UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN LUNG ASSOCIATION and NATIONAL PARKS CONSERVATION ASSOCIATION, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA JACKSON, Administrator, United States Environmental Protection Agency, Defendants.	Civil Action No. 1:12-cv-00243 RLW

APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 65.1(c), Plaintiffs American Lung Association and National Parks Conservation Association hereby ask the Court to enter a preliminary injunction directing the Administrator of the United States Environmental Protection Agency ("EPA") to complete her overdue review of the national ambient air quality standards for particulate matter by no later than October 15, 2012. Plaintiffs further request that the Court schedule oral argument on this application within 21 days, as provided in Local Rule 65.1(d). Expedited treatment of this matter is warranted because, as further explained below, this suit seeks action to remedy particulate matter pollution that presents an imminent and substantial threat to millions of people living throughout the country.

Plaintiffs further ask the Court to advance and consolidate the hearing on the merits of Plaintiffs' claims with the hearing on the application for preliminary injunction, pursuant to Fed. R. Civ. P. 65(a)(2). The law and facts underlying the request for preliminary relief are identical to those underlying the claim on the merits, and the case does not raise any complex issues

requiring separate consideration of preliminary and permanent relief. Advancement and consolidation is also justified by the urgency of the health threat from particulate matter, as further described below.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this application for a preliminary and permanent injunction, Plaintiffs ask the Court to order Defendants U.S. Environmental Protection Agency, *et al.* ("EPA") to take actions explicitly mandated by the Clean Air Act to protect public health from particulate matter pollution. Specifically, Plaintiffs ask the Court to order EPA to complete its overdue statutorily mandated review of the national ambient air quality standards for particulate matter. These standards establish health- and welfare-based limits on the levels of particulate matter pollution allowed in the ambient air. The current standards adopted by EPA in 2006 were remanded by the D.C. Circuit in 2009 for failing to ensure that public health and welfare are protected as required by the Clean Air Act. EPA was statutorily required to complete review and revision of the 2006 standards with a final rulemaking promulgated no later than October 17, 2011. EPA failed to meet this statutory deadline and now claims that it will not take final action on any such review before June 2013. In the meantime, public health and welfare will remain inadequately protected and, by EPA's own assessments, thousands of people every month are expected to die from particulate matter pollution-related impacts and many more will suffer from avoidable asthma attacks, heart illnesses and strokes. Plaintiffs seek preliminary and permanent injunctive relief ordering EPA to expedite its overdue rulemaking and promulgate a final rulemaking on the particulate matter standards by no later than October 15, 2012.

STATEMENT OF FACTS AND RELEVANT AUTHORITIES

I. Particulate Matter Pollution.

Particulate matter pollution refers generally to a broad class of diverse types of particles that can be suspended in the air. *See* 71 Fed. Reg. 61144, 61146 (Oct. 17, 2006). EPA has divided this pollution into two categories based on the size of the particles – fine and coarse. *Id.* Fine particles ("$PM_{2.5}$") are those particles 2.5 microns in diameter and smaller. *Id.* Sources of $PM_{2.5}$ include "motor vehicles, power generation, combustion sources at industrial facilities, and residential fuel burning." *Id.* Because of its size, $PM_{2.5}$ can penetrate deep into the respiratory system and increase the potential for absorption of the toxic components of the particles. 61 Fed. Reg. 65638, 65648 (Dec. 13, 1996); *see also* 71 Fed. Reg. 2620, 2627 (Jan. 17, 2006) (describing cardiovascular concerns related to the ability of smaller particles to move directly from the lungs into systemic circulation). In all, EPA estimates that $PM_{2.5}$ pollution causes thousands of premature deaths and hospital visits every year. *See, e.g.*, EPA, Office of Air Quality Planning and Standards, "Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards," at 2-43 (April 2011) (available at: www.epa.gov/ttnnaaqs/standards/pm/data/20110419pmpafinal.pdf) (filed herewith as Attachment 1 to Declaration of Christopher W. Hudak In Support of Plaintiffs' Request for Judicial Notice ("Hudak Decl.")). EPA has also identified a number of adverse welfare impacts associated with elevated $PM_{2.5}$ levels, including impacts on visibility. *See* 71 Fed. Reg. at 61203.

