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10 **IN THE U.S. DISTRICT COURT**

11 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

12 EL COMITÉ PARA EL BIENESTAR DE EARLIMART, )  
et al., )

13 Plaintiffs, )

14 v. )

15 MARY-ANN WARMERDAM, et al., )

16 Defendants, )

17 AIR COALITION TEAM, )

18 Intervenor. )  
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CIV.S-04-0882 LKK KJM

**FIRST AMENDED  
COMPLAINT**

**Hon. Lawrence K. Karlton**

1 **INTRODUCTION**

2 1. Plaintiffs El Comité para el Bienestar de Earlimart, Association of Irrigated  
3 Residents, Community and Children's Advocates Against Pesticide Poisoning, Wishtoyo  
4 Foundation, and Ventura CoastKeeper (collectively "El Comité") bring this citizen suit under §  
5 304(a)(1) of the Clean Air Act, 42 U.S.C. § 7604(a)(1), to compel Paul Helliker, Director,  
6 Department of Pesticide Regulation; Terry Tamminen, Secretary, California Environmental  
7 Protection Agency; Catherine Witherspoon, Executive Officer, Air Resources Board; Alan  
8 Lloyd, Chairman, Air Resources Board; and William Burke, Joseph Calhoun, Dorene D'Adamo,  
9 Mark DeSaulnier, C. Hugh Friedman, William F. Friedman, Matthew McKinnon, Barbara  
10 Patrick, Barbara Riordan, and Ron Roberts, Members, Air Resources Board (collectively  
11 "Helliker") in their official capacities to adopt, implement, and submit to the U.S. Environmental  
12 Protection Agency ("U.S. EPA") regulations to reduce volatile organic compound ("VOC")  
13 emissions from pesticide use as required by the 1994 Ozone State Implementation Plan ("SIP").

14 2. The SIP contains a commitment, enforceable by citizen suit, to reduce VOC  
15 emissions from agricultural and commercial structural pesticide use by 20% from 1990 levels by  
16 the year 2005 in the Sacramento, San Joaquin Valley, Southeast Desert, Ventura, and South  
17 Coast Nonattainment Areas. The SIP commits the State to reduce pesticide-related VOC  
18 emissions through voluntary means. However, if voluntary controls fail to meet interim  
19 percentage reduction targets in 1996, 1999, or 2002, then the Department of Pesticide Regulation  
20 must adopt and implement regulations that will achieve the 2005 goal.

21 3. The Sacramento, San Joaquin Valley, and Ventura Nonattainment Areas failed to  
22 meet the 1996, 1999, and 2002 percentage reductions. The Southeast Desert Nonattainment Area  
23 failed to meet the 1999 and 2002 percentage reductions.

24 4. The Department of Pesticide Regulation has failed to adopt regulations by June  
25 15, 1997 and since June 15, 1997 as required by the SIP. Once U.S. EPA approved the SIP,  
26 effective February 7, 1997, the pesticide commitment became an enforceable strategy, and the  
27 Department of Pesticide Regulation and the Air Resources Board are obligated to strictly comply  
28 with the strategy, including the associated deadlines.

1 **JURISDICTION AND VENUE**

2 5. This Court has jurisdiction to compel Helliker, in their official capacities, to adopt  
3 and implement emissions standards and limitations contained in a U.S. Environmental Protection  
4 Agency-approved State Implementation Plan pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. §  
5 1331.

6 6. El Comité has provided Helliker, U.S. Environmental Protection Agency  
7 Administrator Michael Leavitt, U.S. Environmental Protection Agency Region IX Administrator  
8 Wayne Nastri, and California Governor Arnold Schwarzenegger with written notice at least 60  
9 days prior to commencing this citizen suit, as required by § 304(b)(1), 42 U.S.C. § 7604(b)(1)  
10 and §§ 54.2 and 54.3 of Title 40 of the Code of Federal Regulations. *See* Exhibit A, Letter from  
11 El Comité, to Paul Helliker, *et al.*, dated March 4, 2004.

