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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SIERRA CLUB, GREAT BASIN RESOURCE) Case No.
WATCH, AMIGOS BRAVOS, and IDAHO)
CONSERVATION LEAGUE,)

Plaintiffs,

 \mathbf{v}_i

STEPHEN JOHNSON, Administrator, United States Environmental Protection Agency, and MARY E. PETERS, Secretary, United States Department of Transportation,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF -1-

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INTRODUCTION

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2 1. This is an action for declaratory and injunctive relief pursuant to the
3 Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) and
4 Administrative Procedure Act (“APA”). In order to reduce the risk of improperly disposed
5 hazardous substances, CERCLA requires defendants Johnson and Peters to promulgate
6 regulations that would require certain facilities involved with such substances to establish and
7 maintain evidence of financial responsibility. These “financial assurance” regulations are
8 intended to ensure that facilities involved in any way with hazardous substances will remain
9 financially responsible for cleaning up improperly disposed hazardous substances.

10 2. CERCLA required defendants to publish notice of priority categories for such
11 regulations no later than December 1983, promulgate the regulations themselves beginning in
12 December 1985, and impose financial assurance requirements as quickly as could reasonably be
13 achieved but in no event later than four years after promulgation. Defendants, however, have
14 taken none of these steps. Plaintiffs Sierra Club, Great Basin Resource Watch, Amigos Bravos,
15 and Idaho Conservation League (collectively, “Sierra Club”) bring this action to compel
16 defendants to follow the requirements of CERCLA and promulgate financial assurance
17 regulations on a reasonable but rigorous schedule.

JURISDICTION

18
19 3. This action arises under CERCLA’s citizen suit provision, 42 U.S.C.
20 § 9659(a)(2), as well as 28 U.S.C. §§ 1331 and 1361, and this Court may issue a declaratory
21 judgment and grant further relief pursuant to 42 U.S.C. § 9659(c) and 28 U.S.C. §§ 2201 and
22 2202. In addition, and/or in the alternative, plaintiffs have a right to bring this action pursuant to
23 the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706.

24
25 4. Venue is appropriate in this District under 28 U.S.C. § 1391 because plaintiff
26 Sierra Club resides in this District. See also 42 U.S.C. § 9659(b)(2) (allowing but not requiring
27 venue in the District Court of the District of Columbia).

5. By certified letter posted on November 6, 2007, plaintiffs gave notice to defendant Johnson, pursuant to 42 U.S.C. § 9659(e) and 40 C.F.R. Part 374. By certified letter posted December 12, 2007, plaintiffs gave notice to defendant Peters, pursuant to 42 U.S.C. § 9659(e) and 40 C.F.R. Part 374.

PARTIES

6. Plaintiff Sierra Club is a nonprofit corporation organized and existing under the laws of the State of California with its headquarters in San Francisco. Sierra Club is a national organization dedicated to the protection of public health and the environment and has more than 700,000 members in all fifty states and the District of Columbia.

7. Plaintiff Great Basin Resource Watch is a nonprofit corporation (formerly Great Basin Mine Watch) organized and existing under the laws of the State of Nevada and based in Reno, Nevada. An organization dedicated to protecting the land, air, water, and wildlife of the Great Basin and the people and communities that depend on these resources, Great Basin Resource Watch has over 200 members residing in Nevada, California, and Utah.

8. Plaintiff Amigos Bravos is a nonprofit corporation organized and existing under the laws of the State of New Mexico with its headquarters in Taos, New Mexico. An organization dedicated to protecting both the ecological and cultural richness of the Río Grande and its tributaries, Amigos Bravos has over 1,500 members in New Mexico and the Rio Grande watershed.

9. Plaintiff Idaho Conservation League is a nonprofit corporation organized and existing under the laws of the State of Idaho and based in Boise, Idaho. An organization dedicated to the preservation of Idaho's clean water, wilderness and quality of life, Idaho Conservation League has 9,000 members in Idaho.

