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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LIBERTY PACKING COMPANY, LLC, NUCKLES OIL CO., INC. D/B/A MERIT OIL COMPANY, NORMAN R. "SKIP" BROWN, DALTON TRUCKING COMPANY, INC., CONSTRUCTION INDUSTRY AIR QUALITY COALITION, and ROBINSON INDUSTRIES, INC.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency,

Defendants.

Case No. 2:21-cv-00724-MCE-DB

EPA'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date: September 9, 2021
Time: 2:00 p.m. PDT
Place: Courtroom, 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on September 9, 2021, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Morrison C. England, Jr., at 501 I Street, Courtroom 7, 14th Floor, Sacramento, California, Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the United States Environmental Protection Agency (collectively, "EPA") will and do move to dismiss the Complaint (Dkt. No. 1, Petition for Writ of Mandamus) filed by Plaintiffs Liberty Packing Company, LLC, Nuckles Oil Co., Inc. d/b/a Merit Oil Company, Norman R. "Skip" Brown, Dalton Trucking Company, Inc., Construction Industry Air Quality Coalition, and Robinson Industries, Inc. for lack of jurisdiction, failure to state a claim upon which relief can be granted, and improper venue.

The motion is based on this notice and the accompanying memorandum of points and authorities; any declarations, exhibits, and/or request for judicial notice filed in support of the motion; together with such oral and/or documentary evidence as may be presented at the hearing on this motion.

Respectfully submitted,

Date: June 28, 2021

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Defendants.

Case No. 2:21-cv-00724-MCE-DB

EPA'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

Date: September 9, 2021
Time: 2:00 p.m. PDT
Place: Courtroom, 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

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Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), and 12(b)(6), Defendants the United States Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the United States Environmental Protection Agency (collectively, "EPA"), respectfully move to dismiss the Complaint filed by Plaintiffs Liberty Packing Company, LLC, Nuckles Oil Co., Inc. d/b/a Merit Oil Company, Norman R. "Skip" Brown, Dalton Trucking Company, Inc., Construction Industry Air Quality Coalition, and Robinson Industries, Inc. ("Plaintiffs") for lack of jurisdiction, failure to state a claim upon which relief can be granted, and improper venue (Dkt. No. 1) ("Complaint").

I. INTRODUCTION

Plaintiffs claim that EPA has unreasonably delayed taking action on their administrative petition for rulemaking under the Clean Air Act ("CAA") and they ask the Court to compel EPA to "issue a definitive ruling" on the petition by a date certain. Compl. ¶ 37. Plaintiffs' administrative petition requests that EPA reconsider its prior finding made pursuant to CAA section 202(a), 42 U.S.C. § 7521(a), that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." *Final Rule*, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) ("Endangerment Finding"); *see* Compl. ¶ 26.

Plaintiffs allege that their claims arise under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*., and that this Court has jurisdiction under the APA, 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1361 (mandamus). However, the APA only provides a waiver of sovereign immunity when "there is no adequate remedy in a court." Because the Clean Air Act provides an adequate remedy at law via its citizen suit provision, 42 U.S.C. § 7604(a), the APA cannot provide a waiver of sovereign immunity or serve as the basis for a claim. In addition, neither 28 U.S.C. § 1331 nor 28 U.S.C. § 1361 provide a waiver of sovereign immunity or can serve as the basis for a claim.

Even if Plaintiffs had alleged a waiver of sovereign immunity under the Clean Air Act instead of the APA, the Court would lack jurisdiction over Plaintiffs' claims because Plaintiffs have failed to give EPA notice 180 days before filing this suit, as required under the citizen suit provision. 42 U.S.C. § 7604(a). Congress imposed this notice requirement to give EPA a window

of time during which it could prevent an unreasonable delay suit by taking action, thereby sparing the parties from the cost of litigation and avoiding the expenditure of judicial resources. And even if Plaintiffs had provided the requisite notice, they brought this action in the wrong district court. The Endangerment Finding is a nationally applicable final agency action. Under CAA section 304(a), *id*. § 7604(a), a suit alleging unreasonable delay in responding to a petition to take a nationally applicable final action must be filed in the District Court for the District of Columbia because such action would only be reviewable in the D.C. Circuit.