12 7. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b)(1) because this is an  
13 action brought under federal question jurisdiction and the state agencies with which Helliker is  
14 affiliated are headquartered in Sacramento, California. Venue is also proper in this Court under  
15 28 U.S.C. § 1391(b)(2) because the omissions giving rise to the claim in this citizen suit occurred  
16 within this judicial district. Assignment to the Sacramento Division of this Court is proper under  
17 Civil Local Rule 3-120(b) because this action arises in the County of Sacramento.

18 **PARTIES**

19 8. Plaintiff EL COMITÉ PARA EL BIENESTAR DE EARLIMART (in English,  
20 The Committee for the Betterment of Earlimart) is an unincorporated association dedicated to  
21 protecting environmental health, advocating for air quality, and reducing pesticide use. El  
22 Comité educates and informs residents of Earlimart and surrounding communities in the San  
23 Joaquin Valley about pesticides and pesticide air pollution with meetings, flyers, word of mouth,  
24 media, posters, and newspaper editorials. El Comité provides communities with technical  
25 assistance in order to respond to pesticide drift accidents and to work with state and local  
26 agencies. El Comité appears before the San Joaquin Valley Air Pollution Control District and  
27 advocates for air quality.

28 9. Plaintiff ASSOCIATION OF IRRITATED RESIDENTS is an unincorporated

1 association that advocates for air quality and environmental health in the San Joaquin Valley.  
2 Members reside in Kern, Tulare, and Stanislaus counties.

3 10. Plaintiff COMMUNITY AND CHILDREN’S ADVOCATES AGAINST  
4 PESTICIDE POISONING (“CCAAPP”) is a California non-profit, membership organization  
5 whose purpose is to educate communities and schools about the dangers of pesticide drift, and to  
6 protect children and communities from harmful pesticide exposure. CCAAPP, based in Ventura  
7 County, advocates for reduced pesticide use and community health.

8 11. Plaintiff WISHTOYO FOUNDATION is a California non-profit, membership  
9 organization and a Native American organization that utilizes traditional Chumash cultural  
10 values and practices to foster environmental awareness. Wishtoyo Foundation protects and  
11 preserves the culture and history of coastal communities and fosters responsibility to our  
12 environment through research, education, community action and where necessary, citizen  
13 enforcement. The Foundation, based in Ventura, aims to utilize traditional Chumash beliefs,  
14 practices, songs, stories and dances to create self-respect and a greater awareness of our  
15 connection with, and dependence upon, the natural environment.

16 12. Plaintiff VENTURA COASTKEEPER is a project of the Wishtoyo Foundation, a  
17 member of the National WaterKeeper Alliance, and a community-based, non-profit, membership  
18 organization dedicated to protecting, preserving and restoring Ventura County’s marine habitat,  
19 coastal waters, and watershed. Ventura CoastKeeper strives to maintain a healthy environment  
20 for everyone in Ventura through advocacy, education, enforcement and citizen action.

21 13. Members of the plaintiff organizations live, work, recreate, and raise their families  
22 in the San Joaquin Valley and Ventura nonattainment areas. Smog levels that exceed the one-  
23 hour and eight-hour National Ambient Air Quality Standards for ground-level ozone adversely  
24 affect members. These adverse effects include lung damage, exacerbated respiratory disease, and  
25 perceived threats to their health, the health of their children, neighbors, and students. Members’  
26 aesthetic enjoyment of the environment in the San Joaquin Valley, Sierra Nevada Mountains, and  
27 Ventura County is also harmed by smoggy skies with diminished visibility.

28 14. Helliker’s on-going violations of the Clean Air Act have injured and continue to

1 injure members of plaintiff organizations. The relief requested in this lawsuit would remedy  
2 members' injuries by reducing emissions of smog-forming chemicals and improving air quality  
3 in the San Joaquin Valley and Ventura County.