Coarse particles ("$PM_{2.5-10}$") are those particles between 2.5 and 10 microns in diameter. 71 Fed. Reg. at 61146. Sources of $PM_{2.5-10}$ include "traffic-related emissions such as tire and brake lining materials, direct emissions from industrial operations, construction and demolition activities, and agricultural and mining operations." *Id.* EPA has found that short-term exposure

to elevated $PM_{10-2.5}$ levels is associated with mortality and increased hospitalization for cardiovascular and respiratory diseases. *Id.* at 61180.

II. The Clean Air Act's Requirements for National Ambient Air Quality Standards.

The Clean Air Act establishes a comprehensive scheme "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. § 7401(b)(1). As one of its central features, the Act requires the Administrator to set national ambient air quality standards for certain air pollutants. 42 U.S.C. § 7409(a). Under the Act, the Administrator must set primary standards for those pollutants at levels that will protect the public health with an adequate margin of safety, *id*. § 7409(b)(1), and secondary standards at levels that will "protect the public welfare from any known or anticipated adverse effects associated with the presence of those pollutants in the ambient air." *Id*. § 7409(b)(2). The Clean Air Act imposes on EPA a non-discretionary duty to review national ambient air quality standards every five years and "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate . . . ." 42 U.S.C. § 7409(d)(1).

III. EPA's Duty Under the Clean Air Act to Review the National Ambient Air Quality Standards for Particulate Matter.

EPA last promulgated national ambient air quality standards for particulate matter on October 17, 2006. *See* 71 Fed. Reg. at 61144. The D.C. Circuit Court of Appeals remanded these standards in *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) because EPA had failed to demonstrate that the standards were adequate to protect public health and prevent adverse welfare impacts. Pursuant to 42 U.S.C. § 7409(d)(1), EPA was required to review these standards within five years, thus by October 17, 2011. To date, EPA has not even proposed a decision, let alone taken final action based on a review of these standards. Instead, EPA

Assistant Administrator for the Office of Air and Radiation Regina McCarthy announced in a sworn declaration submitted to the D.C. Circuit on January 17, 2012 that EPA would not take final action on the overdue review of the particulate matter standards until June 2013. *See* Declaration of Regina McCarthy ("McCarthy Decl.") ¶¶ 17-18 (Jan. 13, 2012) (filed herewith as Attachment 2 to Hudak Decl.).

JURISDICTION

Section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), confers upon district courts jurisdiction to compel EPA action where there is a "failure of the Administrator to perform any act or duty under [the Clean Air Act] which is not discretionary with the Administrator . . . ." The Act requires Plaintiffs, before commencing legal action, to provide 60-days' notice of their intent to file such action. 42 U.S.C. § 7604(b). In accordance with 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Plaintiffs provided notice to the Administrator by letter dated October 18, 2011, of Plaintiffs' intent to sue the Administrator to enforce the nondiscretionary duties described herein. *See* Letter from Paul Cort, Earthjustice, to Lisa P. Jackson, Administrator, EPA (Oct. 18, 2011) (Exhibit 1 hereto). More than 60 days have passed since EPA received that letter, and EPA has still not performed the relevant duties. *See* Certified Mail Receipt (dated Oct. 24, 2011) (Exhibit 2 hereto). Accordingly, this Court has jurisdiction pursuant to 42 U.S.C. § 7604(a)(2).

