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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

SIERRA CLUB,

Plaintiff,

v.

GINA McCARTHY, in her official capacity  
as the Administrator of the United States  
Environmental Protection Agency,

Defendant.

Case No. 3:15-cv-04328-JD

**NOTICE OF LODGING OF  
PROPOSED CONSENT DECREE**

Defendant Gina McCarthy, in her official capacity as the Administrator of the United States Environmental Protection Agency (“EPA”), hereby lodges with the Court a proposed Consent Decree that contains the terms of a proposed settlement of this action. See Exhibit A, Proposed Consent Decree.

**The proposed consent decree should not be signed or entered by the Court at this time.** Pursuant to section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), the Consent Decree is not final and cannot be entered by the Court until the EPA Administrator provides “a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action” to comment in writing

1 upon the proposed Decree. Accordingly, EPA will publish in the Federal Register a  
2 notice of the proposed Consent Decree and request comments. After the public comment  
3 period ends, the EPA Administrator and the Attorney General, as appropriate, will  
4 promptly consider any written comments received and, if none of the comments disclose  
5 facts or considerations which indicate that the proposed Consent Decree is inappropriate,  
6 improper, inadequate, or inconsistent with the requirements of the Clean Air Act, EPA  
7 will move for entry of the Decree.

8  
9 Respectfully submitted,

10 Date: June 20, 2016

JOHN C. CRUDEN  
Assistant Attorney General  
Environment & Natural Resources Division

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12  
13 /s/ Leslie M. Hill

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19 [additional attorneys for Plaintiff included in signature block]

20 Attorneys for Plaintiff

21 **IN THE UNITED STATES DISTRICT COURT**  
22 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
23 **SAN FRANCISCO DIVISION**

24 SIERRA CLUB,

25 Plaintiff,

26 v.

27 GINA McCARTHY, in her official capacity  
28 as the Administrator of the United States  
Environmental Protection Agency,

Defendant.

Case No. 3:15-cv-04328-JD

**[PROPOSED] PARTIAL CONSENT  
DECREE**

1           WHEREAS, on September 22, 2015, Plaintiff Sierra Club (“Plaintiff”) filed the  
2 above-captioned matter against Gina McCarthy, in her official capacity as Administrator  
3 of the United States Environmental Protection Agency (hereinafter “EPA” or  
4 “Defendant”) (Dkt. No. 1);

5           WHEREAS, on February 9, 2016, pursuant to Fed. R. Civ. P. 15(a)(2), Plaintiff  
6 filed a first amended complaint (Dkt. No. 29) (the “Complaint”);

7           WHEREAS, Plaintiff alleges that EPA has failed to undertake certain non-  
8 discretionary duties under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and  
9 that such alleged failure is actionable under section 304(a)(2) of the CAA, 42  
10 U.S.C. § 7604(a)(2);

11           WHEREAS, on March 12, 2008, pursuant to CAA section 109(a)(1), 42 U.S.C. §  
12 7409(d)(1), EPA promulgated a final rule revising the ozone National Ambient Air  
13 Quality Standard (“NAAQS”), *Final Rule*, 73 Fed. Reg. 16,436 (Mar. 27, 2008) (the  
14 “2008 ozone NAAQS”);

15           WHEREAS, pursuant to CAA section 110(d)(1), 42 U.S.C. § 7410(d)(1), “[e]ach  
16 State shall, . . . submit to the Administrator, within 3 years . . . after the promulgation of a  
17 [NAAQS] (or revision thereof) under section 7409 of this title for any air pollutant, a plan  
18 which provides for implementation, maintenance, and enforcement of such primary  
19 standard in each air quality control region (or portion thereof) with each State,” a state  
20 implementation plan (“SIP”), often referred to as an infrastructure SIP;

21           WHEREAS, such SIP submittals must meet the requirements set forth in CAA  
22 section 110(a)(2)(A)-(M), 42 U.S.C. § 7410(a)(2)(A)-(M);

23           WHEREAS, EPA must then determine whether a State’s submittal is complete  
24 within six months after EPA receives the submission. 42 U.S.C. § 7410(k)(1)(B). If  
25 EPA does not determine completeness of the plan or revision within six months, then the  
26 submittal is deemed complete by operation of law after six months. *Id.*;

27           WHEREAS, pursuant to CAA section 110(k)(2)-(4), 42 U.S.C. § 7410(k)(2)-(4),  
28 EPA is required to approve in whole or in part, disapprove, or conditionally approve in