Thus, granting EPA's motion does not mean that Plaintiffs may never present their grievance to a court. If Plaintiffs provide EPA with the required notice, and EPA fails to act on the petition within 180 days, Plaintiffs could bring an unreasonable delay claim under the CAA citizen suit provision in the designated district court (assuming they meet the threshold requirements such as standing). But the present suit cannot proceed at this time and in this Court because Plaintiffs gave EPA no notice and filed this action under the wrong statutory provisions in the wrong district court. The Complaint must therefore be dismissed.

II. LEGAL AND FACTUAL BACKGROUND

A. Statutory Background

1. Clean Air Act

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, enacted in its current form in 1970 and extensively amended in 1977 and 1990, is intended to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." *Id*. § 7401(b)(1). "The Clean Air Act sets forth a cooperative state-federal scheme for improving the nation's air quality." *Vigil v. Leavitt*, 381 F.3d 826, 830 (9th Cir. 2004). In this "cooperative federalism regime[,] . . . the federal agency sets required air quality standards but the state is a primary actor in creating plans to achieve them, followed by potential enforcement at both state and federal levels and by private citizens." *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1173 (9th Cir. 2015). As part of this scheme, EPA prescribes standards for air pollutant emissions from new motor vehicles where EPA finds that such emissions contribute to air pollution that

may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521. Such a finding is commonly referred to as an "endangerment finding."

2. Jurisdiction Under the Clean Air Act

The CAA divides subject matter jurisdiction between the federal district courts and the courts of appeal. *Cal. Dump Truck Owners Ass'n v. Nichols*, 924 F. Supp. 2d 1126, 1137 (E.D. Cal. 2012), *aff'd*, 778 F.3d 1119 (9th Cir. 2015), *withdrawn from bound volume, and aff'd*, 784 F.3d 500 (9th Cir. 2015); *Glob. Cmty. Monitor v. Mammoth Pac., L.P.*, No. 2:14-CV-01612-MCE, 2015 WL 2235815, at *4 (E.D. Cal. May 11, 2015). Pursuant to this bifurcated scheme, "a person may bring suit in district court against the Administrator of EPA for failure to perform a nondiscretionary act or duty," while "judicial review of final actions by the EPA Administrator rests exclusively in the appellate courts." *Cal. Dump Truck Owners Ass'n*, 924 F. Supp. 2d at 1137 (citations omitted).

Before 1990, the CAA's citizen suit provision, 42 U.S.C. § 7604, authorized claims to compel EPA to perform a nondiscretionary duty under the CAA by a specific deadline in the district courts, while the Act's judicial review provision, 42 U.S.C. § 7607(b), authorized petitions for review of EPA's discretionary actions for the courts of appeals. *See Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). Because the citizen suit provision did not expressly address claims seeking to compel EPA to perform a statutory duty that did not have a specific deadline, the D.C. Circuit had to determine which court Congress intended to exercise jurisdiction over such unreasonable delay claims.

In *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), the D.C. Circuit held that, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), it possessed exclusive jurisdiction over claims of unreasonable delay in taking an agency action that would, once taken, be subject to the exclusive review of the D.C. Circuit. *Id*. at 78. Thereafter, in *Sierra Club v. Thomas*, 828 F.2d 783, the D.C. Circuit applied *TRAC* to interpret the judicial review provisions of the CAA. Based on the then-current versions of sections 304 and 307(b) of the CAA, 42 U.S.C. §§ 7604, 7607(b), in *Sierra Club v. Thomas*, the court concluded that it possessed jurisdiction over unreasonable delay claims against EPA: "Where

Congress has established no date-certain deadline—explicitly or implicitly—but EPA must nevertheless avoid unreasonable delay . . . this court reviews claims alleging unreasonable delays of this type." *Id*. at 792.

