

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN LUNG ASSOCIATION,)
ENVIRONMENTAL DEFENSE,)
NATURAL RESOURCES DEFENSE)
COUNCIL, SIERRA CLUB,)
ALABAMA ENVIRONMENTAL)
COUNCIL, CLEAN AIR COUNCIL,)
MICHIGAN ENVIRONMENTAL)
COUNCIL, OHIO ENVIRONMENTAL)
COUNCIL, and SOUTHERN ALLIANCE)
FOR CLEAN ENERGY,)
Plaintiffs,)
v.)
CHRISTINE TODD WHITMAN,)
Administrator, United States Environmental)
Protection Agency, and UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY,)
Defendants.)

C.A. No. 03-778 (ESH)

CONSENT DECREE

WHEREAS, Plaintiffs filed the complaint in this Action on March 31, 2003, against Defendants Christine Todd Whitman, Administrator of the United States Environmental Protection Agency, and United States Environmental Protection Agency (collectively "EPA");

WHEREAS, Plaintiffs' complaint seeks *inter alia* an order directing EPA, under 42 U.S.C. § 7409(d)(1), to (a) complete a thorough review of the air quality criteria and primary and secondary national ambient air quality standards ("NAAQS") for particulate matter and for ozone, (b) make such revisions in the foregoing criteria and NAAQS, and promulgate such new NAAQS, as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b), and (c) publish in the Federal Register pursuant to 42 U.S.C. § 7607(d) EPA's proposed and final decisions concerning such review, including any new and/or revised NAAQS, and also publish in the Federal Register pursuant to 42 U.S.C. § 7408(d) notice of the issuance of revised air quality criteria;

WHEREAS, the Parties agree that this Court has jurisdiction under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a);

WHEREAS, the Parties seek to effect a settlement of this Action without expensive and protracted litigation;

WHEREAS, the Parties have agreed to a settlement of this Action without any admission or adjudication of fact or law;

WHEREAS, the Parties agree that this settlement represents a good faith compromise of disputed claims;

WHEREAS, EPA intends to issue a fourth draft Criteria Document for particulate matter by June 30, 2003;

WHEREAS, EPA intends to issue a first draft Staff Paper and Risk Assessment for particulate matter by August 31, 2003;

WHEREAS, EPA anticipates that, by August 31, 2003, CASAC will review the fourth draft criteria document for particulate matter and hold a meeting concerning such document;

WHEREAS, EPA anticipates that, by November 30, 2003, CASAC will review the first draft Staff Paper and Risk Assessment for particulate matter and hold a meeting concerning such document;

WHEREAS, EPA intends to issue a second draft Staff Paper and Risk Assessment for particulate matter by April 30, 2004;

WHEREAS, EPA anticipates that, by July 31, 2004, CASAC will review the second draft Staff Paper and Risk Assessment for particulate matter and hold a meeting concerning such document;

WHEREAS, EPA intends to issue a final Staff Paper and Risk Assessment for particulate matter by September 30, 2004;

WHEREAS, EPA intends to issue a first draft Criteria Document for ozone by September 30, 2003;

WHEREAS, EPA anticipates that, by January 31, 2004, CASAC will review the first draft Criteria Document for ozone and hold a meeting concerning such document;

WHEREAS, EPA intends to issue a second draft Criteria Document and first draft Staff Paper and Risk Assessment for ozone by June 30, 2004;

WHEREAS, EPA anticipates that, by October 31, 2004, CASAC will review the second draft Criteria Document for ozone and first draft Staff Paper and Risk Assessment for ozone and hold a meeting concerning such documents;

WHEREAS, EPA intends to issue a second draft Staff Paper and Risk Assessment for ozone by March 31, 2005;

WHEREAS, EPA anticipates that, by June 30, 2005, CASAC will review the second draft Staff Paper and Risk Assessment for ozone and hold a meeting concerning such document;

WHEREAS, EPA intends to issue a final Staff Paper and Risk Assessment for ozone by September 30, 2005;

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ordered, adjudged, and decreed that:

DEFINITIONS

1. For the purposes of this Consent Decree, the following terms shall have the following meaning:

a. "CASAC" shall mean the independent scientific review committee referenced in 42 U.S.C. § 7409(d)(2), otherwise known as the Clean Air Scientific Advisory Committee.

b. "Criteria Document" shall mean a document containing air quality criteria for an air pollutant required to be published by 42 U.S.C. § 7408.

c. "Staff Paper and Risk Assessment" shall mean documents that evaluate the policy implications of, and analyze risk to public health based on, key studies and scientific information contained in the Criteria Document.