1 whole or in part, each plan or revision, within 12 months of a determination of  
2 completeness by EPA or a determination deemed by operation of law to be complete;

3 WHEREAS, pursuant to CAA section 110(d)(1), 42 U.S.C. § 7410(d)(1), states  
4 were required to submit infrastructure SIPs within 3 years of promulgation of the 2008  
5 ozone NAAQS, i.e., by March 12, 2011;

6 WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty  
7 mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final  
8 action to approve or disapprove, in whole or in part, certain 2008 ozone NAAQS  
9 infrastructure SIP submissions addressing the following element or elements under  
10 42 U.S.C. § 7410(a)(2) from the states listed below, *see* Compl. ¶¶ 19-43 (Dkt. No. 29):

AREA/STATE	ELEMENT(S) (under CAA section 110)
Louisiana	42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1–4)
Montana	42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1 and 2)
New York	42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1–4)
South Dakota	42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1 and 2)
Wisconsin	42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1–3)
Wyoming	42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1–4)
New Jersey	42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1–4)

21 WHEREAS, on January 25, 2016, EPA took final action approving Montana’s  
22 and South Dakota’s SIPs addressing the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(I)  
23 (prongs 1 and 2), *Final Rule*, 81 Fed. Reg. 7706 (Feb. 16, 2016), for the 2008 ozone  
24 NAAQS and therefore, Claim 1 is moot as to Montana and South Dakota;

25 WHEREAS, on March 30, 2016, the State of New Jersey stated that it was  
26 withdrawing its SIP submission addressing the requirements of 42 U.S.C. §  
27 7410(a)(2)(D)(i)(I) (prongs 1-2) for the 2008 ozone NAAQS;

1 WHEREAS, on June 6, 2016, EPA took final action finding that New Jersey  
2 failed to submit a SIP addressing the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(I)  
3 (prongs 1-2) for the 2008 ozone NAAQS, *Final Rule*, 81 Fed. Reg. 38,963 (Jun. 15,  
4 2016);

5 WHEREAS, Claim 1 is therefore moot as to New Jersey as to the requirements of  
6 42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1-2);

7 WHEREAS, pursuant to 42 U.S.C. § 7410(c)(1), EPA must “promulgate a  
8 Federal implementation plan [(“FIP”)] at any time within 2 years after the Administrator-  
9 -

10 (A) finds that a State has failed to make a required submission or finds that the  
11 plan or plan revision submitted by the State does not satisfy the minimum criteria  
12 established under subsection (k)(1)(A) of this section, or

13 (B) disapproves a [SIP] submission in whole or in part, unless the State corrects  
14 the deficiency, and the Administrator approves the plan or plan revision, before the  
15 Administrator promulgates such [FIP];”

16 WHEREAS, on January 4, 2013, EPA found that California failed to submit a SIP  
17 addressing the requirements of 42 U.S.C. § 7410(a)(2)(A)-(C), (D)(i)(II)-(H), & (J)-(M)  
18 for the 2008 ozone NAAQS, *Notice*, 78 Fed. Reg. 2882 (Jan. 15, 2013) (effective  
19 February 14, 2015);

20 WHEREAS, in Claim 2, Plaintiff alleges that EPA has failed to perform a duty  
21 mandated by CAA section 110(c)(1)(B), 42 U.S.C. § 7410(c)(1)(B), to promulgate a FIP  
22 within 2 years after finding that California failed to make the required submission,  
23 Compl. ¶ 41;

24 WHEREAS, on November 24, 2015, EPA approved in part and disapproved in  
25 part California’s SIP submission addressing certain requirements of 42 U.S.C. §  
26 7410(a)(2)(A)-(C), (D)(i)(II)-(H), & (J)-(M) for the 2008 ozone NAAQS, *Final Rule*, 81  
27 Fed. Reg. 18,766 (Apr. 1, 2016);