Three years after the decision in *Sierra Club v. Thomas*, in the 1990 amendments to the Clean Air Act, Congress amended the citizen suit provision to clarify that claims of unreasonable delay of agency action should be brought in the district court. Pub. L. No. 101-549, § 707(f), 104 Stat. 2399, 2683 (1990); *see also* S. Rep. No. 101-228 (1989), at 374, *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3757 ("The amendment will clarify that such review is available, and will assign it to the Federal district courts, in keeping with the general principle that those courts are better suited to address claims of agency inaction . . . "); 136 Cong. Rec. 35,377 (1990), *available at* 1990 WL 206958 (Nov. 2, 1990) ("The bill changes the judicial review scheme under the act by giving the district courts jurisdiction to compel Agency action that has been unreasonably delayed."). In pertinent part, the 1990 Amendments added the following language:

> The district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) [of this section] shall be provided 180 days before commencing such action.

42 U.S.C. § 7604(a). Thus, the 1990 Amendments redirected the category of unreasonable delay claims to the district courts that, under *TRAC* and *Sierra Club v. Thomas*, would belong in the courts of appeals. However, Congress conditioned this jurisdiction grant, providing that "[i]n any such action for unreasonable delay," the prospective plaintiff must provide EPA with notice 180 days "before commencing such action." 42 U.S.C. § 7604(a); *see also id*. § 7604(b)(1)(A) (specifying who must receive notice of unreasonable delay action and requiring that such notice "shall be given in such manner as the Administrator shall prescribe by regulation"); 40 C.F.R. pt. 54 (regulations specifying the procedures for citizen suit notice).

Further, such actions may only be brought in a "United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title." 42 U.S.C.

§ 7604(a). Nationally applicable final actions taken under the CAA are only reviewable in the D.C. Circuit. 42 U.S.C. § 7607(b). Thus, a complaint alleging unreasonable delay in taking a nationally applicable action must be brought in the District Court for the District of Columbia.

B. Litigation Background

Plaintiffs filed this action for a writ of mandamus to compel EPA to take action on Plaintiffs' petition. Compl. ¶¶ 1-2. Plaintiffs allege that on May 1, 2017, they submitted a petition to EPA requesting that the agency reconsider the *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"). *Id*. ¶ 25. Plaintiffs allege that they petitioned EPA to "reconsider its finding under the Clean Air Act that greenhouse gases pose a danger to human health and welfare, because when making the endangerment finding, the EPA Administrator failed to submit the finding to the Science Advisory Board for peer review as required 42 U.S.C. 4365(c)(1)." *Id*. ¶ 26. On January 19, 2021, EPA denied Plaintiffs' petition in a letter signed by former Administrator Andrew R. Wheeler. *Id*. ¶ 28; *id*. Dkt. No. 1-4 ("Denial Letter," Ex. D to the Compl.). On March 23, 2021, EPA, in a letter signed by Administrator Michael S. Regan, withdrew the Denial Letter because it "does not provide an adequate justification for [the] denial" and the agency "intends to reassess the petition [ ] and to issue a new decision in due course." Compl. ¶ 29; *id*. Dkt. No. 1-5 ("Withdrawal Letter," Ex. E to the Compl.).

The Complaint alleges that EPA has failed to act on the May 2017 petition because it has not yet provided a definitive response, and that its delay in taking such action is unreasonable. *Id*. ¶¶ 24, 30. Plaintiffs request that the Court: (1) issue a writ of mandamus finding that EPA has unreasonably delayed acting upon Plaintiffs' petition, contrary to the requirements of the APA; (2) order EPA to issue a definitive ruling on the petition by a date certain; and (3) award attorney's fees and costs to the Plaintiffs. *Id*. at 13; *see also* id. ¶¶ 30, 36-37. Plaintiffs do not allege any claim under the CAA citizen suit provision, or that they provided EPA with notice of their intent to file this suit, and EPA has no record of having received any notice before this suit was filed.