EPA OBLIGATIONS

2. a. No later than December 19, 2003, EPA shall issue a final Criteria Document for particulate matter.

b. No later than March 31, 2005, EPA shall sign for publication in the Federal Register a notice of proposed rulemaking setting forth its proposed decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for particulate matter promulgated under 42 U.S.C. § 7409, and proposing such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b).

c. No later than December 20, 2005, EPA shall sign for publication in the Federal Register a notice of final rulemaking setting forth its final decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for particulate

matter and promulgating such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b).

d. No later than ten business days following issuance of the Criteria Document referenced in paragraph 2.a. above, EPA shall deliver a notice of such issuance to the Office of the Federal Register for prompt publication. No later than ten business days following signature of the notice of proposed rulemaking referenced in paragraph 2.b. above, EPA shall deliver said notice to the Office of the Federal Register for prompt publication. No later than ten business days following signature of the notice of final rulemaking referenced in paragraph 2.c. above, EPA shall deliver said notice to the Office of the Federal Register for prompt publication. Following delivery to the Office of the Federal Register of the notices referenced in this paragraph, EPA shall not take any step (other than as necessary to correct within 10 calendar days after submittal any typographical or other errors in form) to delay or otherwise interfere with publication of such notices in the Federal Register. EPA shall make available to Plaintiffs, within five business days following signature by the Administrator or her delegate, copies of the Criteria Document referenced in paragraph 2.a. and of the notices delivered to the Office of the Federal Register pursuant to paragraphs 2.a through 2.c.

3. a. No later than December 20, 2004, EPA shall issue a final Criteria Document for ozone.

b. No later than March 31, 2006, EPA shall sign for publication in the Federal Register a notice of proposed rulemaking setting forth its proposed decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for ozone promulgated under 42 U.S.C. § 7409, and proposing such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b).

c. No later than December 20, 2006, EPA shall sign for publication in the Federal Register a notice of final rulemaking setting forth its final decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for ozone and promulgating such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b).

d. No later than ten business days following issuance of the Criteria Document referenced in paragraph 3.a. above, EPA shall deliver a notice of such issuance to the Office of the Federal Register for prompt publication. No later than ten business days following signature of the notice of proposed rulemaking referenced in paragraph 3.b. above, EPA shall deliver said notice to the Office of the Federal Register for prompt publication. No later than ten business days following signature of the notice of final rulemaking referenced in paragraph 3.c. above, EPA shall deliver said notice to the Office of the Federal Register for prompt publication. Following delivery to the Office of the Federal Register of the notices referenced in this paragraph, EPA shall not take any step (other than as necessary to correct within 10 calendar days after submittal any typographical or other errors in form) to delay or otherwise interfere with publication of such notices in the Federal Register. EPA shall make available to Plaintiffs,

within five business days following signature by the Administrator or her delegate, copies of the Criteria Document referenced in paragraph 3.a. and of the notices delivered to the Office of the Federal Register pursuant to paragraphs 3.a through 3.c.

MODIFICATION OF THIS DECREE

4. The Parties may extend the deadlines established in Paragraphs 2 and 3 by written stipulation executed by counsel for the Parties and filed with the Court. In addition, any provision of this Consent Decree may be modified by the Court upon motion by any party to this Consent Decree demonstrating that such modification is consistent with law and in the public interest, after consideration of any response by the non-moving party.

5. Consistent with paragraph 4, EPA may request modification of the deadlines set out in this Consent Decree in accordance with the following procedures:

a. If EPA seeks to modify a deadline established by this Consent Decree, EPA shall make its best efforts to provide notice to Plaintiffs at least 30 days prior to the deadline that EPA seeks to modify.

b. If EPA seeks to modify a deadline established by this Consent Decree, but has not given Plaintiffs' counsel the advance notice specified in subparagraph a of this paragraph, then EPA shall notify Plaintiffs' counsel in writing of the reasons why such prior notice was not practicable. Such notice shall be given by such means as to be received by Plaintiffs' counsel no later than the date when the motion to modify is filed with the Court.