28

1           WHEREAS, Claim 2 is therefore moot as to the approved portions of California’s  
2 SIP addressing the requirements of 42 U.S.C. § 7410(a)(2)(A), (B) (except as to the  
3 ambient air quality monitoring/data system for the Bakersfield Metropolitan Statistical  
4 Area (“MSA”) in San Joaquin Valley Air Pollution Control District (“APCD”)), (C)  
5 (except as to the program for enforcement of control measures and regulation of new and  
6 modified stationary sources), (D)(i)(II) (except as to provisions for the Mendocino, North  
7 Coast, and Northern Sonoma Air Districts to prohibit sources from interfering with other  
8 air agencies’ programs to prevent significant deterioration of air quality), (D)(ii)( except  
9 as to the extent addressed by a FIP pursuant to 40 C.F.R. § 52.270), (E), (F), (G) (except  
10 as to emergency episodes for the Mountain Counties and San Joaquin Valley air quality  
11 control regions (“AQCR”)), (H), (J) (except as to consultation with government officials,  
12 public notification, prevention of significant deterioration, and visibility protection), (K),  
13 (L), & (M) for the 2008 ozone NAAQS;

14           WHEREAS, Claim 2 as to California also fails to state a claim as to a FIP  
15 addressing the requirements of 42 U.S.C. § 7410(a)(D)(ii) for the 2008 ozone NAAQS to  
16 the extent that the requirements to ensure compliance with 42 U.S.C. § 7426(a)(1) are  
17 addressed by a FIP pursuant to 40 C.F.R. § 52.270 for the Amador County, Antelope  
18 Valley, Bay Area, Calaveras County, Colusa County, El Dorado County, Glenn County,  
19 Lake County, Lassen County, Mariposa County, Modoc County, Mojave Desert,  
20 Northern Sierra, San Diego County, Shasta County, Siskiyou County, South Coast,  
21 Tehama County, Tuolumne County, and Ventura County Air Districts;

22           WHEREAS, the relief requested in the Complaint includes, among other things,  
23 an order from this Court to establish a date certain by which EPA must fulfill its  
24 obligations;

25           WHEREAS, Plaintiff and EPA have agreed to a partial settlement of this action  
26 without admission of any issue of fact or law, except as expressly provided herein;  
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1 WHEREAS, Plaintiff and EPA, by entering into this partial Consent Decree (the  
 2 “Consent Decree”), do not waive or limit any claim, remedy, or defense, on any grounds,  
 3 related to any final EPA action;

4 WHEREAS, Plaintiff and EPA consider this Consent Decree to be an adequate  
 5 and equitable resolution of some of the claims in this matter and therefore wish to  
 6 effectuate a partial settlement;

7 WHEREAS, it is in the interest of the public, Plaintiff Sierra Club, Defendant  
 8 EPA, and judicial economy to resolve a substantial portion of this matter without  
 9 protracted litigation;

10 WHEREAS, Plaintiff and EPA agree that this Court has jurisdiction over the  
 11 matters resolved in this Consent Decree pursuant to the citizen suit provision in CAA  
 12 section 304(a)(2), 42 U.S.C. § 7604(a)(2), and that venue is proper in the Northern  
 13 District of California pursuant to 28 U.S.C. § 1391(e) and Civil L.R. 3-2(c)-(d); and

14 WHEREAS, the Court, by entering this Consent Decree, finds that the Consent  
 15 Decree is fair, reasonable, in the public interest, and consistent with the Clean Air Act;

16 NOW THEREFORE, before the taking of testimony, without trial or  
 17 determination of any issues of fact or law, and upon the consent of Plaintiff Sierra Club  
 18 and Defendant EPA, it is hereby ordered, adjudged and decreed that:

19 1. The appropriate EPA official shall:

20 a. sign a notice of final rulemaking to approve, disapprove, conditionally  
 21 approve, or approve in part and conditionally approve or disapprove in part, certain plans  
 22 pursuant to sections 110(k)(2)-(4) of the CAA, 42 U.S.C. §§ 7410(k)(2)-(4), no later than  
 23 the date indicated below for the following states and elements of section 110(a)(2), 42  
 24 U.S.C. §§ 7410(a)(2) for the 2008 ozone NAAQS:

	<b>STATE</b>	<b>SIP ELEMENT(S)</b>	<b>DATE</b>
26	a. Louisiana	42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1 and 2)	August 1, 2016
27	b. Louisiana	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 3 only)	October 3, 2016

	<b>STATE</b>	<b>SIP ELEMENT(S)</b>	<b>DATE</b>
c.	Louisiana	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 4 only)	December 15, 2017
d.	New Jersey	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prongs 3 and 4)	September 30, 2016
e.	New York	42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1, 2, and 4)	August 15, 2016
f.	New York	42 U.S.C. § 7410(a)(2)(D)(i) (prong 3)	November 1, 2016
g.	Wisconsin	42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1 and 2)	August 1, 2016
h.	Wisconsin	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 3 only)	December 16, 2016
i.	Wyoming	42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1 and 2)	November 18, 2016
j.	Wyoming	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 3 only)	September 30, 2016
k.	Wyoming	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 4 only)	November 18, 2016

b. sign a notice of final rulemaking to approve a revised SIP submission, promulgate a FIP, or partially approve a revised SIP submission and promulgate a partial FIP for California no later than the date indicated below for the following elements of section 110(a)(2), 42 U.S.C. §§ 7410(a)(2) for the 2008 ozone NAAQS:

