

**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL  
DIVERSITY,

Plaintiff,

v.

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

Defendant.

Case No. 15-cv-00268 TFH  
**[PROPOSED] CONSENT DECREE**

WHEREAS, on February 24, 2015, Plaintiff Center for Biological Diversity (“Plaintiff”) filed the above-captioned matter in the U.S. District Court for the District of Columbia against Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (hereinafter “EPA” or “Defendant”);

WHEREAS, Plaintiff alleges that on September 8, 2011, EPA found that Puerto Rico, Iowa, and Washington had failed to submit elements of their State implementation plans (“SIPs”) to satisfy the requirements of Clean Air Act Section 110, 42 U.S.C. § 7410(a)(2)(A)-(C); (D)(i)(II) (Prevention of Significant Deterioration prong only); (E)-(H); and (J)-(M) to implement the 2006 National Ambient Air Quality Standards (“NAAQS”) for fine particulate matter (“PM<sub>2.5</sub>”), 76 Fed. Reg. 55,577, 55,579 (Sept. 8, 2011);

WHEREAS, pursuant to Section 110(c)(1) of the Clean Air Act, 42 U.S.C. § 7410(c)(1), EPA “shall promulgate a Federal implementation plan at any time within 2 years after the Administrator” either “finds that a State has failed to make a required submission . . .” or “disapproves a State implementation plan submission in whole or in part,” “unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan”;

WHEREAS, Plaintiff alleges that EPA had a mandatory duty to promulgate a Federal implementation plan (“FIP”) addressing the requirements listed above for Puerto Rico, Iowa, and Washington by October 11, 2013;

WHEREAS, Plaintiff alleges that EPA failed to perform this mandatory duty;

WHEREAS, EPA took final action on the Washington SIP submission for the 2006 PM<sub>2.5</sub> NAAQS for the elements listed above, *Final Rule*, 80 Fed. Reg. 27,102 (May 12, 2015), and therefore Plaintiff’s claim is moot as to Washington;

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

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

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

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

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

WHEREAS, Plaintiff and EPA agree that this Court has jurisdiction over this matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2);

WHEREAS, Plaintiff and EPA agree that venue lies in the District of Columbia;

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

NOW THEREFORE, before the taking of testimony, without trial or determination of any issues of fact or law, and upon the consent of Plaintiff Center for Biological Diversity and Defendant EPA, it is hereby ordered, adjudged and decreed that:

1. No later than April 1, 2016, the appropriate EPA official shall sign a notice or notices of final rulemaking either approving a SIP, promulgating a FIP, or

approving a SIP in part with promulgation of a partial FIP, for Puerto Rico to meet the requirements of 42 U.S.C. § 7410(a)(2)(A)-(C); (D)(i)(II) (Prevention of Significant Deterioration prong only); (E)-(H); and (J)-(M) to implement the 2006 PM2.5 NAAQS.

2. No later than September 30, 2016, the appropriate EPA official shall sign a notice or notices of final rulemaking either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for Iowa to meet the requirements of 42 U.S.C. § 7410(a)(2)(A)-(C); (D)(i)(II) (Prevention of Significant Deterioration prong only); (E)-(H); and (J)-(M) to implement the 2006 PM2.5 NAAQS;
3. EPA shall, within 15 business days of signature, deliver notice of each action taken pursuant to paragraphs 1 and 2 of this Consent Decree to the Office of the Federal Register for review and publication.
4. The deadlines established by this Consent Decree may be extended (a) by written stipulation of Plaintiff and EPA with notice to the Court, or (b) by the Court upon motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure and upon consideration of any response by Plaintiff and any reply by EPA. Any other provision of this Consent Decree also may be modified by the Court following motion of an undersigned party for good cause shown pursuant to the Federal Rules of Civil Procedure and upon consideration of any response by a non-moving party and any reply.
5. If a lapse in appropriations for EPA occurs within one hundred and twenty (120) days prior to any deadline in Paragraphs 1 and 2 in this Decree, that deadline shall be extended automatically one day for each day of the lapse in appropriations. Nothing in this paragraph shall preclude EPA from seeking an additional extension through modification of this Agreement pursuant to Paragraph 4.