4 15. Defendant PAUL HELLIKER is the Director of the California Department of  
5 Pesticide Regulation ("DPR"), the entity that the SIP identifies as the state agency that  
6 committed to adopt, implement, and enforce the State Implementation Plan for Agricultural and  
7 Commercial Structural Pesticides ("Pesticide Element"), a component of the SIP. The Director  
8 of DPR has authority to adopt regulations necessary to carry out DPR's pesticide regulatory  
9 duties, California Food & Agriculture Code § 12781 ("Food & Ag."), has authority to regulate  
10 environmentally-harmful materials, Food & Ag. § 14102, and has authority to eliminate from use  
11 in the State any pesticide that endangers the agricultural or nonagricultural environment. Food &  
12 Ag. § 12824.

13 16. Defendant TERRY TAMMINEN is the Secretary of the California Environmental  
14 Protection Agency. The DPR and the Air Resources Board ("ARB") are agencies within the  
15 California Environmental Protection Agency. The Secretary of the California Environmental  
16 Protection Agency has the power of general supervision over DPR and ARB. California  
17 Government Code § 12850.

18 17. Defendant CATHERINE WITHERSPOON is the Executive Officer of the ARB  
19 the state agency responsible for the preparation of the State Implementation Plan and the  
20 designated "air pollution control agency for all purposes set forth in federal law." California  
21 Health & Safety Code § 39602. The ARB shall adopt and submit implementation plans to  
22 achieve the National Ambient Air Quality Standards by the applicable attainment dates under the  
23 Clean Air Act ("Act"), 42 U.S.C. § 7410. The ARB, on behalf of DPR, submitted the Pesticide  
24 Element and subsequent clarifications as part of the SIP to the U.S. EPA.

25 18. Defendant ALAN C. LLOYD is the Chairman of the Air Resources Board.  
26 Defendants WILLIAM BURKE, JOSEPH CALHOUN, DORENE D'ADAMO, MARK  
27 DESAULNIER, C. HUGH FRIEDMAN, WILLIAM F. FRIEDMAN, MATTHEW  
28 MCKINNON, BARBARA PATRICK, BARBARA RIORDAN, RON ROBERTS are Members

1 of the ARB. The Chairman and the Members comprise the eleven-member decision-making  
2 body of the ARB. The Governor appoints the Chairman and Members with the consent of the  
3 Senate. ARB adopted the SIP on November 15, 1994, including the Pesticide Element, and  
4 submitted the SIP to the U.S. EPA on the same day.

5 19. El Comité files this suit against PAUL HELLIKER, TERRY TAMMINEN,  
6 CATHERINE WITHERSPOON, ALAN C. LLOYD, WILLIAM BURKE, JOSEPH CALHOUN,  
7 DORENE D'ADAMO, MARK DESAULNIER, C. HUGH FRIEDMAN, WILLIAM F.  
8 FRIEDMAN, MATTHEW MCKINNON, BARBARA PATRICK, BARBARA RIORDAN, and  
9 RON ROBERTS in their official capacities.

### 10 **FACTS**

11 20. The general purpose of the Clean Air Act, as adopted in 1970 and amended in  
12 1977 and 1990, is “to protect and enhance the quality of the Nation’s air resources so as to  
13 promote the public health and welfare and the productive capacity of its population.” 42 U.S.C.  
14 § 7401(b)(1).

15 21. To further this purpose, the Act requires EPA to set National Ambient Air Quality  
16 Standards for certain air pollutants, including ground-level ozone, that threaten public health and  
17 welfare. 42 U.S.C. § 7409.

18 22. The U.S. EPA set the one-hour National Ambient Air Quality Standard  
19 (“NAAQS”) for ozone at 0.12 parts per million by volume, a level sufficient to protect human  
20 health with an adequate margin of safety. An area complies with the 1-hour ozone standard  
21 when measured ozone levels do not exceed 0.12 parts per million by volume at any monitoring  
22 station in the area on more than one day per year over any three year period. 40 C.F.R. § 50.9.

23 23. EPA set the eight-hour ozone standard at 0.08 parts per million measured over the  
24 daily maximum eight-hour average. 40 C.F.R. § 50.10.

25 24. The Clean Air Act, as amended in 1990, requires states to adopt implementation  
26 plans to achieve the National Ambient Air Quality Standards by the applicable attainment dates  
27 under the Act. 42 U.S.C. § 7410.

