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10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

13 CITIZENS FOR CLEAN AIR, a project of  
14 ALASKA COMMUNITY ACTION ON  
15 TOXICS, and SIERRA CLUB,

16 Plaintiffs,

17 v.

18 GINA MCCARTHY, in her official capacity  
19 as Administrator of the United States  
20 Environmental Protection Agency, and  
21 DENNIS MCLERRAN, in his official  
22 capacity as Regional Administrator of the  
23 United States Environmental Protection  
24 Agency Region 10,

25 Defendants.

Case No. 2:16-cv-01594-RAJ

**[PROPOSED] CONSENT DECREE**

24 WHEREAS on October 11, 2016, Citizens for Clean Air and Sierra Club  
25 (“Plaintiffs”) filed the above-captioned matter against Gina McCarthy, in her official  
26 capacity as Administrator of the United States Environmental Protection Agency, and  
27 Dennis McLerran, in his official capacity as Regional Administrator of the United States  
28 Environmental Protection Agency, Region 10 (collectively, “EPA” or “Defendant”);

1           WHEREAS Plaintiffs allege that EPA has failed to undertake certain non-  
2 discretionary duties under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and  
3 that such alleged failure is actionable under section 304(a)(2) of the CAA, 42 U.S.C. §  
4 7604(a)(2);

5           WHEREAS the CAA requires EPA to set National Ambient Air Quality  
6 Standards (“NAAQS”) for certain pollutants, “the attainment and maintenance of  
7 which . . . are requisite to protect the public health” with “an adequate margin of safety,”  
8 42 U.S.C. §§ 7409(a)-(b), and to designate areas with air pollution levels that exceed the  
9 national standards or contribute to such violating areas as “nonattainment” areas, 42  
10 U.S.C. § 7407(d)(1);

11           WHEREAS the CAA requires that an area that EPA has designated and classified  
12 as a “moderate” nonattainment area for fine particulate matter (“PM<sub>2.5</sub>”) must attain the  
13 NAAQS “as expeditiously as practicable but no later than the end of the sixth calendar  
14 year after the area’s designation as nonattainment,” 42 U.S.C. § 7513(c)(1);

15           WHEREAS the CAA provides that the EPA Administrator shall determine  
16 whether a “moderate” nonattainment area has attained the PM<sub>2.5</sub> NAAQS by its  
17 attainment date, and publish a notice of that finding in the Federal Register, within six  
18 months following that attainment date, and that if EPA determines that the NAAQS was  
19 not attained, the area shall be reclassified by operation of law as a “serious”  
20 nonattainment area, 42 U.S.C. § 7513(b)(2);

21           WHEREAS EPA designated the Fairbanks North Star Borough as a moderate  
22 nonattainment area for the 2006 24-hour PM<sub>2.5</sub> NAAQS on November 13, 2009;

23           WHEREAS Plaintiffs allege that EPA failed to perform a duty mandated by CAA  
24 section 188(b)(2), 42 U.S.C. § 7513(b)(2), by failing to determine whether the Fairbanks  
25 North Star Borough moderate nonattainment area attained the 2006 24-hour PM<sub>2.5</sub>  
26 NAAQS by the latest permissible attainment date of December 31, 2015, and failing to  
27 publish a notice in the Federal Register setting forth that determination and (if  
28

1 appropriate) reclassifying the area as “serious” within six months of the attainment  
2 deadline (i.e., by June 30, 2016);

3 WHEREAS the relief requested in the Complaint is an order from this Court to  
4 establish a date certain by which EPA must make and publish a determination of whether  
5 the Fairbanks North Star Borough moderate nonattainment area attained the 2006 24-  
6 hour PM<sub>2.5</sub> NAAQS by December 31, 2015, and (if EPA determines that the area did not  
7 attain) reclassifying the area as “serious”;

8 WHEREAS Plaintiffs and EPA have agreed to a settlement of this action without  
9 admission of any issue of fact or law, except as expressly provided herein;

