

1 SAM HIRSCH
2 Acting Assistant Attorney General
3 Environment & Natural Resources Division
4 United States Department of Justice
5 LESLIE M. HILL (D.C. Bar No. 476008)
6 Leslie.Hill@usdoj.gov
7 Environmental Defense Section
8 601 D Street N.W., Suite 8000
9 Washington D.C. 20004
10 Telephone (202) 514-0375
11 Facsimile (202) 514-8865

12 Attorneys for Defendant

13 ROBERT UKEILEY, Admitted *Pro Hac Vice*
14 rukeiley@igc.org
15 Law Office of Robert Ukeiley
16 507 Center St.
17 Berea, KY 40403
18 Telephone (859) 986-5402

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.: 3:14-cv-00964-JD

[PROPOSED] CONSENT DECREE

1 WHEREAS, on March 3, 2014, Plaintiff Sierra Club (“Plaintiff”) filed the above-
 2 captioned matter against Gina McCarthy, in her official capacity as Administrator of the
 3 United States Environmental Protection Agency (hereinafter “EPA” or “Defendant”);

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

7 WHEREAS, Plaintiff alleges that EPA has failed to perform a duty mandated by
 8 CAA section 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B), to find that certain states, as
 9 follows, failed to submit state implementation plan (“SIP”) revisions for the state or
 10 certain areas to address the PM_{2.5} prevention of significant deterioration (“PSD”)
 11 increments and implementing regulations as promulgated by EPA on October 20, 2010,
 12 *Final Rule, Prevention of Significant Deterioration (PSD) for Particulate Matter Less*
 13 *Than 2.5 Micrometers (PM_{2.5})-Increments, Significant Impact Levels (SILs) and*
 14 *Significant Monitoring Concentration (SMC)*, 75 Fed. Reg. 64,864 (Oct. 20, 2010):

15	AREA/STATE
16	Pinal County, Arizona
17	Arkansas
18	Clark County, Nevada
19	Vermont
20	Ohio
21	North Coast Management District, California
22	Wisconsin

24 WHEREAS, Plaintiff alleges that EPA required states to submit SIPs addressing
 25 these requirements by July 20, 2012, 75 Fed. Reg. at 64,898;

26 WHEREAS, Arizona’s statewide SIP submission, which became complete by
 27 operation of law on April 29, 2013, addresses these requirements for Pinal County,
 28

1 Arizona, and therefore, as to Pinal County, Arizona, the complaint fails to state a claim
2 upon which relief can be granted;

3 WHEREAS, EPA took final action finding that Arkansas failed to submit a SIP
4 revision to address the PM_{2.5} PSD increments and implementing regulations, *Final Rule,*
5 *Finding of Failure To Submit a Prevention of Significant Deterioration State*
6 *Implementation Plan Revision for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5});*
7 *Arkansas*, 79 Fed. Reg. 29,354 (May 22, 2014), and therefore the claim as to Arkansas is
8 moot;

9 WHEREAS, Nevada submitted a SIP revision addressing these requirements for
10 Clark County, Nevada on April 1, 2014, which EPA determined was complete on May 5,
11 2014, and therefore the claim as to Clark County, Nevada, is moot;

12 WHEREAS, Ohio submitted a SIP revision addressing these requirements for the
13 state on June 19, 2014, which EPA determined was complete on June 27, 2014, and
14 therefore the claim as to Ohio is moot;

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

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

20 WHEREAS, Plaintiff and EPA, by entering into this Consent Decree, do not
21 waive or limit any claim, remedy, or defense, on any grounds, related to any final EPA
22 action;

23 WHEREAS, Plaintiff and EPA consider this Consent Decree to be an adequate
24 and equitable resolution of all the claims in this matter and therefore wish to effectuate a
25 settlement;

26 WHEREAS, it is in the interest of the public, Plaintiff Sierra Club, Defendant
27 EPA, and judicial economy to resolve this matter without protracted litigation;

28

1 WHEREAS, Plaintiff and EPA agree that this Court has jurisdiction over this
2 matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. §
3 7604(a)(2), and that venue is proper in the Northern District of California pursuant to 28
4 U.S.C. § 1391(e) and N.D. Cal. Civ. Local Rule 3-2(c)-(d); and

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

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

10 1. The appropriate EPA official shall sign a notice or notices by no later than
11 August 15, 2014, finding that Vermont, Wisconsin, and California (as to the North Coast
12 Management District) have failed to submit SIPs addressing the PM_{2.5} PSD increments
13 and implementing regulations, as promulgated by EPA on October 20, 2010.