III. STANDARD OF REVIEW

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the Court must determine whether the complaint sets forth allegations sufficient to establish the court's jurisdiction over the subject matter of the claims for relief. Because federal courts are courts of limited jurisdiction and may hear cases only to the extent expressly provided by statute, the first and fundamental question presented by every case is whether the court has jurisdiction to hear it. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("jurisdiction [must] be established as a threshold matter"). Where subject matter jurisdiction does not exist, "the court cannot proceed at all in any cause." *Id.* (internal quotation marks omitted). Plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Dismissal should be granted where the "complaint is vague, conclusory, and general and does not set forth any material facts in support of the allegations." *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 583 (9th Cir. 1983). Although well-pleaded allegations of material fact are accepted as true and reasonable inferences are to be drawn in favor of the plaintiff, *Wyler Summit Partnership v. Turner Broadcasting System*, 135 F.3d 658, 661 (9th Cir. 1998), the court need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations," *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (citation omitted). The Ninth Circuit has made clear that "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("[A]llegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing

party to defend itself effectively.").

Federal Rule of Civil Procedure 12(b)(3) allows a party to challenge a claim for relief by asserting the defense of improper venue. Fed. R. Civ. P. 12(b)(3). Once challenged, the plaintiff bears the burden of showing that venue is proper in the chosen district. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979); *Hope v. Otis Elevator Co.*, 389 F. Supp. 2d 1235, 1243 (E.D. Cal. 2005).

IV. ARGUMENT

Federal courts are courts of limited jurisdiction and may hear cases only to the extent expressly provided by statute. *Kokkonen*, 511 U.S. at 377. As a sovereign, the United States, including its agencies, departments, and individual federal officials acting in their official capacity, are immune from all suits absent an express waiver of immunity. *FAA v. Cooper*, 566 U.S. 284, 290 (2012); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"; sovereign immunity is "jurisdictional in nature"); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998). Any waiver must be "unequivocally expressed in statutory text," not "implied," and must be construed strictly, with all doubts or ambiguities resolved in favor of the federal government. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted). If the statute can be read in a manner both to allow and to disallow a waiver, it must be interpreted against the waiver. *United States v. Nordic Village*, 503 U.S. 30, 37 (1992). Moreover, when the United States consents to be sued, Congress may define the terms and conditions upon which it may be sued and the terms of its consent are jurisdictional. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007) ("A court lacks subject matter jurisdiction over a claim against the United States if it has not consented to be sued on that claim.") (quoting *United States v. Mottaz*, 476 U.S. 834, 841 (1986)). In any action against the United States, a plaintiff must establish both subject matter jurisdiction and a waiver of sovereign immunity. *Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991). In the absence of a waiver, the claims must be dismissed for lack of

jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

A. Plaintiffs Cannot Rely on the Administrative Procedure Act Where Another Adequate Remedy at Law Is Available.

The APA makes clear that if another statute provides an "adequate remedy in a court," the APA cannot supply the cause of action, which means that it cannot serve as the waiver of sovereign immunity either. 5 U.S.C. §§ 704, 706(1). Although the APA waives sovereign immunity for "action[s] . . . stating a claim that an agency or an officer or an employee thereof acted or failed to act in an official capacity or under color of legal authority," 5 U.S.C. § 702, that waiver has limitations. Section 702 declares that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id*. Thus, the APA's waiver of sovereign immunity does not apply where Congress, in another statute, has precisely defined the limits of an available claim against the government. *See*, *e.g., Match-E-Be-Nash-She-Wish Band v. Patchak*, 132 S. Ct. 2199, 2204 (2012) ("[T]he APA's waiver of immunity comes with an important carve-out: The waiver does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff."); *id*. at 2204-05 (Section 702 "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes."); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) ("The APA's waiver of sovereign immunity, however, contains several limitations. By its own terms, § 702 does not apply to . . . claims 'expressly or impliedly forbid[den]' by another statute granting consent to suit. Moreover, only '[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court' are subject to judicial review.") (quoting 5 U.S.C. § 704).