28 25. The U.S. EPA must approve or disapprove state implementation plans or state

1 implementation plan revisions as consistent with the Clean Air Act. Once approved, a state  
2 implementation plan's requirements become federal law.

3 26. The Sacramento and Ventura nonattainment areas are designated "severe"  
4 nonattainment for the one-hour ozone NAAQS.

5 27. The Southeast Desert Nonattainment area is designated "severe 17" nonattainment  
6 for the one-hour ozone NAAQS.

7 28. The San Joaquin Valley and the South Coast nonattainment areas are designated  
8 "extreme" nonattainment for the one-hour ozone NAAQS.

9 29. The Sacramento and San Joaquin Valley nonattainment areas are designated  
10 "serious" for the eight-hour ozone NAAQS.

11 30. The Southeast Desert and Ventura nonattainment areas are designated "moderate"  
12 nonattainment for the eight-hour ozone NAAQS.

13 31. The South Coast Nonattainment Area is designated "extreme" nonattainment for  
14 the eight-hour ozone NAAQS.

15 32. Volatile organic compounds (VOC) react with oxides of nitrogen (NOx) in the  
16 presence of heat and sunlight to form ground-level ozone ("smog"). Chemical products used to  
17 treat agricultural land, agricultural crops, and structures for protection from insects, fungus,  
18 rodents, and other pests (hereafter "pesticides") emit VOC.

19 33. Ozone pollution damages lung tissue, damages crops and vegetation, exacerbates  
20 asthma, reduces lung capacity, increases respiratory and cardiovascular hospital admissions, and  
21 increases school and work absenteeism. Recent research suggests a causal connection between  
22 ozone pollution and asthma.

23 34. On November 15, 1994 the Air Resources Board adopted and submitted the 1994  
24 Ozone State Implementation Plan ("SIP"). The SIP contains the Pesticide Element, as adopted  
25 by the Department of Pesticide Regulation.

26 35. The Pesticide Element, as submitted on November 15, 1994, provided for  
27 voluntary controls to achieve a 20% reduction in VOC emissions from pesticide use by 2005  
28 from a 1990 baseline.



1 from pesticide use by 8%, 12%, and 16% by 1996, 1999, and 2002, respectively.

2 42. The Ventura Nonattainment Area failed to reduce VOC emissions from pesticide  
3 use by 8%, 12%, and 16% by 1996, 1999, and 2002, respectively.

4 43. The Southeast Desert Nonattainment Area failed to reduce VOC emissions from  
5 pesticide use by 12% and 16% by 1999, and 2002, respectively.

6 44. In early 2002, ARB released the California Clean Air Plan, a document that  
7 contained control measures that included no-spray days, product reformulations, and other  
8 control measures designed to reduce pesticide VOC emissions. ARB subsequently withdrew the  
9 California Clean Air Plan, and its proposed pesticide control measures, from consideration  
10 without adoption.

11 45. Helliker failed to adopt and implement regulations that would achieve the  
12 committed reductions in pesticide-related VOC emissions.

#### 13 **FIRST CAUSE OF ACTION**

#### 14 **FAILURE TO ADOPT AND IMPLEMENT REGULATIONS REQUIRED BY THE SIP**

15 46. El Comité realleges and incorporate the allegations contained in paragraphs 1  
16 through 45, inclusive.

17 47. The California Environmental Protection Agency, Department of Pesticide  
18 Regulation, and the Air Resources Board are government instrumentalities or agencies within the  
19 meaning of § 304(a)(1) of the Clean Air Act, 42 U.S.C. § 7640(a)(1).

20 48. The standards, limitations, and schedules contained in the 1994 Ozone State  
21 Implementation Plan, including the May 9, 1995 letter from DPR, were approved by the U.S.  
22 EPA and are “emissions standards or limitations” as defined in § 304(f) of the Clean Air Act, 42  
23 U.S.C. § 7604(f).

24 49. Helliker, acting in their official capacities, have violated an emission standard or  
25 limitation by failing to adopt regulations to reduce pesticide-related VOC emissions by June 15,  
26 1997 as required by the 1994 Ozone State Implementation Plan.