Plaintiff organizations have standing to bring this action because (1) at least one of their members has suffered an "injury in fact," (2) the injury is "fairly traceable" to the challenged illegal conduct, and (3) it is "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528

U.S. 167, 180-81 (2000).[1] Individual members of both Plaintiff organizations are suffering "injury in fact." Here, individual members of the Plaintiff organizations have alleged concrete injuries to their physical well-being and their aesthetic and recreational interests stemming from their "compelled" exposure to particulate matter pollution. *See* Declaration of Andrea Graboff ("Graboff Decl.") ¶¶ 3-7; Declaration of William H. Skelton ("Skelton Decl.") ¶¶ 4-9; Declaration of Mark Wenzler ("Wenzler Decl.") ¶¶ 9-12; *Laidlaw*, 528 U.S. at 184-85 ("reasonable" concerns about the effects of illegal discharges of pollutants on recreational and aesthetic interests are sufficient to confer standing); *see also Natural Res. Def. Council v. EPA*, 507 F.2d 905, 910 (9th Cir. 2004) (holding that a plaintiff "suffer[s] injury if compelled to breathe air less pure than that mandated by the Clean Air Act"). These injuries inflicted on Plaintiffs' members are "fairly traceable" to EPA's illegal conduct challenged in this case because each month of delay extends the health and welfare impacts associated with particulate matter pollution in the areas where Plaintiffs' members live. Finally, this Court may redress Plaintiffs' asserted injuries by issuing an order compelling EPA to expedite its overdue review of the national ambient air quality standards for particulate matter.

STANDARD OF REVIEW

The Supreme Court, in *Winter v. Natural Res. Def. Council*, outlined the four-factor test to be applied by courts when deciding whether to grant a preliminary injunction: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he

[1] In addition, Plaintiffs have standing to represent the interests of their members in this lawsuit because: (1) neither the claim asserted nor the relief requested requires their members to participate directly in the lawsuit; (2) each Plaintiff organization is seeking to protect interests that are germane to its purposes; and (3) at least one individual member of each Plaintiff organization would have standing to sue individually, as demonstrated above. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also* Declaration of Charles Connor ("Connor Decl.") ¶ 3 (mission of American Lung Association is "to save lives by preventing lung disease and promoting lung health"); Declaration of Mark Wenzler ("Wenzler Decl.") ¶ 5 (mission of National Parks Conservation Association is "to protect and enhance America's National Parks for present and future generations").

is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. 7, 20 (2008). District courts may use a sliding scale approach whereby "a particularly strong showing in one area can compensate for weakness in another." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 12 (D.D.C. 2009), citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

Here, Plaintiffs seek both preliminary and permanent injunctive relief because the law and facts underlying the request for preliminary relief are identical to those underlying the claim on the merits. In fashioning permanent injunctive relief in cases such as this where EPA has acted in direct conflict with mandatory statutory deadlines, it is well-established that courts should use their equitable authority "to set enforceable deadlines" to obtain "expeditious compliance" with the Congressional deadlines that EPA has ignored. *Natural Res. Def. Council v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974); *see also Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52-53 (D.D.C. 2006) (applying *Train* to a violation of a nondiscretionary duty under the Clean Air Act).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits and are Entitled to Judgment as a Matter of Law.

There are two issues for the court to resolve in this matter: (1) whether EPA has failed to perform a duty under the Clean Air Act that is not discretionary; and (2) what is the appropriate timetable for remedying that failure. On the first issue, there is no dispute that Plaintiffs are entitled to judgment as a matter of law. EPA has missed the clear mandatory deadline for reviewing the national particulate matter standards and Plaintiffs are entitled to enforce that deadline under the Clean Air Act. On the remedy issue, EPA has offered a schedule for

remedying its illegal delay that is unreasonable and contrary to the case law in this court. As will be shown below, Plaintiffs are also likely to succeed in any dispute over the appropriate timetable for remedying EPA's violation of the Clean Air Act.

