPA agrees are unsafe in communities where Health and Environmental  
5 Groups’ members live, work, and enjoy recreation. Such communities include areas currently  
6 designated as attainment under the 2008 standards but whose ozone levels violate the 2015  
7 standards; because of EPA’s failure to act, they will not be timely designated nonattainment and  
8 thus will lack the anti-pollution protections that a nonattainment designation would accord them.  
9 *See supra* pp.3-5; Berman Decl. ¶¶ 16-34, Ex.21; Craft Decl. ¶ 15, Ex.25. These important  
10 protections include measures states adopt into their implementation plans to limit emissions of  
11 ozone-forming chemicals sufficiently for the area to come into attainment, as well as attainment  
12 deadlines, nonattainment new source review for new or modified major sources of pollution, like  
13 factories and power plants, and pollution controls for large existing plants.

14                   These delays will severely harm Health and Environmental Groups’ members by  
15 prolonging their exposure to ozone levels EPA has found cause premature deaths, asthma attacks  
16 in children, emergency room visits, hospitalizations, and other serious health harms. RIA at ES-  
17 16 tbl.ES-6; *see also id.* ES-2 to -3. The attached Declarations, Exs.15-46, demonstrate the  
18 human impacts of these harms. Krystal Henagan is a member of Environmental Defense Fund  
19 and Sierra Club living in San Antonio, a city with ozone levels that violate the 2015 standards,  
20 but that has not been designated under the 2015 standards and is designated attainment under the  
21 2008 standards. Henagan Decl. ¶¶ 1-2, 4-5, Ex.33; Berman Decl. ¶ 18. She struggles with her 8-  
22 year-old son’s asthma, which is controlled by four medications, and which has been “life  
23 threatening” in the past. Henagan Decl. ¶¶ 6-15. Her son regularly must go to the doctor—15  
24 visits in 2017 alone—and “he has missed countless school days due to poor air quality  
25 exacerbating his asthma,” days during which Ms. Henagan must stay home and care for him. *Id.*  
26 ¶¶ 8-15. She fears he will suffer asthma attacks or that she “would need to rush him to the  
27 hospital due to his inability to breathe.” *Id.* ¶ 10.  
28

1 Rhonda Anderson, a Sierra Club member living and working in Detroit (also a city with  
2 ozone levels that violate the 2015 standards, but designated attainment under the 2008 standards,  
3 Berman Decl. ¶ 18), a grandmother, and a senior with asthma, describes how, even as an adult,  
4 she has had to go to the hospital because of her asthma, and her daughters and granddaughters  
5 have similarly had to go (both as adults and as children). Anderson Decl. ¶¶ 1-6, Ex.16. She  
6 describes the trauma of going to the emergency room because of a child's asthma attack:

7 Often, I have spent no less than 4 hours waiting, all the while  
8 wondering when my child will be able to see the doctor. Once we  
9 are called, we get sent to a second crowded room with breathing  
10 machines, and every station is filled with a child having an asthma  
11 attack. It is very stressful and there is nothing that can take my  
12 mind off the fact that I have a sick child that I cannot help.

13 *Id.* ¶ 6. Family members and others she knew have died from asthma attacks. *Id.* ¶ 8.

14 Other declarants living in undesignated areas further detail how the health harms ozone  
15 causes affect them. Nsedu Obot Witherspoon, a member of the American Public Health  
16 Association who lives in the Washington, D.C. area, has a seven-year-old son with asthma.  
17 Witherspoon Decl. ¶¶ 3, 5, Ex.46; *see also* Berman Decl. ¶ 22. He endured "his first bad asthma  
18 attack at just three years old," so bad that when they got to the doctor,

19 they said his oxygen levels were so low that we had to leave our  
20 car and go immediately to the ER in an ambulance. This was one  
21 of the scariest moments of my life. He was hospitalized for two  
22 nights. He was again hospitalized at the age of four.

23 *Id.* Even now, despite "a rigorous asthma management plan with frequent check-ups at the  
24 pediatrician's office," "his asthma acts up... frequently... when air quality is bad." *Id.* ¶ 6. "[H]e  
25 often has to slow down or sit out on high air pollution days," instead of playing outside or  
26 walking or hiking with his siblings and parents. *Id.* ¶¶ 3-4, 7.