Plaintiffs' Complaint explicitly seeks a remedy for EPA's alleged "failure to comply with its nondiscretionary duty to rule on Plaintiffs' petition for rulemaking without unreasonable delay." Compl. ¶ 1; *see also id*. ¶¶ 17-18, 21, 24, 36. In the CAA citizen suit provision, Congress expressly waived the United States' sovereign immunity by granting district courts jurisdiction

over suits against EPA "to compel . . . agency action unreasonably delayed" under the CAA. 42 U.S.C. § 7604(a); *Humane Soc'y of the United States v. McCarthy*, 209 F. Supp. 3d 280, 287 (D.D.C. 2016) (finding that the legislative history of the 1990 amendments "make clear that Congress intended that district courts be given jurisdiction over unreasonable delay claims alleging a failure to respond to a petition for rulemaking under the CAA"); *Env't Integrity Project v. EPA*, 160 F. Supp. 3d 50, 63 (D.D.C. 2015); *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1992) (same). Thus, the Clean Air Act provides a cause of action and remedy for a claim that the EPA has unreasonably delayed taking action to respond to Plaintiffs' petition. Therefore, the APA's waiver cannot be used to "evade [the] limitations on suit" contained therein. *Patchak*, 132 S. Ct. at 2204-05; *see Royster-Clark Agribusiness, Inc. v. Johnson*, 391 F. Supp. 2d 21, 25-26 (D.D.C. 2005) (finding no sovereign immunity waiver under APA Section 702 because "[t]he CAA provides its own waiver of sovereign immunity and procedures for review, and it precludes all other forms of judicial review, stating that '[n]othing in this [Act] shall be construed to authorize judicial review of regulations or orders of the Administrator under this [Act], except as provided in [section 307 of the CAA].' 42 U.S.C. § 7607(e)").

Though this issue has not arisen in the Ninth Circuit, two decisions of the District Court for the District of Columbia have considered whether allegations of unreasonable delay in responding to a petition seeking action under the Clean Air Act must be brought pursuant to the CAA citizen suit provision. In *Environmental Integrity Project v. EPA*, the plaintiffs sought to have the district court declare that EPA's failure to respond to a petition asking EPA to take various actions under the Clean Air Act was actionable under the APA. 160 F. Supp. 3d at 52. As in this case, the plaintiffs did not provide pre-suit notice of intent to sue. EPA moved to dismiss for the same reason it moves here, that the "action [ ] falls within the scope of the citizen-suit provision of the Clean Air Act, 42 U.S.C. § 7604(a), and therefore could not have been brought under the APA." *Id*. The district court agreed finding that "[b]ecause the citizen-suit provision provides an adequate remedy for claims that the EPA unreasonably delayed in responding to a citizen petition for rulemaking under the Clean Air Act, plaintiffs cannot rely on the APA to

secure the government's waiver of its sovereign immunity." *Id*. at 63.

Similarly, in *Humane Society v. McCarthy*, the plaintiffs brought an action for declaratory and injunctive relief under the APA and sought an order to compel EPA to provide a response to their petition for rulemaking, which requested that EPA regulate concentrated animal feeding operations as a source of air pollution under the Clean Air Act. 209 F. Supp. 3d at 281. The plaintiffs also did not provide pre-suit notice. EPA moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The district court found that the CAA citizen suit provision provides "an adequate remedy for [environmental groups'] alleged harms" and that "the appropriate waiver of sovereign immunity also comes from the CAA." *Id*. at 287-88. Further, the court reasoned that if "the APA provided a separate avenue to pursue unreasonable delay claims, then Plaintiffs could simply bring suit under the APA instead of the CAA, without providing notice to the agency, thus nullifying the purpose and effect of the notice requirement." *Id.* at 286. Thus, the court dismissed the suit for lack of jurisdiction. *Id*. at 288.

So too here. The waiver of sovereign immunity in APA section 702 does not apply and Plaintiffs have failed to bring a CAA citizen suit claim (or comply with the CAA's notice requirement). Accordingly, this Court lacks jurisdiction over Plaintiffs' claim and Plaintiffs have failed to state a claim upon which this Court could grant relief.