	<b>SIP ELEMENT(S)</b>	<b>DATE</b>
1.	42 U.S.C. § 7410(a)(2)(B)	December 15, 2017
2.	42 U.S.C. § 7410(a)(2)(C), (D)(i)(II), (J) (with respect to the Northern Sonoma Air District)	December 16, 2016
3.	42 U.S.C. § 7410(a)(2)(C), (D)(i)(II), (J) (with respect to the Mendocino Air District)	March 15, 2017
4.	42 U.S.C. § 7410(a)(2)(C), (D)(i)(II), (J) (with respect to the North Coast Air District)	March 15, 2017
5.	42 U.S.C. § 7410(a)(2)(G)	September 23, 2016

1           2. If any State withdraws a submittal listed above in Paragraph 1(a), then EPA's  
2 obligation to take the action required by Paragraph 1(a) with respect to that submittal is  
3 automatically terminated unless Plaintiff moves the Court to address EPA's obligation in  
4 light of the withdrawn submittal. If Plaintiff files such a motion, EPA's obligation to act  
5 on the submittal is stayed pending resolution of said motion. EPA shall notify Plaintiff  
6 within ten business days of receiving a written request from a state to withdraw any  
7 submittal listed in Paragraph 1(a). Nothing in this Consent Decree shall be construed as  
8 an admission of any issue of fact or law nor to waive or limit any claim, remedy, or  
9 defense, on any grounds, related to EPA's obligation in the event that any State  
10 withdraws a submittal listed above in Paragraph 1(a) and Plaintiff files a motion pursuant  
11 to this Paragraph. If EPA signs a finding of failure to submit for the withdrawn submittal  
12 while such a motion is pending, Plaintiff shall withdraw its motion.

13           3. EPA shall, within 15 business days of signature, send the rulemaking package  
14 for each action taken pursuant to Paragraph 1 of this Consent Decree to the Office of the  
15 Federal Register for review and publication.

16           4. After EPA has completed the actions set forth in Paragraph 1 of this Consent  
17 Decree, after notice of each final action required by Paragraph 1 has been published in  
18 the Federal Register, and the issue of costs of litigation (including reasonable attorney  
19 fees) has been resolved), EPA may move to have this Decree terminated. Plaintiff shall  
20 have fourteen (14) days in which to respond to such motion, unless the parties stipulate to  
21 a longer time for Plaintiff to respond.

22           5. The deadlines established by this Consent Decree may be extended (a) by  
23 written stipulation of Plaintiff and EPA with notice to the Court, or (b) by the Court upon  
24 motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure  
25 and upon consideration of any response by Plaintiff and any reply by EPA. Any other  
26 provision of this Consent Decree also may be modified by the Court following motion of  
27 an undersigned party for good cause shown pursuant to the Federal Rules of Civil  
28 Procedure and upon consideration of any response by a non-moving party and any reply.

1           6. If a lapse in EPA appropriations occurs within ninety (90) days prior to a  
2 deadline in Paragraph 1 in this Decree, that deadline shall be extended automatically one  
3 day for each day of the lapse in appropriations. Nothing in this Paragraph shall preclude  
4 EPA from seeking an additional extension of time through modification of this Consent  
5 Decree pursuant to Paragraph 5.

6           7. Plaintiff and EPA agree that this Consent Decree constitutes a complete  
7 settlement of Claim 1 as described in Paragraph 1 and Claim 2 as to California as  
8 described in Paragraph 1.

9           8. In the event of a dispute between Plaintiff and EPA concerning the  
10 interpretation or implementation of any aspect of this Consent Decree, the disputing party  
11 shall provide the other party with a written notice, via electronic mail or other means,  
12 outlining the nature of the dispute and requesting informal negotiations. These parties  
13 shall meet and confer in order to attempt to resolve the dispute. If these parties are  
14 unable to resolve the dispute within ten (10) business days after receipt of the notice,  
15 either party may petition the Court to resolve the dispute.