27 Health and Environmental Groups' members and their families living, working, and  
28 recreating in areas attaining the 2008 standards, but with ozone levels that violate the 2015  
standards routinely find their ability to breathe impaired (*see, e.g.*, Anderson Decl. ¶¶ 4-5; Brock  
Decl. ¶ 5 (Atlanta area), Ex.22; DiMarzio Decl. ¶¶ 6-7 (Las Vegas), Ex.27; Einzig Decl. ¶¶ 3-5



1 (Baltimore), Ex.28; *see also* Berman Decl. ¶¶ 18, 21-22) and their ability to work and their  
2 children’s ability to attend school impeded (*see, e.g.*, Einzig Decl. ¶ 8; Henagan Decl. ¶¶ 6-7).  
3 Because of their health concerns, they must refrain from outdoor activities they would otherwise  
4 enjoy. *See, e.g.*, DiMarzio Decl. ¶ 7; Einzig Decl. ¶ 7.

5 Because the attainment deadlines run from the date of designation, *see supra* p.4, the  
6 ozone pollution levels in these areas will be allowed to remain at dangerously elevated levels for  
7 longer unless and until EPA takes its legally required action. *See* Craft Decl. ¶ 15. Health and  
8 Environmental Groups’ members living in such areas, who experience severe harms to their  
9 health and wellbeing because of ozone pollution, thus are and will be harmed both by the delay  
10 in mandatory pollution reductions and by the additional time that they will have to endure  
11 dangerous ozone levels.

12 Even in areas violating both the 2008 and 2015 standards, EPA’s failure to act means  
13 Health and Environmental Groups’ members there will receive neither the benefits of pollution  
14 reductions designed to achieve compliance with the new, more protective 2015 standards nor the  
15 benefit of actual compliance with those standards as soon as they should under the Act. For  
16 example, Jane Reardon, a nurse and member of American Lung Association’s board, lives and  
17 works in Hartford County, Connecticut, caring for patients “who are hospitalized as a result of  
18 respiratory ailments,” including “many...patients...older than 65, like [her].” Reardon Decl.  
19 ¶¶ 1, 5-6, Ex.41; *see also id.* ¶ 7 (describing activities she engages in outdoors near her home,  
20 thus exposing her to dangerous ozone pollution). Hartford County violates both the 2008 and  
21 2015 standards. Berman Decl. ¶¶ 16, 29. EPA’s failure to promulgate designations means  
22 implementation of the 2015 standards in Hartford County has already been delayed, and the  
23 area’s attainment deadline is, too, thus endangering her health and her patients’ health. Reardon  
24 Decl. ¶ 8; *see also* Lyon Decl. ¶¶ 4-5 (describing how patients in Philadelphia with lung disease  
25 must miss medical appointments because poor air quality causes symptoms to flare up), Ex.36.  
26 Accordingly, the harms described above affect even more of Health and Environmental Groups’  
27 members.

1 Likewise, serious environmental harms, including to places Health and Environmental  
2 Groups' members use and enjoy, is also likely to result from EPA's failure to promulgate timely  
3 designations. *See* Kodish Decl. ¶¶ 2-6, 10-15, Ex.35; Toher Decl. ¶¶ 3-8, Ex.43. Ozone damages  
4 vegetation and forested ecosystems, causing or contributing to widespread stunting of plant  
5 growth, tree deaths, visible leaf injury, reduced carbon storage, and damage to entire ecosystems.  
6 PA 5-2 to -3; ISA 9-1; 80 FR 65,370/1-2, 65,377/3. EPA acknowledges that, "[i]n terms of forest  
7 productivity and ecosystem diversity, ozone may be the pollutant with the greatest potential for  
8 region-scale forest impacts." RIA 7-3.

9 In short, EPA has delayed initial area designations beyond what the statute allows,  
10 making for a longer period of time that Health and Environmental Groups' members will be  
11 exposed to excessive amounts of air pollution that causes serious harms to them and the  
12 environment they enjoy. Plaintiffs have hundreds of thousands of members residing in affected  
13 areas. *See* Stith Decl. ¶ 10; 82 FR 54,235-87. These harms are extremely serious—irreparable  
14 even (though the Court need not reach that question), *see Harris v. Bd. of Supervisors*, 366 F.3d  
15 754, 766 (9th Cir. 2004) (irreparable harms include “pain, infection, amputation, medical  
16 complications, and death”); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)  
17 (environmental injury “can seldom be adequately remedied by money damages and is often  
18 permanent or at least of long duration, *i.e.*, irreparable”)—and without a court order compelling  
19 EPA to act, they will be allowed to persist still longer.