10 WHEREAS Plaintiffs and EPA, by entering into this Consent Decree, do not  
11 waive or limit any claim, remedy, or defense, on any grounds, related to any final EPA  
12 action;

13 WHEREAS Plaintiffs and EPA consider this Consent Decree to be an adequate  
14 and equitable resolution of all the claims in this matter and therefore wish to effectuate a  
15 settlement;

16 WHEREAS it is in the interest of the public, Plaintiffs, EPA, and judicial  
17 economy to resolve this matter without protracted litigation;

18 WHEREAS Plaintiffs and EPA agree that this Court has jurisdiction over this  
19 matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. §  
20 7604(a)(2), and that venue is proper in the Western District of Washington pursuant to 28  
21 U.S.C. § 1391(e);

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

24 NOW THEREFORE, before the taking of testimony, without trial or  
25 determination of any issues of fact or law, and upon the consent of Plaintiffs and EPA, it  
26 is hereby ordered, adjudged and decreed that:

27 1. No later than April 28, 2017, EPA shall sign a notice of final rulemaking  
28 determining whether the Fairbanks North Star Borough attained the 2006 24-hour PM<sub>2.5</sub>

1 NAAQS as of December 31, 2015, and (if EPA concludes the area did not attain the  
2 NAAQS by that date) reclassifying the area as a “serious” nonattainment area for the  
3 2006 24-hour PM<sub>2.5</sub> NAAQS pursuant to 42 U.S.C. § 7513.

4 2. EPA shall, within 15 business days after signature of the final rulemaking  
5 described in Paragraph 1, deliver the notice of action taken pursuant to Paragraph 1 to the  
6 Office of the Federal Register for review and publication.

7 3. After EPA has completed the action set forth in Paragraph 1 of this Consent  
8 Decree and after notice of that action has been published in the Federal Register and the  
9 issue of costs of litigation, including reasonable attorneys’ fees, has been resolved, EPA  
10 may move to have this Decree terminated and the action dismissed. Plaintiffs shall have  
11 fourteen (14) days in which to respond to such a motion, unless the parties stipulate to a  
12 longer time for Plaintiffs to respond.

13 4. The deadlines established by this Consent Decree may be extended (a) by  
14 written stipulation of Plaintiffs and EPA with notice to the Court, or (b) by the Court  
15 upon motion of EPA for good cause shown pursuant to the Federal Rules of Civil  
16 Procedure and upon consideration of any response by Plaintiffs and any reply by EPA.

17 5. If a lapse in appropriations occurs within one hundred and twenty (120) days  
18 prior to the deadline set forth in Paragraph 1 of this Consent Decree, that deadline shall  
19 be extended automatically one day for each day of the lapse in appropriations. Nothing  
20 in this paragraph shall preclude EPA from seeking additional time pursuant to Paragraph  
21 4.

22 6. Plaintiffs and EPA agree that this Consent Decree shall constitute a complete  
23 and final settlement of all claims that Plaintiffs have asserted against the United States,  
24 including EPA, under any provision of law, in connection with *Citizens for Clean Air v*  
25 *McCarthy*, Case No. 2:16-cv-001594 (W.D. Wash.). Plaintiffs therefore discharge and  
26 covenant not to sue the United States, including EPA, for any such claims.

27 7. In the event of a dispute between Plaintiffs and EPA concerning the  
28 interpretation or implementation of any aspect of this Consent Decree, the disputing party

1 shall provide the other party with a written notice outlining the nature of the dispute and  
2 requesting informal negotiations. These parties shall meet and confer in order to attempt  
3 to resolve the dispute. If these parties are unable to resolve the dispute within ten (10)  
4 business days after receipt of the notice, either party may petition the Court to resolve the  
5 dispute.

6 8. No motion seeking to enforce this Consent Decree or for contempt of Court  
7 shall be properly filed unless the procedure set forth in Paragraph 7 has been followed,  
8 and the non-moving party has been provided with written notice at least ten (10) business  
9 days before the filing of such motion.