14 2. If any of these States makes a complete submission addressing these
15 requirements prior to August 15, 2014, then EPA's obligation to take the action required
16 by Paragraph 1 is automatically terminated.

17 3. EPA shall, within 15 days of signature, deliver notice of each action taken
18 pursuant to paragraph 1 of this Consent Decree to the Office of the Federal Register for
19 review and publication.

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

26 5. The deadlines established by this Consent Decree may be extended (a) by
27 written stipulation of Plaintiff and EPA with notice to the Court, or (b) by the Court upon
28 motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure

1 and upon consideration of any response by Plaintiff and any reply by EPA. Any other
2 provision of this Consent Decree also may be modified by the Court following motion of
3 an undersigned party for good cause shown pursuant to the Federal Rules of Civil
4 Procedure and upon consideration of any response by a non-moving party and any reply.

5 6. If a lapse in appropriations occurs within one hundred and twenty (120) days
6 prior to the deadline in Paragraph 1 in this Decree, that deadline shall be extended
7 automatically one day for each day of the lapse in appropriations.

8 7. Plaintiff and EPA agree that this Consent Decree shall constitute a complete
9 and final settlement of all claims that Plaintiff has asserted in this case. The Sierra Club
10 therefore discharges and covenants not to sue the United States, including EPA, for any
11 such claims.

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

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

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

1 such a motion. EPA reserves the right to oppose any such request. The Court shall retain
2 jurisdiction to resolve any requests for costs of litigation, including attorney fees.

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

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

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

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

24 15. Plaintiff reserves the right to seek additional costs of litigation, including
25 reasonable attorney fees, incurred subsequent to entry of this Consent Decree and arising
26 from Plaintiff's need to enforce or defend against efforts to modify its terms or the
27 underlying schedule outlined herein, or for any other unforeseen continuation of this
28

1 action. EPA reserves the right to oppose any such request for additional costs of
2 litigation, including attorney fees.

3 16. It is hereby expressly understood and agreed that this Consent Decree was
4 jointly drafted by Plaintiff and EPA. Accordingly, the parties hereby agree that any and
5 all rules of construction to the effect that ambiguity is construed against the drafting party
6 shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of
7 this Consent Decree.

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

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

21 For Plaintiff Sierra Club:

22 Robert Ukeiley
23 507 Center Street
24 Berea, KY 40403
25 Tel. (859) 986-5402
26 Email: rukeiley@igc.org

27 Kristin Henry (Cal. Bar. No. 220908)
28 Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
Tel. (415) 977-5716
Email: kristin.henry@sierraclub.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

For Defendant EPA:

Leslie M. Hill
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
601 D Street N.W., Suite 8000
Washington D.C. 20004
Tel. (202) 514-0375
Email: leslie.hill@usdoj.gov

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 _____, 2014.

JAMES DONATO
UNITED STATES DISTRICT JUDGE

//
//

1 COUNSEL FOR PLAINTIFF:

2
3 /s/ Robert Ukeiley (email authorization 7/22/14)

4 Robert Ukeiley, Admitted *Pro Hac Vice*
5 Law Office of Robert Ukeiley
6 507 Center Street
7 Berea, KY 40403
8 Tel: (859) 986-5402
9 Email: rukeiley@igc.org

10 KRISTIN HENRY (Cal. Bar. No. 220908)
11 Sierra Club
12 85 Second Street, 2nd Floor
13 San Francisco, CA 94105
14 Telephone (415) 977-5716
15 kristin.henry@sierraclub.org

16 *Attorneys for Plaintiff Sierra Club*

17 COUNSEL FOR DEFENDANT:

18 SAM HIRSCH
19 Acting Assistant Attorney General
20 Environment & Natural Resources Division

21 /s/ Leslie M. Hill

22 LESLIE M. HILL (D.C. Bar No. 476008)
23 Environmental Defense Section
24 601 D Street N.W., Suite 8000
25 Washington D.C. 20004
26 Tel. (202) 514-0375
27 Email: Leslie.Hill@usdoj.gov

28 *Attorneys for Defendant EPA*

Of counsel:

Stephanie Hogan
Office of General Counsel
U.S. Environmental Protection Agency