B. Plaintiffs Cannot Rely on the Mandamus Act, 28 U.S.C. § 1361, or the Federal Question Statute, 28 U.S.C. § 1331, to Provide a Waiver of Sovereign Immunity or the Basis for Their Claim.

Plaintiffs allege that this Court has jurisdiction pursuant to the Mandamus Act, 28 U.S.C. § 1361. Compl. ¶ 5. Under 28 U.S.C. § 1361, district courts have jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361; *see Agua Caliente Tribe of Cupeno Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1216 (9th Cir. 2019). Much like APA section 706(1), an order pursuant to section 1361 is available only if, among other things, "no other adequate remedy is available." 932 F.3d at 1216 (quoting *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997)); *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 761 (9th Cir. 1989) (explaining that section 1361 "fails to confer jurisdiction to compel agency action where review by other means is possible").

Thus, because the Clean Air Act provides an adequate remedy at law, the Mandamus Act cannot provide a basis for Plaintiffs' claim of unreasonable delay.

Plaintiffs also cite the federal question statute, 28 U.S.C. § 1331, as a basis for this Court's jurisdiction. Compl. ¶ 5. The federal question statute provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This provision merely establishes subject matters that are within the jurisdiction of federal courts to entertain, but does not waive sovereign immunity. *Dunn & Black, P.S. v. United States,* 492 F.3d 1084, 1088 n. 3 (9th Cir. 2007) (stating that section 1331 is a "grant[ ] of general jurisdiction and 'cannot be construed as authorizing suits . . . against the United States, else the exemption of sovereign immunity would become meaningless.'") (internal citation omitted). The Ninth Circuit has long recognized that 28 U.S.C. § 1331, by itself, "neither waives the federal government's sovereign immunity to suit nor indicates the appropriate forum for adjudication of the controversy." *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982). Where the United States is the defendant, a grant of general jurisdiction is not enough; there must also be a statutory cause of action through which Congress has waived sovereign immunity. *Nordic Village*, 503 U.S. at 34; *Hughes*, 953 F.2d at 539 n.5. Hence, the federal question statute does not itself provide a waiver of sovereign immunity allowing Plaintiffs to bring suit against EPA.

Thus, neither the Mandamus Act, 28 U.S.C. § 1361, nor the federal question statute, 28 U.S.C. § 1331, provide a waiver of sovereign immunity or cognizable cause of action for Plaintiffs' claim. The Complaint must be dismissed.

C. Even if Plaintiffs Had Alleged a Cause of Action under the Clean Air Act Citizen Suit Provision, Plaintiffs Failed to Provide EPA with the Requisite Notice of Intent to Sue.

In order for this Court to have jurisdiction over Plaintiffs' claim, they must allege a valid waiver of sovereign immunity. As discussed earlier, the Complaint does not allege 42 U.S.C. § 7604(a) as the basis for Plaintiffs' claim or the waiver of sovereign immunity. But even if Plaintiffs had made that allegation, the Court would still lack jurisdiction because Plaintiffs have failed to comply with the statutory prerequisite for the waiver of sovereign immunity in

42 U.S.C. § 7604(a). Section 7604(a) provides that in any action for unreasonable delay, notice "shall be provided 180 days before commencing such action." *Id*. § 7604(a).