The material facts of this case are not in dispute. The Clean Air Act provides that EPA, "at five-year intervals[,] . . . shall complete a thorough review of . . . the national ambient air quality standards . . . and shall make such revisions in . . . standards and promulgate such new standards as may be appropriate . . . ." 42 U.S.C. § 7409(d)(1). EPA last promulgated national ambient air quality standards for particulate matter on October 17, 2006. *See* 71 Fed. Reg. at 61144. The D.C. Circuit held that the 2006 standards failed to comply with the public health and welfare protection requirements of the Clean Air Act. *See Am. Farm Bureau Fed'n*, 559 F.3d at 528 and 531 (D.C. Cir. 2009). In accordance with 42 U.S.C. § 7409(d)(1), EPA was required to complete its review and promulgate new appropriate revisions to the standards no later than October 17, 2011. To date, however, EPA has failed to take any action in compliance with 42 U.S.C. § 7409(d)(1).

The Clean Air Act's requirements are unambiguous and mandatory. Courts have repeatedly interpreted "shall" in statutes such as the Clean Air Act to create a mandatory, non-discretionary duty. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily the language of command."); *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (Clean Air Act requirement that the Administrator "shall" promulgate standards "manifestly obligates" EPA to act); *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 549 (D.D.C. 2005) ("the word 'shall' [] sets forth a mandatory duty"). EPA's failure to perform an act or duty that is not discretionary is enforceable by Plaintiffs pursuant to 42 U.S.C. § 7604(a)(2).

Plaintiffs, thus, are more than merely "likely" to succeed on the merits. Plaintiffs are entitled to judgment as a matter of law and injunctive relief. *See* Fed. R. Civ. P. 56(a); *see also U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (holding "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the courts to enforce them when enforcement is sought"). Where, as here, EPA has acted in direct conflict with mandatory statutory deadlines, courts should use their equitable authority "to set enforceable deadlines" to require "expeditious compliance." *Train*, 510 F.2d at 705 (finding "[t]he authority to set enforceable deadlines both of an ultimate and intermediate nature is an appropriate procedure for exercise of the court's equity powers to vindicate the public interest"); *see also Sierra Club v. Johnson*, 444 F. Supp. 2d at 52-53 (applying *Train* to a violation of a nondiscretionary duty under the Clean Air Act); 42 U.S.C. § 7604(a) (giving district courts jurisdiction to order the Administrator to perform such mandatory acts or duties under the statute).

The only issue open for dispute in this case is the appropriate timetable for remedying EPA's failure. EPA recently announced in a sworn declaration filed with the D.C. Circuit Court of Appeals that EPA plans to complete the required particulate matter rulemaking with a proposed rule signed in June 2012 and a final rule signed in June 2013. *See* McCarthy Decl. ¶¶ 17-18. The timetable outlined by EPA in this declaration, however, is not appropriate under the case law in this court and Plaintiffs are likely to succeed in demanding the more expedited schedule requested by this motion for preliminary and permanent injunction.

The first defect in EPA's timetable is that it includes 90 days of review at the Office of Management and Budget ("OMB") before both the proposed rulemaking and the final rulemaking. *See* McCarthy Decl. ¶¶ 17-18. This court, and others, have repeatedly rejected

attempts to further delay overdue agency action in order to provide time for OMB review. *See, e.g., Envt'l Def. Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (holding "OMB has no authority to use its regulatory review . . . to delay promulgation of EPA regulations . . . beyond the date of a statutory deadline"); *Natural Res. Def. Council v. Ruckelshaus*, 1984 WL 6092, *4 (D.D.C. 1984) (holding "OMB review is not only unnecessary, but in contravention to applicable law"); *see also Am. Lung Ass'n v. Browner*, 884 F. Supp. 345, 349 (D. Ariz. 1994) (excluding OMB review from the review schedule of the particulate matter standards because such review "serves no congressional purpose and is wholly discretionary"); *Natural Res. Def. Council v. EPA*, 797 F. Supp. 194, 197-98 (E.D.N.Y. 1992) (same). Indeed, even Executive Order 12866 provides that interagency review can be shortened or waived "for regulatory actions that are governed by a statutory or court-imposed deadline." Exec. Order No. 12866 § 6(a)(3)(D), 58 Fed. Reg. 51735, 51741 (Oct. 4, 1993).