10. The plaintiffs and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected by the failure of the

1 United States Environmental Protection Agency (EPA) and the Department of Transportation
2 (DOT) to comply with CERCLA, the purpose of which is to control and remediate the release of
3 hazardous substances into the environment. EPA and DOT's failure to carry out statutorily
4 mandated promulgation of regulations under CERCLA increases the likelihood that plaintiffs'
5 members and their environment will be exposed to unremediated releases of hazardous
6 substances.

7 11. Plaintiffs and their members use the rivers, landscapes, and watersheds near
8 facilities that produce, treat, transport, store, or dispose of hazardous substances around the
9 nation for recreational, scientific, aesthetic, commercial, life-sustaining, and spiritual purposes.
10 Plaintiffs and their members derive—or, but for the presence of hazardous substances, would
11 derive—recreational, scientific, aesthetic, commercial, life-sustaining, and spiritual benefits from
12 their use of such places. The past, present, and future enjoyment of these benefits by plaintiffs
13 and their members has been, is being, and will continue to be irreparably harmed by the
14 defendants' disregard of their statutory duties.

15 12. Plaintiffs' members also have an interest in protecting the health of themselves,
16 their children, and their communities. Defendants' failure to promulgate regulations requiring
17 that classes of facilities establish and maintain evidence of financial responsibility consistent
18 with the degree and duration of risk associated with the production, treatment, transportation,
19 storage, or disposal of hazardous substances as required by section 108(b)(1) of CERCLA in the
20 timeframe specified in the Act increases the risk to plaintiffs' members of exposure to hazardous
21 substances and/or increases and prolongs plaintiffs' members' exposure to hazardous substances
22 and their risk of adverse health effects.

23 13. The health effects from exposure to the hazardous substances released by
24 facilities that produce, treat, transport, store, or dispose of hazardous substances, such as the
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1 facilities described above include cancer, birth defects, reproductive disorders, damage to the
2 brain and nervous system, and damage to the respiratory system.

3 14. Defendant Stephen Johnson is the Administrator of the United States
4 Environmental Protection Agency and in that role is charged with the duty to promulgate
5 regulations pertaining to facilities that generate, handle, store, treat, and dispose of hazardous
6 substances according to the time periods set out in CERCLA.

7 15. Defendant Mary E. Peters is the Secretary of the United States Department of
8 Transportation and in that role is charged with the duty to promulgate regulations pertaining to
9 the transportation of hazardous substances according to the time periods set out in CERCLA.

10 STATUTORY BACKGROUND

11 16. In the wake of the Love Canal disaster, Congress in 1980 enacted CERCLA as the
12 nation's principle statutory vehicle for addressing the cleanup of improperly disposed hazardous
13 substances. It defines federal response priorities, prescribes the liabilities of potentially
14 responsible parties, and specifies the use of a federal trust fund—known as “Superfund”—for
15 cleanup of hazardous waste sites.

16 17. CERCLA also contains important provisions that seek to reduce the risk that new
17 hazardous waste sites will be created in the future and to ensure that potentially responsible
18 parties would remain in a position to fund their cleanup. Congress sought to achieve this in part
19 through establishing requirements that any party involved with the production, transportation,
20 treatment, storage or disposal of hazardous substances demonstrate financial responsibility
21 sufficient to mitigate the risks associated with those activities. Specifically, section 108(b)(1) of
22 the Act provides in pertinent part:

23
24 Beginning not earlier than five years after December 11, 1980, the President shall
25 promulgate requirements (for facilities in addition to those under Subtitle C of the
26 Solid Waste Disposal Act [citation omitted] and other Federal law) that classes of
27 facilities establish and maintain evidence of financial responsibility consistent
28 with the degree and duration of risk associated with the production,
transportation, treatment, storage or disposal of hazardous substances.