20  
21 **B. A 180-Day Timeframe Is Appropriate.**

22 When Congress “categorically mandate[s]” that EPA meet explicit deadlines, EPA is  
23 “deprive[d] of all discretion over the timing of its work.” *Sierra Club v. Thomas*, 828 F.2d 783,  
24 791 (D.C. Cir. 1987). Violations of such statutory deadlines should be corrected “as soon as  
25 possible,” using all available means. *Delaney v. EPA*, 898 F.2d 687, 691 (9th Cir. 1990).  
26 Urgency is particularly heightened in this case because Congress intended EPA to move “as  
27 expeditiously as practicable” to promulgate designations and then for nonattainment areas to  
28 come into attainment “as expeditiously as practicable,” but no later than fixed deadlines

1 calculated off the date of designation. 42 U.S.C. §§ 7407(d)(1)(B)(i), 7511(a)(1); *see Alaska Ctr.*  
2 *for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (district court should tailor the remedy  
3 to further “the congressional objectives” of the statute); *see also NRDC*, 777 F.3d at 465-69  
4 (attainment deadlines are keyed to date of designation).

5 In fashioning an appropriate deadline, courts generally consider the original statutory  
6 time period for compliance, the public interest, and the time needed by the agency to properly do  
7 the job. *See Sierra Club*, 658 F. Supp. at 171-72. Where Congress directed an agency to perform  
8 a regulatory duty within a given time, the “agency carries a heavy burden to show” that its  
9 proposed remedy is as expeditious as possible, and that faster compliance is “impossible.”  
10 *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 347 (D. Ariz. 1994); *see also, e.g., Train*,  
11 510 F.2d at 712-13 (“injunction should serve like adrenalin, to heighten the response and to  
12 stimulate the fullest use of resources,” and agency has burden to demonstrate it is impossible to  
13 comply by deadline); *Communities for a Better Env't v. EPA*, No. C 07-03678 JSW, 2008 WL  
14 1994898, at \*2 (N.D. Cal. May 5, 2008) (rejecting EPA’s argument that “it is only obligated to  
15 demonstrate a reasonable schedule” and finding that “EPA bears the heavy burden of proving  
16 impossibility” (internal quotations and citations omitted)).

17 Here, Health and Environmental Groups respectfully request that the Court direct EPA to  
18 take final action to promulgate all designations within 180 days of the Court’s order. This  
19 timeframe is expeditious and practicable, for it is consistent with available indications of  
20 progress EPA already made toward making designations, fits with EPA’s past practices, and still  
21 allows EPA to provide the legally required notice to states if it intends to depart from their  
22 recommendations, *see* 42 U.S.C. § 7407(d)(1)(B)(ii).<sup>6</sup>

23  
24  
25 <sup>6</sup> The Act expressly exempts designations from the notice and comment process, though it  
26 encourages notice and comment. 42 U.S.C. § 7407(d)(2)(B). Plaintiffs’ requested timeframe also  
27 allows for such notice and comment. In making ozone designations in 2011-12, under the prior  
28 ozone standard, EPA put the proposed designations out for public comment on December 20,  
2011, shortly after sending letters to states notifying them of proposed modifications, took public  
comment for 45 days, and finalized nearly all designations within 132 days, on April 30, 2012.  
*See* 77 FR 30,088, 30,091/2, 30,095/2 (2012).

1 Documents released through the Freedom of Information Act indicate that EPA  
2 completed substantial work on designations already. As of early April 2017, EPA was on-track  
3 for making timely designations on October 1, 2017. *See* U.S. EPA Region 4 Air Quality Update  
4 at slide 16 (Apr. 5, 2017) (listed scheduled date for “Final Designation” as “October 1, 2017”),  
5 Ex.12. Just a few weeks earlier, EPA Region 4 also said that October 1, 2017, was the  
6 “[a]nticipated” date it would “promulgate[] final ozone area designations,” Ozone Air  
7 Monitoring Update at slide 11 (Mar. 21, 2017), Ex.13. Even as late as June 2017—the same  
8 month EPA purported to extend its designations deadline, an action it later rescinded—EPA  
9 Region 1 appears to also have been on schedule, still listing the “Tentative Date” for  
10 designations as “October 2017.” 2015 NAAQS for Ozone: Background, Trends and  
11 Designations at slide 11 (June 2017), Ex.14. From early April to October 1 is slightly less than  
12 180 days, and EPA thought it could complete designations in that time.<sup>7</sup>