6. Plaintiff and EPA shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Upon entry, no party shall challenge the terms of this Consent Decree.
7. Plaintiff and EPA agree that this Consent Decree shall constitute a complete and final settlement of all claims that Plaintiff has asserted in this case. Plaintiff therefore discharges and covenants not to sue the United States, including EPA, for any such claims.
8. This Court shall retain jurisdiction over this matter to enforce the terms of this Consent Decree and to consider any requests for costs of litigation, including attorney fees.
9. In the event of a dispute between Plaintiff and EPA concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing party shall provide the other party with a written notice outlining the nature of the dispute and requesting informal negotiations. These parties shall meet and confer in order to attempt to resolve the dispute. If these parties are unable to resolve the dispute within ten (10) business days after receipt of the notice, either party may petition the Court to resolve the dispute.
10. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of Court shall be filed unless the procedure set forth in Paragraph 9 has been followed, and the moving party has provided the other party with written notice received at least ten (10) business days before the filing of such motion or proceeding.
11. Nothing in the terms of this Consent Decree shall be construed (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 CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1) or (b) to waive any claims, remedies, or defenses that the parties may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

12. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions which are the subject of this Consent Decree, including the discretion to alter, amend, or revise any final actions promulgated pursuant to this Consent Decree. EPA's obligation to perform each action specified in this Consent Decree does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.
13. Except as expressly provided herein, nothing in this Consent Decree shall be construed as an admission of any issue of fact or law nor to waive or limit any claim, remedy, or defense, on any grounds, related to any final action EPA takes with respect to the actions addressed in this Consent Decree.
14. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiff and EPA. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.
15. The parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice of this Consent Decree in the Federal Register and an opportunity for public comment pursuant to CAA section 113(g), 42 U.S.C. § 7413(g). After this Consent Decree has undergone notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any written comments in determining whether to withdraw or withhold their consent to the Consent Decree, in accordance with CAA section 113(g). If the Administrator and/or the Attorney General do not elect to withdraw or withhold consent, EPA shall promptly file a motion that requests that the Court enter this Consent Decree.
16. Any notices required or provided for by this Consent Decree shall be in writing, via electronic mail or other means, and sent to the following (or to any new address of

counsel as filed and listed in the docket of the above-captioned matter, at a future date):

For Plaintiff:

ROBERT UKEILEY  
Law Office of Robert Ukeiley  
255 Mountain Meadows Road  
Boulder, CO 80302  
Telephone: (303) 442-4033  
rukeiley@igc.org

For EPA:

SIMI BHAT  
Environmental Defense Section  
P.O. Box 7611  
Washington D.C. 20044  
Telephone: (202) 514-0242  
Facsimile: (202) 514-8865  
simi.bhat@usdoj.gov

17. 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.
18. The deadline for filing a motion for costs of litigation (including attorney fees) for activities performed prior to entry of the Consent Decree is hereby extended until ninety (90) days after this Consent Decree is entered by the Court. During this period, the Parties shall seek to resolve informally any claim for costs of litigation (including attorney fees), and if they cannot, the Center for Biological Diversity will file a motion for costs of litigation (including attorney fees) or a stipulation or motion to extend the deadline to file such a motion. EPA reserves the right to oppose any such request. The Court shall retain jurisdiction to resolve any requests for costs of litigation, including attorney fees.

19. Plaintiff reserves the right to seek additional costs of litigation, including reasonable attorney fees, incurred subsequent to entry of this Consent Decree. EPA reserves the right to oppose any such request for additional costs of litigation, including attorney fees.
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 and 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 \_\_\_\_\_, 2015.

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THOMAS F. HOGAN  
UNITED STATES DISTRICT JUDGE

COUNSEL FOR PLAINTIFF:

*/s Robert Ukeiley*  
\_\_\_\_\_  
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COUNSEL FOR DEFENDANT: JOHN C. CRUDEN  
Assistant Attorney General  
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/s/Simi Bhat

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U.S. Environmental Protection Agency