42 U.S.C. § 9608(b)(1). Section 108(b)(1) of the Act also provides:

Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register.

42 U.S.C. § 9608(b)(1).

18. Section 108(b)(3) further required that:

Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event more than 4 years after the date of promulgation.

42 U.S.C. § 9608(b)(3).

19. By Executive Order, the functions vested in the President in section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act were delegated to the Administrator of EPA. See Executive Order No. 12,580, 52 Fed. Reg. 2923 (January 23, 1987), section 7(d)(1).

20. By Executive Order, the functions vested in the President in section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act were delegated to the Secretary of Transportation with respect to all transportation related facilities, including any pipeline, motor vehicle, rolling stock, or aircraft. 46 Fed. Reg. 42237 (Aug. 14, 1981), Section 5(c).

21. Thus section 108(b)(1) of CERCLA required defendants to (1) publish notice of the identification of classes for which financial responsibility requirements would first be developed by December 11, 1983; (2) promulgate requirements that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, treatment, transportation, storage, or disposal of hazardous substances beginning on December 11, 1985; and (3) implement those requirements as quickly as possible, but in no event more than four years after they are promulgated.

1 I. THE LACK OF FINANCIAL ASSURANCE REGULATIONS INCREASES THE RISK
2 OF HARM TO PEOPLE AND THE ENVIRONMENT FROM IMPROPERLY
3 DISPOSED HAZARDOUS SUBSTANCES.

4 22. Defendants have not published a notice in the Federal Register nor promulgated
5 regulations for classes of facilities pursuant to section 108(b)(1) of the Act. Plaintiffs are
6 unaware of any existing effort by defendants to comply with these requirements.

7 23. Facilities that produce, treat, transport, store, or dispose of hazardous substances
8 (in addition to those under Subtitle C of the Solid Waste Disposal Act [42 U.S.C. § 6921 et seq.]
9 and other Federal law) include, but are not limited to, mines, hazardous waste generators,
10 hazardous waste recyclers, metal finishers, and wood treatment facilities. Such facilities are
11 located throughout the United States.

12 24. In the absence of financial assurances requirements promulgated under CERCLA,
13 such facilities may have inadequate or no requirements to provide financial assurances (such as
14 bonds, trust funds, insurance policies, or letters of credit) that are intended to ensure that such
15 facilities will be financially responsible for remediation of releases of hazardous substances.

16 25. Since 1980, significant releases of hazardous substances have occurred at many
17 facilities that have been financially unable to pay for the costs of remediation. For example,
18 Asarco, a century-old mining and smelting company, is liable for the environmental cleanup of
19 94 Superfund sites in 21 states. The bill to clean up Asarco's environmental contamination is
20 estimated at more than \$1 billion, but the company has recently declared bankruptcy. Similarly,
21 Standard Chlorine Corporation (also known as Metachem) is responsible for major chemical
22 releases, including PCBs and dioxin, from its Delaware facility, that contaminated soil, sediment,
23 an aquifer, and surface water. EPA estimates that the total cleanup cost will be approximately
24 \$100 million, but Metachem declared bankruptcy in 2002.

25 26. Since 1980, significant releases of hazardous substances occurred at many
26 facilities that have not provided evidence of financial responsibility consistent with the degree
27 and duration of risk associated with the production, transportation, treatment, storage, or disposal
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1 of hazardous substances at the facilities. Therefore, there is no guarantee that funds will be
2 available for timely cleanup. For example, the following facilities do not have financial
3 assurance for releases of hazardous substances consistent with the degree and duration of risk
4 associated with their activities: J.R. Simplot Company's Smoky Canyon Mine in southeastern
5 Idaho, where releases of hazardous substances, including selenium and cadmium, have
6 contaminated groundwater, surface water, sediment, and soil, and Chevron Mining Inc.'s
7 (formerly Molycorp) molybdenum mine near Questa, New Mexico where releases of hazardous
8 substances, including cadmium, copper, lead, silver, and zinc have contaminated groundwater,
9 surface water, soil, and sediment.