Even accepting as reasonable the other timing assumptions included in EPA's timetable, which Plaintiffs do not, subtracting 90 days from the timetable before the proposed and final rulemakings suggests that EPA should be able to complete its final rulemaking by December 2012. At a minimum, Plaintiffs ask the Court to order completion of the standards by no later than December 2012 based on EPA's own sworn declaration on the time required to complete review within EPA.

Plaintiffs contend, however, that a yet more expedited schedule is appropriate based on the timing of similar rulemakings, and the urgency of these standards as described below. Plaintiffs ask the Court to use the March 2012 proposal deadline implied by Ms. McCarthy's declaration (*i.e.*, the date by which EPA should be able to sign a proposed rulemaking if the 90 days of interagency review is cut from the schedule) and order a final rulemaking seven months

later (*i.e.*, in October 2012). This schedule is appropriate based on the schedules of other recent national ambient air quality standard rulemakings of comparable complexity, as summarized in the following table:

National Standard	**Notice of Proposed Rulemaking (NPRM)**	**Comment Period Offered**	**Public Hearing?**	**Final Rulemaking (FRM)**	**Time Between NPRM and FRM**
'97 PM	12/13/96 (61 Fed. Reg. 65638)	67 days	Yes	7/18/97 (62 Fed. Reg. 38652)	7 months
'06 PM	1/17/06 (71 Fed. Reg. 2620)	90 days	Yes	10/17/06 (71 Fed. Reg. 61144)	9 months
'97 Ozone	12/13/96 (61 Fed. Reg. 65716)	67 days	Yes	7/18/97 (62 Fed. Reg. 38856)	7 months
'08 Ozone	7/11/07 (72 Fed. Reg. 37818)	90 days	Yes	3/27/08 (73 Fed. Reg. 16436)	8 months
'10 NO_2	7/15/09 (74 Fed. Reg. 34404)	60 days	Yes	2/9/10 (75 Fed. Reg. 6474)	7 months
'09 Lead	5/20/08 (73 Fed. Reg. 29184)	75 days	Yes	11/12/08 (73 Fed. Reg. 66964)	6 months

As the table shows, the longest period taken between proposed and final rulemakings in any recent action was nine months and this included interagency review, which should not be allowed here. Seven months between proposed and final rulemaking would allow for three months of public review and comment and four months for EPA to respond to those comments and issue a final decision.

Plaintiffs' requested schedule is also consistent with EPA's earlier predictions on the timing of this very rulemaking. In March 2008, EPA announced that instead of the year that Ms. McCarthy's declaration now claims, EPA believed nine months (including OMB review) was all that was necessary between proposed and final rulemakings. *See* "Integrated Review Plan for the National Ambient Air Quality Standards for Particulate Matter," at 17 (Mar. 2008) (available

at http://www.epa.gov/ttn/naaqs/standards/pm/data/2008_03_final_integrated_review_plan.pdf) (filed herewith as Attachment 3 to Hudak Decl.). A year-and-a-half later, in an October 5, 2009 presentation to the Clean Air Scientific Advisory Committee review panel for these particulate matter standards, EPA reiterated this same nine-month span between proposed and final rulemaking, this time announcing that it planned to propose action on the remanded standards by July 2010 and issue a final action by April 2011. *See* Lydia N. Wegman and Beth M. Hassett-Sipple, EPA, "Review of the Particulate Matter National Ambient Air Quality Standards – Schedule and Development of Policy Assessment – Presentation for CASAC PM Panel," at 5 (Oct. 5, 2009) (available at: yosemite.epa.gov/sab/sabproduct.nsf/41D9A1D53C581EAF852576450061556C/$File/Wegman+and+Hassett-Sipple+presentation+10+05+09.pdf) (filed herewith as Attachment 4 to Hudak Decl.). Then in June 2010, though announcing another delay in the rulemaking, EPA suggested that only eight months between proposed and final rulemakings would be necessary – again including OMB review. *See* EPA, "Quantitative Health Risk Assessment for Particulate Matter," at 1-3 (June 2010) (announcing that "[p]roposed and final rulemaking are now scheduled for November 2010 and July 2011, respectively") (available at: www.epa.gov/ttnnaaqs/standards/pm/data/PM_RA_FINAL_June_2010.pdf) (filed herewith as Attachment 5 to Hudak Decl.). Given that EPA's current timetable provides no explanation as to why the schedule now requires a year between proposed and final rulemaking when this has never been EPA's estimate for the timing of this rulemaking and such extended delay has not been required in any of the recent rulemakings on other national ambient air quality standards, Plaintiffs' request for an expedited deadline of October 15, 2012 for final action should be granted.

