

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NATURAL RESOURCES DEFENSE COUNCIL,
ENVIRONMENTAL JUSTICE HEALTH ALLIANCE, PUBLIC
CITIZEN, CATSKILL MOUNTAINKEEPER, CENTER FOR
COALFIELD JUSTICE, CLEAN WATER ACTION, COMING
CLEAN, FLINT RISING, INDIGENOUS ENVIRONMENTAL
NETWORK, JUST TRANSITION ALLIANCE, LOS
JARDINES INSTITUTE, SOUTHEAST ENVIRONMENTAL
TASK FORCE, TEXAS ENVIRONMENTAL JUSTICE
ADVOCACY SERVICES, WATER YOU FIGHTING FOR,
WEST HARLEM ENVIRONMENTAL ACTION, INC.,

Plaintiffs,

v.

ASSISTANT ADMINISTRATOR SUSAN PARKER BODINE,
ADMINISTRATOR ANDREW WHEELER, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

No. 20 Civ. 3058 (CM)

DECLARATION OF Anne Idsal

I, Anne Idsal, state the following:

1. I declare that the following statements are true and correct to the best of my knowledge and belief and are based upon my personal knowledge and/or my review of information contained in the records of the United States Environmental Protection Agency (“EPA” or the “Agency”) or supplied by current employees.

2. I am Principal Deputy Assistant Administrator for the United States Environmental Protection Agency (“EPA” or the “Agency”) Office of Air and Radiation (“OAR”), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

3. I am making this Declaration in support of EPA's opposition to Plaintiffs' Motion for Summary Judgment and in support of its Cross-Motion for Summary Judgment filed in the above captioned case.

4. OAR develops national programs, policies and regulations for controlling air pollution and radiation exposure. Among other responsibilities, OAR is responsible for administering the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 to 7671q.

5. The Administrator has designated OAR to lead the Agency's review of Plaintiffs' petition for emergency rulemaking.

6. While the Agency believes that the temporary enforcement policy issued on March 26, 2020 ("Policy") appropriately responds to the national emergency caused by the COVID-19 pandemic, EPA does not prejudge Plaintiffs' petition and is assessing the merits of the requested rule in light of the Agency's current resources, statutory authorities, and various procedural requirements.

7. As the lead media office, OAR is responsible for coordinating input from the Offices of Water (OW), Land and Emergency Management (OLEM) and Chemical Safety and Pollution Prevention (OCSPP), as well as the Office of Enforcement and Compliance Assurance (OECA).

8. Plaintiffs' petition seeks a final, enforceable rule imposing new reporting requirements on any regulated entity that fails to comply with any compliance requirement covered under the Policy and the creation of a new searchable public database for EPA to publish any such notification. The petition requests EPA to issue the emergency rule without prior notice and comment under the authority of at least five separate statutes: Clean Water Act (CWA) 33 U.S.C. § 1318(a), Clean Air Act (CAA), 42 U.S.C. § 7414(a)(1); Safe Drinking Water Act

(SDWA), 42 U.S.C. § 300j-4(a)(1)(A); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6927(a); and Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11048.

9. The Agency’s substantive rulemaking authority comes from the individual statutes that it implements, some of which have their own rulemaking requirements, *see e.g.* CAA § 307(d), and judicial review provisions. As a result, the rule requested by Plaintiffs may need to be issued as one or more rules under each of the statutes implicated by the petition rather than a single, generally applicable, uniform rule.

10. While EPA’s response to the Petition itself is distinct from any rulemaking it may actually elect to undertake, as part of the review process, the Agency will need to assess the necessary procedural requirements that would apply to a potential rulemaking, whether it be a single, consolidated rule or several different rules. These include both internal processes and those mandated by Executive Order, statute or Agency regulation.

11. Internally, EPA has an Action Development Process (“ADP”) that sets forth the internal, recommended practices for the development of regulatory actions. These practices generally include the creation of a cross-agency workgroup, the gathering of relevant information (scientific, economic, legal and stakeholder input), development of and selection from various options, drafting and various stages of intra-agency consultation. These practices are designed to ensure the kind of coordination that would be necessary for the type of rule sought in Plaintiffs’ petition – one that would be promulgated under the authority of several statutes that are implemented by separate offices.