CONTINUING JURISDICTION AND TERMINATION

6. a. The Court shall retain jurisdiction to effectuate compliance with this Consent Decree and to consider any requests for costs of litigation (including attorney's fees). When EPA has discharged its obligations under Paragraphs 2 and 3 above, then this case shall be dismissed with prejudice.

b. Notwithstanding such dismissal, if (1) Plaintiff(s) to this Consent Decree seek judicial review in the court of appeals of any action taken by EPA pursuant to this Consent Decree, and (2) the court of appeals rules that such challenge is not within the jurisdiction of the court of appeals, any dismissal of the instant action shall not preclude Plaintiff(s) from bringing a district court action challenging any such action. Should any final action taken by EPA under Paragraphs 2 and 3 be vacated in whole or part by a United States Court of Appeals under section 307(b)(1) of the Clean Air Act, any dismissal of the instant case shall not preclude any party's right, which is expressly reserved, to argue in a new lawsuit whether a claim exists for EPA to perform the actions sought by Plaintiffs' complaint herein, the court in which such a lawsuit and claim might be heard, and the jurisdictional basis for any such lawsuit and claim. With the exception of the defense that the claim is barred by preclusion principles, due to the

dismissal of the case with prejudice, EPA reserves all its defenses to any such argument, including the defense that the actions sought have been performed.

c. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Decree, the disputing party shall contact the other party to confer and attempt to reach an agreement on the disputed issue. If the parties cannot reach an agreed-upon resolution, then either party may move the Court to resolve the dispute.

SAVINGS PROVISIONS

7. The obligations imposed on EPA under Paragraphs 2 and 3 of this Consent Decree can only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.

8. Nothing in this Consent Decree shall be considered to limit or modify any discretion EPA may have to alter, amend, or revise the actions taken pursuant to Paragraphs 2 and 3 of this Consent Decree.

9. Nothing in the terms of this Decree shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law, in taking the actions referred to in Paragraphs 2 and 3. EPA's obligation to perform the actions specified in Paragraphs 2 and 3 of this Decree, by the dates specified in said paragraphs, does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

10. Nothing in the terms of this Consent Decree shall be construed either (a) to confer upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), or (b) to waive any remedies Plaintiffs may have under section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Decree shall be construed to confer upon the district court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree.

ATTORNEY FEES AND COSTS

11. The deadline for filing a motion for costs of litigation (including attorney's fees) for activities performed prior to entry of this Consent Decree in this case is hereby extended until 120 days after entry of this Consent Decree by the Court. During this time the parties shall seek to resolve informally any claim for costs of litigation (including attorney's fees), and if they cannot, will submit that issue to the Court for resolution. The Court shall retain jurisdiction to resolve any request for costs of litigation (including attorney's fees), notwithstanding any dismissal pursuant to Paragraph 6 above.

SECTION 113(g)

12. The Parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). EPA will expeditiously prepare such notice and forward it to the Office of Federal Register within 15 days of lodging the draft Consent Decree with the Court. After this Consent Decree has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree, in accordance with section 113(g) of the Clean Air Act. If the federal government elects not to withdraw or withhold consent to this Consent Decree, the parties shall promptly file a motion that requests the Court to enter this Consent Decree. If a motion to enter the Consent Decree is not filed within 90 days after the notice is published in the Federal Register, any party may file dispositive motions in this matter.

RECIPIENTS OF NOTIFICATION

13. Any notices required or provided for by this Decree shall be in writing, effective upon receipt, and sent to the following:

For Plaintiffs:

Howard Fox
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, D.C. 20036-2212

Ann B. Weeks
Clean Air Task Force
77 Summer Street, 8th Floor
c/o Grants Management Associates
Boston, MA 02110

For Defendants:

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United States Department of Justice
P.O. Box 23986
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or such other person as either party may subsequently identify in writing to the other party.

SIGNATURE OF PARTIES

14. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to consent to the Court's entry of the terms and conditions of this Consent Decree.

For Plaintiffs

Dated: _____

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For Defendants

Dated: _____

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SO ORDERED this _____ day of _____, 2003

UNITED STATES DISTRICT JUDGE