Like any waiver of sovereign immunity, section 7604(a) must be strictly construed in the United States' favor. *Nordic Village*, 503 U.S. at 34. The Supreme Court has held that such notice requirements in citizen suit provisions are a "mandatory, not optional, condition precedent for suit;" thus, "a plaintiff may not file suit before fulfilling the . . . notice requirement." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 26 (1989). In *Hallstrom*, the Court construed the notice requirements of the Resource Conservation and Recovery Act. 493 U.S. at 22-23. The Supreme Court's reasoning in *Hallstrom* applies to similar notice provisions under other environmental statutes, including the Clean Air Act. *See id*. at 23 n.1 (identifying similar notice provisions under other environmental statutes); *id*. at 25 n.2 (citing precedent under both the Resource Conservation and Recovery Act and Clean Air Act). In the Ninth Circuit, giving notice "is not simply a desideratum; it is a jurisdictional necessity." *Ctr. For Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 800 (9th Cir. 2009) (addressing a similar notice provision in the Clean Water Act) (citations omitted); *Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1353 (9th Cir. 1995) (same). And as other district courts have recognized, "*Hallstrom*'s lesson is equally applicable to the court's analysis of plaintiffs' notice of their CAA claims." *Glazer v. Am. Ecology Env't Servs. Corp.*, 894 F. Supp. 1029, 1041 (E.D. Tex. 1995). In *Humane Society v. McCarthy*, the district court held that the "waiver of immunity requires that a prospective plaintiff give the EPA notice 180 days before filing suit, and, since Plaintiffs concede that they did not do so here, they cannot proceed. Because the Plaintiffs failed to effectuate waiver of sovereign immunity through notice, the court lacks subject matter jurisdiction over this particular dispute." 209 F. Supp. 3d at 287-88. Thus, even if Plaintiffs had asserted a claim under the CAA citizen suit provision, the Court would have to dismiss the Complaint for lack of pre-suit notice.

Providing adequate pre-suit notice serves an important purpose, in that it creates a "nonadversarial" period in which the government has the opportunity to take action to obviate the need for litigation. *See Hallstrom*, 493 U.S. at 28-29. "[T]he notice is not just an annoying piece of paper intended as a stumbling block for people who want to sue; it is purposive in nature

and the purpose is to accomplish corrections where needed without the necessity of a citizen action." *Ctr. for Biological Diversity*, 566 F.3d at 800. If a plaintiff fails to meet statutory notice requirements, a court "must dismiss the action as barred by the terms of the statute." *Hallstrom*, 493 U.S. at 33; *Ctr. for Biological Diversity*, 566 F.3d at 800. Here, Plaintiffs do not allege that they provided the required 180-day notice to EPA, and EPA has no record of any such notice. Even if Plaintiffs had alleged a claim and waiver of sovereign immunity under the Clean Air Act citizen suit provision, Plaintiffs could not rely on CAA section 7604(a)'s waiver of sovereign immunity because they have not satisfied Congress' express conditions on that waiver. For that additional reason, Plaintiffs' suit must be dismissed.

D. Even If Plaintiffs Had Asserted a Clean Air Act Citizen Suit Claim and Provided the Requisite Notice, This Action Can Only Be Brought in the District Court for the District of Columbia.

The CAA citizen suit provision provides that:

> The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) [of Title 42].

42 U.S.C. § 7604(a). [1] Thus, the waiver of sovereign immunity in 42 U.S.C. § 7604(a) references 42 U.S.C. § 7607(b).

Judicial review of EPA actions under 42 U.S.C. § 7607(b) is based in part on the geographic applicability of the challenged action. Relevant here,"[a] petition for review of . . . any . . . nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." *Id*. As part of the Clean Air Act's waiver of sovereign immunity, this forum provision must be construed narrowly and in favor of the United States. *See Am. Lung*

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[1] Pursuant to 42 U.S.C. § 7604(a), suits to compel EPA to comply with nondiscretionary duties with date certain deadlines under 42 U.S.C. § 7604(a)(2) ("mandatory duty" suits) are not subject to the portion of the waiver of sovereign immunity that requires unreasonable delay suits alleging delay related to a nationally applicable final action to be filed in the District Court for the District of Columbia.

Ass'n v. Reilly, 962 F.2d 258, 263 (2d Cir. 1992) (describing the distinction between nondiscretionary duty suits that are not subject to this provision and suits for unreasonable delay that are subject to it as "vital for jurisdictional purposes"); *see also FAA v. Cooper*, 566 U.S. at 290 (waivers of sovereign immunity must be strictly construed); *FDIC v. Meyer*, 510 U.S. at 475 (same); *Tucson Airport Auth.*, 136 F.3d at 644 (same); *Lane*, 518 U.S. at 192 (same); *Nordic Village*, 503 U.S. at 37 (same); *Lehman*, 453 U.S. at 160 (same); *Consejo de Desarrollo Economico de Mexicali, A.C.*, 482 F.3d at 1173 (same). Thus, the Court must dismiss the Complaint because forum for this suit is in the District Court for the District of Columbia.