10 27. When responsible parties are unable to pay for the costs of remediating hazardous
11 substance sites, the costs of such remediation fall to the public. CERCLA provided for the
12 "Superfund" trust fund to cover such costs. However, the tax on crude oil and certain chemicals
13 and an environmental tax on corporations that were the primary sources of revenues for the
14 Superfund trust fund expired in 1995.

15 28. Since 2000, the Superfund program has increasingly relied on revenue from
16 general revenue fund appropriations. For fiscal year 2004, for example, EPA's Superfund
17 appropriation of \$1.2 billion was from general revenue only. Appropriations for the Superfund
18 program have decreased from \$1.9 billion to \$1.2 billion, in constant 2003 dollars, from fiscal
19 year 1993 to fiscal year 2004. The number of Superfund sites and the costs of their cleanup,
20 however, have not lessened during that time, but grown.

21 29. The cost of investigation and cleanup at the "orphan" sites listed on the National
22 Priorities List, where the facility responsible for the release is unable to fund investigation and
23 cleanup, amounts to hundreds of millions of dollars annually. This amount greatly exceeds
24 EPA's annual Superfund budget. Therefore, federal funding is currently not able to finance
25 response activities in a timely and effective manner at numerous Superfund sites.
26
27

1 30. On January 7, 2004, the EPA Office of Inspector General (OIG) issued a Special
2 Report, "Congressional Request on Funding Needs for Non-Federal Superfund Sites (Report
3 2004-P-00001)" ("OIG Report"). This report addressed the sufficiency of funding for non-
4 Federal Superfund sites, "including a more detailed review of a limited number of sites to
5 determine if cleanup actions are being stretched out over a greater number of years because of
6 inadequate funding."

7 31. The OIG Report found that:

8 In summary, during FY 2003, limited funding prevented EPA from beginning
9 construction at all sites or providing additional funds needed to address sites in a
10 manner believed necessary by regional officials, and caused projects to be
11 segmented into phases and/or scaled back to accommodate available funding. ...
12 [A]s discussed in the body of this report and in the enclosures, sufficient funds
13 were not available to address a limited number of removal, pipeline, and remedial
14 action sites. We estimate that the FY 2003 site-specific funding shortfall was
15 \$174.9 million.

16 OIG Report at page 1.

17 32. The OIG Report further explained the ramifications of the \$174.9 million shortfall
18 in the Superfund program:

19 When funding is not sufficient, construction at National Priority List (NPL) sites
20 cannot begin; cleanups are performed in less than an optimal manner; and/or
21 activities are stretched over longer periods of time. As a result, total project costs
22 may increase and actions needed to fully address the human health and
23 environmental risk posed by the contaminants are delayed.

24 OIG Report at page 4.

25 33. The OIG Report describes numerous specific Superfund sites where cleanup was
26 delayed, performed in a less than an optimal manner, or where activities were performed over
27 longer periods of time. Such delays in cleanup and reduction in the scope of remedial action
28 threaten to expose people and the environment to hazardous substances.

 34. Numerous facilities that produce, treat, transport, store, or dispose of hazardous
substances and that have released hazardous substances to the environment (in addition to those

1 under Subtitle C of the Solid Waste Disposal Act and other Federal law) present a threat to
2 human health or the environment and require cleanup pursuant to sections 104 or 106 of
3 CERCLA. 42 U.S.C. §§ 9604 and 9606.

4 35. No regulations promulgated by either EPA or DOT under CERCLA require such
5 facilities to establish and maintain evidence of financial responsibility consistent with the
6 duration of risk associated with the production, treatment, transportation, storage, or disposal of
7 hazardous substances. A substantial number of facilities did not establish and do not now
8 maintain evidence of financial responsibility consistent with the duration of risk associated with
9 the production, treatment, transportation, storage, or disposal of hazardous substances.