12. When promulgating a rule like the one requested by the petition, the Agency will also need to comply with requirements imposed by various statutes and Executive Orders. These include:

a. Paperwork Reduction Act (PRA) – The rule(s) contemplated by Plaintiffs’ petition would impose new reporting requirements on regulated entities. The PRA requires EPA to obtain an Information Collection Request (ICR) from the Office of Management and Budget (OMB) as part of the rulemaking process. *See* 44 U.S.C. § 3507. While the Agency could seek an emergency ICR under 5 CFR 1320.13, the approval and timing of such a request rests solely with OMB. If OMB were to deny EPA’s emergency request, the Agency would have to seek public comment for a minimum of thirty days on the ICR for the new reporting requirements under 5 CFR §§ 1320.11.

b. Regulatory Flexibility Act – The rule(s) contemplated by Plaintiffs’ petition would require the Agency to determine whether they would impose significant economic impact on a substantial number of small entities and, if it would, convene a small business panel.

c. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review – These Executive Orders apply to significant regulatory actions, which are defined as meeting one of the following four criteria: 1) has an annual effect on the economy of \$100 million or more or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; 2) creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency; 3) materially alters the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or 4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. EPA would need to assess the economic impact of the rule and consult with OMB as to the

potential significance of the requested rule. If such a rule was deemed significant, OMB would have 90 days to conduct its formal review of the rule.

13. The Agency must also comply with the requirements of the Administrative Procedure Act (APA), which generally requires prior notice and opportunity for public comment prior to issuance of a final, enforceable rule. 5 U.S.C. § 553. In order to issue the rule(s) without prior notice and comment, as requested by Plaintiffs, the Agency must develop a sufficient finding of good cause under 5 U.S.C. § 553(b)(B). Such a finding will necessarily be different than the finding included in EPA's recent interim final rule related to continuous emissions monitoring in the Acid Rain Program. That finding relied on an urgent need to modify certain reporting requirements so that sources could abide by the public health restrictions put in place to address the current national emergency concerning the COVID-19 outbreak. The rule(s) contemplated by Plaintiffs' petition would run counter to that finding by requiring additional reporting at time when such reporting is becoming more difficult due to the impact of the COVID-19 public health emergency on the workforce.

14. The Agency will also need to assess whether the requested rule is subject to the specific rulemaking requirements under § 307(d) of the CAA pursuant to § 307(d)(1)(A)-(V). When applicable, except as expressly provided in § 307(d), that section displaces section 553 through 557 and section 706 of the APA. Section 307(d) requires several specific procedures, which include (among others) special docketing requirements for proposed and final rules, §§ 307(d)(2) – (4) and (6), requirements to allow submission of written comments and an opportunity for oral comments at a public hearing, § 307(d)(5), and “an opportunity for submission of rebuttal and supplementary information” for a period of 30 days following the hearing, *id.*

15. The rule(s) contemplated by Plaintiffs' petition may also implicate concerns regarding confidential business information. The Agency needs to assess what, if any, information required under the rule(s) contemplated by Plaintiffs implicates the treatment of certain categories of business information under 40 CFR Subpart B and any special rules governing certain information obtained under the various statutes. *See* 40 CFR §§ 2.301 through 2.311.

16. As part of OAR's preliminary assessment of the petition in light of our existing air programs, we have identified 683 regulatory sections, distributed across 30 separate regulatory parts in the Code of Federal Regulations, that impose recordkeeping and reporting requirements that are potentially implicated by the rule that the petitioners are requesting. OAR estimates that these reporting and recordkeeping requirements are covered under at least 120 separately approved ICRs, representing millions (in terms of both costs and hours) in existing informational burdens. As OAR continues its assessment, we may discover additional testing, inspection, and other similar requirements that would be potentially implicated.

17. In order to inform the Administrator's decision about whether to grant or deny the petition, OAR is seeking preliminary assessments and similar priority-related information from the Offices of Water, Land and Emergency Management and Chemical Safety and Pollution Prevention.

18. As the Administrator testified on May 20, 2020, EPA is performing new and critical time-sensitive work in response to the COVID-19 public health crisis, while also continuing our important work to protect the public health and environment. Examples of the priority work EPA is currently focused on include:

a. The Agency has expanded our work under our Emerging Viral Pathogens Guidance for Antimicrobial Pesticides. Under the program, developed in 2016 and deployed for the first time against SARS-CoV-2, we expedited the review of submissions from companies requesting to add emerging viral pathogen claims to their already registered surface disinfectant labels. In response to the global need for effective disinfectants, we are also adding to the EPA-approved disinfectant list products with demonstrated efficacy against harder-to-kill viruses and products with demonstrated efficacy against other human coronaviruses similar to SARS-CoV-2. In many cases, we have reduced the approval process time from 3-5 months to 2-3 weeks. The Agency started off on March 5 with 60 EPA-approved disinfectants to combat the coronavirus and as of May 1 has approved over 400 products. At this time, the Agency's goal is to update the website weekly to include products that have been added to the list so that it is readily accessible to the public.