27 50. Helliker’s violations are on-going and will continue unless remedied by an order  
28 from the Court.

1 **SECOND CAUSE OF ACTION**

2 **IMPROPER CALCULATION OF THE 1990 BASELINE EMISSION INVENTORY**

3 51. El Comité realleges and incorporate the allegations contained in paragraphs 1  
4 through 50, inclusive.

5 52. The 1994 Ozone State Implementation Plan commits the Department of Pesticide  
6 Regulation to calculate the 1990 baseline inventory using data from 1991 Pesticide Use Reports  
7 and then adjusted by a factor to represent the 1990 base year.

8 53. The 1994 Ozone State Implementation Plan requires the Department of Pesticide  
9 Regulation to calculate the 1990 baseline inventory using 1991 Pesticide Use Report data  
10 because, according to the Plan, “the 1991 pesticide use report would be a more accurate source to  
11 determine 1990 pesticidal VOC emissions” than using 1990 Pesticide Use Report data.

12 54. In early 1997, the Department of Pesticide Regulation used 1990 Pesticide Use  
13 Report data to calculate the 1990 baseline inventory.

14 55. By using 1990 Pesticide Use Report data, the 1990 baseline inventory of  
15 pesticide-related VOC emissions increased in the San Joaquin Valley, Ventura, and Southeast  
16 Desert Nonattainment Areas compared to the 1990 baseline as calculated using adjusted 1991  
17 Pesticide Use Report data. This increase allowed the San Joaquin Valley and Ventura  
18 Nonattainment Areas to appear to meet the reduction goals in the 1994 Ozone State  
19 Implementation Plan.

20 56. By using 1990 Pesticide Use Report data, the 1990 baseline inventory increased  
21 by 55% in the San Joaquin Valley Nonattainment Area, 68% in the Ventura Nonattainment Area,  
22 and 10% in the Southeast Desert Nonattainment Area compared to the 1990 baseline as  
23 calculated using adjusted 1991 Pesticide Use Report data.

24 57. The Department of Pesticide Regulation used the inflated 1990 baseline calculated  
25 with 1990 Pesticide Use Report data in violation of the 1994 Ozone State Implementation Plan as  
26 the basis for its April 1997 decision that regulations were not necessary.

27 58. Defendants, acting in their official capacities, have violated an emission standard  
28 or limitation by manipulating the 1990 baseline inventory to avoid adopting regulations to reduce

1 pesticide-related VOC emissions by June 15, 1997 as required by the 1994 Ozone State  
2 Implementation Plan.

3 59. Defendants' violations are on-going and will continue unless remedied by an  
4 order from the Court.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, El Comité respectfully requests that the Court grant the following relief:

- 7 A. Issue an order declaring that Helliker is in violation of the Clean Air Act and the  
8 1994 Ozone State Implementation Plan by failing to adopt and implement  
9 regulations necessary to reduce pesticide-related VOC emissions as specified by  
10 the 1994 State Implementation Plan;
- 11 B. Issue a preliminary and permanent injunction directing Helliker to adopt,  
12 implement, and submit to the U.S. EPA regulations necessary to reduce pesticide-  
13 related VOC emissions by 20% from the 1990 baseline for the Sacramento, San  
14 Joaquin Valley, Ventura, and Southeast Desert nonattainment areas no later than  
15 January 1, 2005;
- 16 C. Retain jurisdiction over this matter until Helliker has complied with their duty to  
17 fully implement the regulations in paragraph B;
- 18 D. Award El Comité its costs of litigation, including reasonable attorney and expert  
19 witness fees, pursuant to § 304(d) of the Act, 42 U.S.C. § 7604(d); and
- 20 E. Provide such additional relief as the Court deems just and proper.

21  
22 Dated: July 14, 2005

Respectfully submitted,

23  
24 /s/ Brent Newell  
25 Brent Newell  
26 Attorney for Plaintiffs  
27 El Comité para el Bienestar de Earlimart,  
28 Association of Irrigated Residents, Community and  
Children's Advocates Against Pesticide Poisoning,  
Wishtoyer Foundation, and Ventura CoastKeeper