10 36. CERCLA required the promulgation of financial assurance regulations to reduce
11 the risk of “orphan” sites where releases of hazardous substances require publicly funded
12 cleanups and to reduce the delays and inadequacies of such cleanups. The lack of financial
13 assurance regulations increases the risks of such orphan sites and hence increases the risk that
14 hazardous substance releases will be cleaned up more slowly, or less completely, than would be
15 the case if such regulations were in place.

16 CAUSES OF ACTION

17 FIRST CLAIM FOR RELIEF 18 VIOLATION OF 42 U.S.C. § 9608(B)(1)

19 37. CERCLA requires defendants to prioritize, promulgate, and implement
20 regulations governing financial responsibility requirements for facilities involved with the
21 production, treatment, transportation, storage or disposal of hazardous substances. 42 U.S.C.
22 § 9608(b)(1). Such duties were imposed in 1980.

23 38. Defendants have failed to comply with the requirements of 42 U.S.C.
24 § 9608(b)(1). No regulations have been proposed, let alone promulgated or implemented.

25 39. Defendants’ failure to comply with 42 U.S.C. § 9608(b)(1) constitutes a “failure
26 of the President or of such other officer to perform any act or duty under this chapter . . . which
27

1 is not discretionary with the President or such other officer” within the meaning of 42 U.S.C.
2 § 9659(a)(2).

3 SECOND CLAIM FOR RELIEF
4 VIOLATION OF 5 U.S.C. § 706

5 40. The Administrative Procedure Act provides Courts with jurisdiction to “compel
6 agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The APA also
7 authorizes review of agency action, which includes an agency’s “failure to act.” 5 U.S.C.
8 § 551(13).

9 41. Defendants failure to prioritize, promulgate, and implement regulations governing
10 financial responsibility requirements for facilities involved with the production, treatment,
11 transportation, storage, or disposal of hazardous substances constitutes agency action unlawfully
12 withheld or unreasonably delayed, in violation of the APA. The action is unlawfully withheld
13 because it is required by CERCLA. Moreover, a delay of over 20 years is inherently
14 unreasonable, particularly in light of the importance Congress has assigned to the protection of
15 people and the environment from hazardous substances.

16 RELIEF REQUESTED

17 WHEREFORE, plaintiffs request that this Court:

18 1. Declare that defendants’ failure to publish notice of the identification of classes for
19 which financial responsibility requirements would first be developed and their failure to promulgate
20 requirements that classes of facilities establish and maintain evidence of financial responsibility
21 consistent with the degree and duration of risk associated with the production, treatment,
22 transportation, storage, or disposal of hazardous substances constitutes a violation of CERCLA
23 § 108(b) and/or APA 5 U.S.C. § 706.

24 2. Enjoin defendants Johnson and Peters to comply with the nondiscretionary
25 requirements of CERCLA § 108(b). Specifically, plaintiffs ask that this Court order defendants to:
26 a) identify classes for which financial responsibility requirements would first be developed; b) order
27

1 defendants to publish proposed regulations establishing requirements that classes of facilities
2 establish and maintain evidence of financial responsibility consistent with the degree and duration
3 of risk associated with the production, treatment, transportation, storage, or disposal of hazardous
4 substances; and publish a final rule establishing requirements that classes of facilities establish and
5 maintain evidence of financial responsibility consistent with the degree and duration of risk
6 associated with the production, treatment, transportation, storage, or disposal of hazardous
7 substances.

8 3. Retain jurisdiction of this action to ensure compliance with its decree;

9 4. Award plaintiffs their reasonable fees, costs, expenses and disbursements, including
10 attorneys' fees, associated with this litigation; and

11 5. Grant plaintiffs such further and additional relief as the Court deems just and proper.

12 Respectfully submitted this 11th day of March, 2008.

13
14 /s/ Jan Hasselman

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