10 9. The deadline for filing a motion for costs of litigation (including reasonable  
11 attorney fees) for activities performed prior to entry of the Consent Decree is hereby  
12 extended until ninety (90) days after this Consent Decree is entered by the Court. During  
13 this period, the Parties shall seek to resolve informally any claim for costs of litigation  
14 (including reasonable attorney fees), and if they cannot, Plaintiffs will file a motion for  
15 costs of litigation (including reasonable attorney fees) or a stipulation or motion to extend  
16 the deadline to file such a motion. EPA reserves the right to oppose any such request.

17 10. This Court shall retain jurisdiction over this matter to enforce the terms of  
18 this Consent Decree and to consider any requests for costs of litigation, including  
19 reasonable attorney fees.

20 11. Nothing in the terms of this Consent Decree shall be construed (a) to confer  
21 upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction  
22 of the United States Courts of Appeals under CAA section 307(b)(1), 42 U.S.C. §  
23 7607(b)(1), including final action pursuant to section 188(b)(2) of the CAA, 42 U.S.C. §  
24 7513(b)(2), determining that the Fairbanks North Star Borough attained or did not attain  
25 the 2006 24-hour PM<sub>2.5</sub> NAAQS and making any corresponding reclassification of that  
26 area, or (b) to waive any claims, remedies, or defenses that the parties may have under  
27 CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

28

1           12. Nothing in this Consent Decree shall be construed to limit or modify any  
2 discretion accorded EPA by the CAA or by general principles of administrative law in  
3 taking the actions which are the subject of this Consent Decree, including the discretion  
4 to alter, amend, or revise any final actions promulgated pursuant to this Consent Decree.  
5 EPA's obligation to perform each action specified in this Consent Decree does not  
6 constitute a limitation or modification of EPA's discretion within the meaning of this  
7 paragraph.

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

12           14. Plaintiffs reserve the right to seek additional costs of litigation, including  
13 reasonable attorney fees, incurred subsequent to entry of this Consent Decree and arising  
14 from Plaintiffs' need to enforce or defend against efforts to modify its terms or the  
15 underlying schedule outlined herein, or for any other unforeseen continuation of this  
16 action. EPA reserves the right to oppose any such request for additional costs of  
17 litigation, including reasonable attorney fees.

18           15. It is hereby expressly understood and agreed that this Consent Decree was  
19 jointly drafted by Plaintiffs and EPA. Accordingly, the parties hereby agree that any and  
20 all rules of construction to the effect that ambiguity is construed against the drafting party  
21 shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of  
22 this Consent Decree.

23           16. The parties agree and acknowledge that before this Consent Decree can be  
24 finalized and entered by the Court, EPA must provide notice of this Consent Decree in  
25 the Federal Register and an opportunity for public comment pursuant to CAA section  
26 113(g), 42 U.S.C. § 7413(g). After this Consent Decree has undergone notice and  
27 comment, the Administrator and/or the Attorney General, as appropriate, shall promptly  
28 consider any written comments in determining whether to withdraw or withhold their

1 consent to the Consent Decree, in accordance with CAA section 113(g). If the  
2 Administrator and/or the Attorney General do not elect to withdraw or withhold consent,  
3 EPA shall promptly file a motion that requests that the Court enter this Consent Decree.

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

7  
8 For Plaintiffs Citizens for Clean Air and Sierra Club:

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21 For Defendant EPA:

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28 Tel. (202) 514-1950  
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18. EPA and Plaintiffs 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.

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

5 20. The undersigned representatives of Plaintiffs Citizens for Clean Air and  
6 Sierra Club and Defendant EPA certify that they are fully authorized by the party or the  
7 parties they represent to consent to the Court’s entry of the terms and conditions of this  
8 Decree.

9 SO ORDERED on this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_.  
10

11  
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13 \_\_\_\_\_  
14 The Hon. Richard A. Jones  
15 UNITED STATES DISTRICT JUDGE

16

17 COUNSEL FOR PLAINTIFFS: /s/ Janette K. Brimmer  
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