Both on the merits and on the specific injunctive relief requested, Plaintiffs are likely to succeed. EPA has no defense for its failure to comply with the statute, and the extended delay built into its timetable for remedying that failure does not "expeditious compliance," *Train*, 510 F.2d at 705, and is contrary to the law of this court. As discussed below, the balance of harms further supports the need for immediate action by the Court.

II. Plaintiffs Are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief.

In the absence of injunctive relief, EPA plans to delay signing a proposed rule until June 2012 and delay signing a final rule until June 2013. *See* McCarthy Decl. ¶¶ 17-18. This illegal delay will postpone overdue standards that by EPA's own reckoning will likely save tens of thousands of lives every year. Each month of delay means thousands of avoidable deaths and even greater amounts of suffering from other health impacts such as heart attacks, strokes, asthma and bronchitis. As EPA itself has determined, elevated $PM_{2.5}$ exposures have been linked to both lung- and heart-related diseases and deaths. *See, e.g.*, 71 Fed. Reg. at 61152 (finding particulate matter exposure to be associated with "premature mortality, aggravation of respiratory and cardiovascular disease . . ., changes in lung function and increased respiratory symptoms, as well as . . . more subtle indicators of cardiovascular health"); EPA, Office of Air Quality Planning and Standards, "Policy Assessment for the Review of the Particulate Matter National Ambient Air quality Standards," at 2-18 (April 2011) (available at: www.epa.gov/ttnnaaqs/standards/pm/data/20110419 pmpafinal.pdf) (finding that "currently available evidence is suggestive of a causal relationship between long-term $PM_{2.5}$ exposures and other health effects including developmental and reproductive effects (e.g., low birth weight) and carcinogenic, mutagenic, and genotoxic effects (e.g., lung cancer))" (emphasis omitted) (filed herewith as Attachment 1 to Hudak Decl.).

A recent EPA study used computer modeling of 2005 air quality data to quantify the extent of health impacts from particulate matter and determined that approximately 1,800 premature infant deaths and 130,000 to 320,000 premature adult deaths are caused by particulate matter *each year*. Fann N., Lamson A., Wesson K., Risley D., Anenberg S.C., Hubbell B.J., "Estimating the National Public Health Burden Associated with Exposure to Ambient $PM_{2.5}$ and Ozone," Risk Analysis, Vol. 32, No.1, at Table 1 (2012) (originally published online May, 2011) (available at: http://onlinelibrary.wiley.com/doi/10.1111/j.1539-6924.2011.01630.x/pdf) (filed herewith as Attachment 6 to Hudak Decl.). The annual non-fatal health impacts modeled in the study were similarly sobering: 180,000 heart attacks, 83,000 cases of chronic bronchitis among adults, 30,000 hospital admissions for respiratory problems, 62,000 hospital admissions of adults for cardiovascular related effects, 110,000 emergency room visits for asthma in minors, 200,000 cases of acute bronchitis among children ages 8 to 12, 2,400,000 cases of lower respiratory symptoms among children ages 7 to 14, 2,000,000 cases of upper respiratory symptoms among asthmatics age 9 to 18, 2,500,000 cases of asthma exacerbation among asthmatics ages 6 to 18, and 18,000,000 lost work days. *Id.* In southern California, where Plaintiffs have members, the study estimated that between 7% and 17% of *all deaths* are caused by particulate matter pollution. *See id*. at 92; *see also* Connor Decl. ¶ 4; Graboff Decl. ¶ 3; Wenzler Dec. ¶ 6.