"[C]ertain actions are clearly nationally applicable, such as the issuance of an EPA regulation that applies uniformly nationwide." *Sierra Club v. Johnson*, 623 F. Supp. 2d 31, 36 (D.D.C. 2009). Here, "[i]n their rulemaking petition, Plaintiffs requested that the EPA reconsider its finding under the Clean Air Act [made in the Endangerment Finding] that greenhouse gases pose a danger to human health and welfare." Compl. ¶ 26; *see also* Dkt. No. 1-1 (the "Petition"). It would be hard to imagine an action that is more nationally applicable. The Endangerment Finding found that emissions from motor vehicles contribute to elevated concentrations of six well-mixed greenhouse gases in the global atmosphere and that, taken in combination, those elevated global concentrations pose a risk to public health and welfare in the United States. 74 Fed. Reg. at 66,496.

The Endangerment Finding stated that "[u]nder CAA section 307(b)(1), judicial review of this final action is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 16, 2010." *Id*. The *Federal Register* notice indicates EPA's conclusion that the Endangerment Finding was nationally applicable and thus, reviewable only in the D.C. Circuit pursuant to 42 U.S.C. § 7607(b)(1). Thereupon, in response to multiple petitions for review, the Endangerment Finding, made pursuant to EPA's authority under CAA section 202(a), 42 U.S.C. § 7521(a), was reviewed by the D.C. Circuit. *See Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012), *aff'd in part, rev'd in part on other grounds*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014), and *amended sub nom. Coal. for Responsible Regul., Inc. v. EPA*, 606 F. App'x 6 (D.C. Cir. 2015). Likewise, any final

action taken to reconsider the Endangerment Finding in response to the Petition would similarly be reviewable only in the D.C. Circuit. *See Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir. 1988) ("We believe the clause governing 'nationally applicable regulations' provides jurisdiction over both the direct challenge to the regulations and the petition for reconsideration."). Accordingly, any properly noticed suit alleging unreasonable delay in responding to a request to reconsider the Endangerment Finding must be filed in the District Court for the District of Columbia under 42 U.S.C. § 7604(a) ("an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title"). Even if Plaintiffs had given notice of their intent to bring an unreasonable delay suit, and alleged a citizen suit claim under the CAA, Plaintiffs would be in the wrong district court.

Furthermore, even if the requirement in 42 U.S.C. § 7604(a) was not part of the requisite waiver of sovereign immunity for Plaintiffs' claim and a bar to this Court's jurisdiction (and it is), 42 U.S.C. § 7604(a) still specifies the only permissible forum for Plaintiffs' challenge. For this additional reason, the Complaint should also be dismissed for improper venue under Federal Rule of Civil Procedure 12(b)(3).

V. CONCLUSION

For the foregoing reasons, Plaintiffs' complaint should be dismissed for lack of jurisdiction, failure to state a claim upon which relief can be granted, and improper venue.

Date: June 28, 2021

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LIBERTY PACKING COMPANY, LLC, NUCKLES OIL CO., INC. D/B/A MERIT OIL COMPANY, NORMAN R. "SKIP" BROWN, DALTON TRUCKING COMPANY, INC., CONSTRUCTION INDUSTRY AIR QUALITY COALITION, and ROBINSON INDUSTRIES, INC.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency,

Defendants.

Case No. 2:21-cv-00724-MCE-DB

[PROPOSED] ORDER

The Court, having considered Defendants' motion to dismiss and memorandum in support, Plaintiffs' memoranda in opposition and replies thereto, and otherwise being sufficiently advised, hereby **GRANTS** the motion. It is therefore **ORDERED** that this case is **DISMISSED WITH PREJUDICE**, and the parties shall bear their own attorneys' fees and costs.

IT IS SO ORDERED.

Dated:

MORRISON C. ENGLAND, JR.
SENIOR UNITED STATES DISTRICT JUDGE