16           9. No motion or other proceeding seeking to enforce this Consent Decree or for  
17 contempt of Court shall be properly filed unless the procedure set forth in Paragraph 8  
18 has been followed, and the moving party has provided the other party with written notice  
19 received at least ten (10) business days before the filing of such motion or proceeding.

20           10. The deadline for filing a motion for costs of litigation (including attorney  
21 fees) for activities performed prior to entry of the Consent Decree is hereby extended  
22 until ninety (90) days after this Consent Decree is entered by the Court. During this  
23 period, the Parties shall seek to resolve informally any claim for costs of litigation  
24 (including attorney fees), and if they cannot, the Sierra Club will file a motion for costs of  
25 litigation (including attorney fees) or a stipulation or motion to extend the deadline to file  
26 such a motion. EPA reserves the right to oppose any such request. The Court shall retain  
27 jurisdiction to resolve any requests for costs of litigation, including attorney fees.  
28

1           11. This Court shall retain jurisdiction over this matter to enforce the terms of  
2 this Consent Decree and to consider any requests for costs of litigation (including  
3 attorney fees).

4           12. Nothing in the terms of this Consent Decree shall be construed (a) to confer  
5 upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction  
6 of the United States Courts of Appeals under CAA section 307(b)(1),  
7 42 U.S.C. § 7607(b)(1), including final action take pursuant to section 110(k) of the  
8 CAA, 42 U.S.C. § 7410(k), approving, disapproving, or approving in part and  
9 disapproving in part a SIP submittal, or (b) to waive any claims, remedies, or defenses  
10 that the parties may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

11           13. Nothing in this Consent Decree shall be construed to limit or modify any  
12 discretion accorded EPA by the Clean Air Act or by general principles of administrative  
13 law in taking the actions which are the subject of this Consent Decree, including the  
14 discretion to alter, amend, or revise any final actions promulgated pursuant to this  
15 Consent Decree. EPA's obligation to perform each action specified in this Consent  
16 Decree does not constitute a limitation or modification of EPA's discretion within the  
17 meaning of this paragraph.

18           14. Except as expressly provided herein, nothing in this Consent Decree shall be  
19 construed as an admission of any issue of fact or law nor to waive or limit any claim,  
20 remedy, or defense, on any grounds, related to any final action EPA takes with respect to  
21 the actions addressed in this Consent Decree.

22           15. Plaintiff reserves the right to seek additional costs of litigation (including  
23 reasonable attorney fees) incurred subsequent to entry of this Consent Decree. EPA  
24 reserves the right to oppose any such request for additional costs of litigation (including  
25 attorney fees).

26           16. It is hereby expressly understood and agreed that this Consent Decree was  
27 jointly drafted by Plaintiff and EPA. Accordingly, the parties hereby agree that any and  
28 all rules of construction to the effect that ambiguity is construed against the drafting party

1 shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of  
2 this Consent Decree.

3 17. The parties agree and acknowledge that before this Consent Decree can be  
4 finalized and entered by the Court, EPA must provide notice of this Consent Decree in  
5 the Federal Register and an opportunity for public comment pursuant to CAA section  
6 113(g), 42 U.S.C. § 7413(g). After this Consent Decree has undergone notice and  
7 comment, the Administrator and/or the Attorney General, as appropriate, shall promptly  
8 consider any written comments in determining whether to withdraw or withhold their  
9 consent to the Consent Decree, in accordance with CAA section 113(g). If the  
10 Administrator and/or the Attorney General do not elect to withdraw or withhold consent,  
11 EPA shall promptly file a motion that requests that the Court enter this Consent Decree.

12 18. Any notices required or provided for by this Consent Decree shall be in  
13 writing, via electronic mail or other means, and sent to the following (or to any new  
14 address of counsel as filed and listed in the docket of the above-captioned matter, at a  
15 future date):

16 For Plaintiff Sierra Club:

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19. EPA and Plaintiff recognize and acknowledge that the obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

20. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either party and the terms of the proposed Consent Decree may not be used as evidence in any litigation between the parties.

21. The undersigned representatives of Plaintiff Sierra Club and Defendant EPA certify that they are fully authorized by the party they represent to consent to the Court's entry of the terms and conditions of this Decree.

SO ORDERED on this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
JAMES DONATO  
UNITED STATES DISTRICT JUDGE

//  
//

1 COUNSEL FOR PLAINTIFF:  
2

3 /s/ Robert Ukeiley (email authorization 6/15/16)

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