13 Importantly, EPA already has all the information it has historically used to make  
14 designations. All states gave their recommended designations to EPA long ago. *See*  
15 <https://www.epa.gov/ozone-designations/2015-ozone-standards-state-recommendations>. EPA  
16 has the most recent quality-assured and certified design values. *See supra* p.8 & n.4. It further  
17 has provided significant guidance, based on its prior practice (which survived judicial review),  
18 about how to make designations and determine nonattainment area boundaries. *See*  
19 Memorandum 3-7, attach.3 at 1-12; *Miss. Comm’n*, 790 F.3d at 147, 149, 158-59 (upholding  
20 EPA’s prior ozone designations). The Agency has also made publicly available datasets with  
21 copious information relevant to making designations and determining nonattainment area  
22 boundaries: amounts of ozone-forming pollutants emitted in every U.S. county; vehicle miles  
23 traveled (a measure of the usage of, and thus ozone-forming emissions from, different types of  
24 motor vehicles) in every U.S. county; and the population of every U.S. county.  
25 <https://www.epa.gov/ozone-designations/ozone-designations-guidance-and-data> (table titled  
26 \_\_\_\_\_

27 <sup>7</sup> The requested 180-day period from the date of a court order actually undercounts how long  
28 EPA has to analyze data and develop the final designations: nothing prevents EPA from  
resuming its work on designations even before this Court issues any ruling.

1 “Datasets Provided by EPA to Support the Five-factor Analysis”). EPA even created a public  
2 tool to help in crafting designations and nonattainment area boundaries by making maps that rely  
3 on analyses of these datasets and the most recent official design values.

4 <https://www.epa.gov/ozone-designations/ozone-designations-guidance-and-data#C>;

5 Memorandum attach.3 at 2. Thus, EPA has all the information it needs to make legally adequate  
6 designations within 180 days of this Court’s order—a time that will be months after the date by  
7 which Congress commanded EPA to act.<sup>8</sup>

8 Finally, a 180-day deadline is fully consistent with the Clean Air Act. EPA has discretion  
9 in the designations process to modify a state’s recommendations about designations as necessary  
10 to ensure the designations meet the requirements of the Act. 42 U.S.C. § 7407(d)(1)(B)(ii);  
11 *Alaska Ctr.*, 20 F.3d at 986-87 (approving of injunction that required agency to act, but left intact  
12 agency discretion over how exactly to act). To do so, EPA must notify the state “no later than  
13 120 days” before it promulgates final designations that it intends to modify the state’s  
14 recommendation and give the state “an opportunity to demonstrate why any proposed  
15 modification is inappropriate.” 42 U.S.C. § 7407(d)(1)(B)(ii). EPA will have adequate time to go  
16 through this process under Health and Environmental Groups’ request.

17 Swift action is necessary here. These protections are already years overdue. EPA’s  
18 deadline for reviewing and revising the 2008 standards fell in March 2013. *See* 42 U.S.C.  
19 § 7409(d)(1) (five-year review cycle); 73 FR 16,436 (standards promulgated in March 2008).  
20 EPA acted over 18 months late, and only after being sued (a suit in which it requested still more  
21 time to finalize its review and revision of the 2008 standards). Order 1-2, *Sierra Club v. EPA*,  
22 No. 13-cv-2809 (N.D. Cal. Apr. 30, 2014) (rejecting timeframe EPA sought for finishing  
23 rulemaking). Further delaying the designations will cause serious harm to the breathing public  
24 and to the environment. *See supra* pp.16-19; Craft Dec. ¶ 15 (delaying designations will “lead to

25 \_\_\_\_\_  
26 <sup>8</sup> EPA previously claimed it lacked needed information, 82 FR 29,247/1-3, but that claim was  
27 baseless and unsupported, and EPA subsequently withdrew it, 82 FR 37,319/2-3. EPA has never  
28 subsequently claimed it lacks sufficient information to promulgate designations for the areas at  
issue here. *See* 82 FR 54,232/2-3 (not claiming any missing information and not extending  
period for making designations).

1 a longer period of inaction before measures to abate health-harming ozone are undertaken in...  
2 important, heavily-impacted areas,” resulting in “delayed attainment and more exposure to  
3 ground-level ozone,” resulting in “more asthma attacks, hospitalizations, emergency room visits,  
4 and premature deaths in those areas”). The requested deadline is expeditious, realistic, and  
5 urgently needed. *See Union Elec. v. EPA*, 427 U.S. 246, 256 (1976) (Clean Air Act is “a drastic  
6 remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution”).  
7

### 8 CONCLUSION

9 For the foregoing reasons, Health and Environmental Groups respectfully request that  
10 this Court enter summary judgment in their favor on the question of liability, declare EPA to be  
11 in violation of its mandatory Clean Air Act duty to promulgate initial area air quality  
12 designations under the 2015 ozone standards for all areas of the country by October 1, 2017, and  
13 order EPA to complete its overdue duty by promulgating final designations for all areas of the  
14 country no later than 180 days from the date of this Court’s order.  
15

16 Dated: December 4, 2017

17 Respectfully submitted,

18  
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