The new standards that will ultimately result from EPA's overdue review of national ambient air quality standards for particulate matter will significantly lower the health impacts of particulate matter pollution. In another recent assessment of the risks posed by particulate matter pollution, EPA looked at the health impacts in 15 urban areas assuming those areas just met the current standards, and compared those results to the impacts predicted under the more protective alternative standards currently recommended by EPA staff. *See* EPA, "Quantitative Health Risk

Assessment for Particulate Matter" (June 2010) (available at: www.epa.gov/ttnnaaqs/standards/pm/data/PM_RA_FINAL_June_2010.pdf) (filed herewith as Attachment 5 to Hudak Decl.). Under the 2006 standards, EPA estimates that in these 15 urban areas alone, there will be over 8,000 deaths per year due to long-term exposures to $PM_{2.5}$, over 2,500 deaths per year due to short-term exposures to $PM_{2.5}$, and over 2,700 hospital admissions per year due to respiratory and cardiovascular illness from short-term $PM_{2.5}$ exposures. *See id.* at E-13, E-76, E-103 and E-112 (totals derived from summing data presented for each urban area). EPA's analysis for these cities suggest that adopting new $PM_{2.5}$ standards of 12 micrograms per cubic meter ("$\mu g/m^3$") (annual) and 25 $\mu g/m^3$ (24-hour) would reduce long- and short-term exposures and save over 5,000 lives per year. *Id.* at E-13 and E-76 (based on totals derived from summing data for each urban area). With these more protective standards, more than 750 annual hospital admissions due to respiratory and cardiovascular illnesses could also be avoided in these cities. *Id.* at E-103 and E-112.

The American Lung Association, Clean Air Task Force and Earthjustice commissioned an expanded analysis of these data to look beyond the 15 cities analyzed by EPA and "conduct a national analysis of the mortality and morbidity benefits of a greater range of annual and daily [PM] standards . . . ." *See* McCubbin, D., "Health Benefits of Alternative $PM_{2.5}$ Standards," at 1 (July 2011) (filed herewith as Attachment 7 to Hudak Decl.). Dr. McCubbin's analysis projected that adopting $PM_{2.5}$ standards of 12 $\mu g/m^3$ (annual) and 25 $\mu g/m^3$ (24-hour) would save 14,000 to 27,000 lives per year nationally compared to the current standards, and even more protective standards of 11 $\mu g/m^3$ and 25 $\mu g/m^3$ would save 15,000 to 30,000 lives nationally compared to the current standards. *Id.* at 18 (based on a comparison of mortalities avoided under various alternative standards).

Plaintiffs' members are currently suffering from the effects of particulate matter pollution and would benefit from an expedited schedule. For example, ALA member Andrea Graboff, a resident of Orange County, CA, lives in an area that is out of attainment of the 2006 standard for $PM_{2.5}$. *See* Graboff Decl. ¶ 3. Ms. Graboff is forced to curtail her outdoor activities on bad air days and is deeply concerned about the effects of particulate matter pollution on both her asthmatic son and herself. *See* Graboff Decl. ¶¶ 5-6. In addition, National Parks Conservation Association member William Skelton lives in Knoxville, TN, an area that is also out of attainment of the 2006 standard for $PM_{2.5}$, and he is concerned about the effects of particulate matter on his health. *See* Skelton Decl. ¶¶ 4 and 6. In addition, Mr. Skelton suffers injury from the haze caused by particulate matter pollution, which substantially impairs the visibility in the parks that he regularly visits. *Id.* ¶¶ 5-6. EPA's delay in adopting tighter standards means that the regulations and pollution control plans to clean up these areas are not as stringent as they should be.