b. Ensuring that drinking water and wastewater services are fully operational is one of the Agency's top priorities as it is critical to containing COVID-19 and protecting Americans from other public health risks. It is critical to ensure that the American public can continue to drink water from their tap, as well as wash their hands and be confident that both their drinking and wastewater is being treated by one of the 165,000 public water and wastewater treatment facilities in this country. The EPA is working with our state, local, and tribal partners to ensure that these public water and wastewater treatment facilities continue to protect public health and the environment. EPA has made a request to all governors that water and wastewater workers, as well as water and wastewater manufacturers and suppliers, be considered essential workers and businesses by state authorities when establishing restrictions to curb COVID-19. Our critical infrastructure and the operators who ensure the safe supply of water to our homes

and hospitals depend on treatment chemicals, laboratory supplies, and related goods and materials. EPA is actively meeting with a wide range of stakeholders to acknowledge the importance of their work and to identify ways that EPA and its partners can support the water sector during the COVID-19 pandemic. EPA has been providing information on resources that water stakeholders—including states, tribes, municipalities, utilities, and their workforces—can use to support operations. These resources can be used to help maintain adequate staffing and laboratory capacity.

c. EPA continues to aggressively implement the *Per- and Polyfluoralkyl substances (PFAS) Action Plan*—EPA’s first multi-media, multiprogram, national research, management, and risk communication plan to address this extensive class of emerging chemicals of concern. These priority efforts include finalization of EPA’s proposed regulatory determinations for PFOA and PFOS in drinking water, which mark a key milestone in EPA’s extensive efforts under the *PFAS Action Plan* to help communities address these substances nationwide. An additional priority is the finalization of proposed regulations to close a loophole that allows imports of products including certain PFAS chemicals that have been phased out in the United States as part of surface coatings. This supplemental proposal would ensure that any new uses are reviewed by EPA before any products with coatings containing these chemicals could be imported into the United States again.

d. EPA is working to finalize proposed revisions to the Lead and Copper Rule to reduce lead exposure in drinking water to better protect children and at-risk communities. The proposed rule will ensure that systems have plans in place to rapidly respond by taking actions to reduce elevated levels of lead in drinking water. EPA staff is currently monitoring and mapping the location of the highest-risk lead pipes so we can focus our work on

the most impacted areas of the country first. An additional priority is the finalization of proposed regulations to close a loophole that allows imports of products including certain PFAS chemicals that have been phased out in the United States as part of surface coatings. This supplemental proposal would ensure that any new uses are reviewed by EPA before any products with coatings containing these chemicals could be imported into the United States again.


e. EPA is continuing its effort to meet the major statutory deadlines of the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amended the Toxic Substances Control Act (TSCA). EPA is working its way through the final risk evaluations for the first 10 chemicals and we expect all ten will be finalized later this year. We also identified in December the next 20 high-priority chemicals that EPA will work on, with scoping documents expected this summer.

19. OAR, in particular, is currently in the process of developing a notice of proposed rulemaking to address the need for more stringent standards for emissions of the hazardous air pollutant ethylene oxide from commercial sterilizer facilities, an action necessitated by the Agency's determination that such emissions may pose an unacceptable risk to public health. EPA intends to issue this proposed rule by the late third quarter of this year. OAR is also working towards developing and finalizing 15 risk and technology reviews ("RTRs"), rulemakings that the Agency is directed to undertake pursuant to CAA § 112(d)(6) and (f)(2); 42 U.S.C. § 7412(d)(6), (f)(2). EPA is under court order to finalize six of those RTRs by June 30, 2020. The Agency is required by court order to finalize the other nine RTRs by October 1, 2021. In order to meet this latter deadline, OAR is working towards issuing proposed rules for these nine actions no later than October 1 of this year.

20. OAR is coordinating with OW, OLEM, OCSPP and OECA to evaluate the impact of Plaintiffs' requested rulemaking in of these competing priorities, which also include continuous assessment of the COVID-19 public health emergency and whether additional, targeted measures such as those mentioned above and the recent rule related to continuous emission monitoring are appropriate to both protect individuals tasked with regulatory compliance while ensuring continued protection of human health and the environment more broadly.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of May 2020.



Anne L. Idsal