Mark Wenzler, a National Parks Conservation Association member, lives in Washington D.C., an area that EPA currently considers "clean" because ambient levels of particulate matter fall just below the current annual standard of 15 $\mu g/m^3$ that is known to be inadequate to protect public health. *See* Wenzler Decl. ¶ 9; *see also* 74 Fed. Reg. 1146, 1147 (Jan. 12. 2009) (finding that Washington, D.C. meets the 1997 $PM_{2.5}$ standards and suspending additional pollution control requirements). Plaintiffs' members, such as Mr. Wenzler, are particularly impacted by EPA's delay because they live in areas with levels of $PM_{2.5}$ that are known to be unhealthy and yet there is no requirement for these areas to develop strategies for cleaning the air because they do not violate the standards currently in effect. *See, e.g.*, 73 Fed. Reg. 62945, 62947 (Oct. 22, 2008) (showing annual $PM_{2.5}$ levels for counties in D.C. metro area ranging from 12 to 14

$\mu g/m^3$). Mr. Wenzler explains that particulate matter pollution in the D.C. area still forces him to restrict his outdoor activities, and that he is concerned about the health impacts of particulate matter pollution on himself and his 7-year old daughter. *See* Wenzler Decl. ¶¶ 9-12. Within NPCA alone, there are 27,000 members who, like Mr. Wenzler, live in areas with unhealthy annual $PM_{2.5}$ design values above 12 $\mu g/m^3$ but below the current annual standard of 15 $\mu g/m^3$. *See* Wenzler Decl. ¶ 7. By EPA's own estimates, every month that new standards are delayed means thousands of lives lost or impacted in these areas where Plaintiffs' members live.

III. The Balance of Equities Tips Sharply in Favor of Plaintiffs.

Against this backdrop of significant health impacts, there is no justification for EPA's failure to comply with the Clean Air Act and its current timetable of extended delay. EPA has completed all of the preliminary review steps needed to prepare a rulemaking: the Integrated Science Assessment was completed in December 2009; the Quantitative Risk Assessment was completed in June 2010; review of EPA's policy assessment by the Clean Air Scientific Advisory Committee was completed in June 2010; and, after much delay, EPA finalized its Policy Assessment with staff recommendations on new standards in April 2011. *See generally* www.epa.gov/ttnnaaqs/standards/pm/s_pm_index.html (EPA's portal website for activities on the current review of the PM standards). The declaration prepared by Ms. McCarthy suggests that a complete rulemaking package has already been prepared and that the EPA has only to "finish[] internal agency review." McCarthy Decl. ¶ 17.

Likewise, there is no clear hardship associated with finalizing the rulemaking by October 15, 2012. According to EPA's own schedule, if OMB review is waived, it should be able to sign a final rule by the end of December 2012. Accelerating that schedule by a month-and-a-half to October 15, 2012 is consistent with the schedules of other similar rulemakings and cannot

reasonably be claimed as a hardship that justifies the thousands of deaths and other impacts associated with every month these standards are delayed.

IV. The Public Interest Favors an Injunction.

Because EPA is in violation of the Clean Air Act's express terms and its delay undermines the central public health purposes of the Act, the public interest favors an injunction curing that delay. *See, e.g.*, 42 U.S.C. §§ 7409(b), 7410(a)(2) and 7470; *see also Train*, 510 F.2d at 705 (holding that enforcement of statutory deadlines is necessary to vindicate public interest). An injunction forcing EPA to act in a more expedited fashion is further warranted in light of the urgent need to curb dangerous particulate matter exposures to the tens of thousands of people suffering from and threated by illness and premature death due to such pollution.

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request the Court, pursuant to Fed. R. Civ. P. 65(a)(2), to advance and consolidate the hearing on the merits of Plaintiffs' claims with the hearing on the application for preliminary injunction, and order EPA to complete its overdue review of the national ambient air quality standards for particulate matter by October 15, 2012. A proposed form of order is provided herewith.

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Respectfully submitted,

/s/Paul R. Cort

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