

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

_____)		
EAST YARD COMMUNITIES FOR)		
ENVIRONMENTAL JUSTICE, <i>et al.</i> ,)		
)	
Plaintiffs,)		
)	
v.)	No. 22-cv-0094	
)	
UNITED STATES ENVIRONMENTAL)	Hon. James E. Boasberg	
PROTECTION AGENCY, <i>et al.</i> ,)		
)	
Defendants.)		
_____)		

NOTICE OF LODGING OF PROPOSED CONSENT DECREE

PLEASE TAKE NOTICE that Defendant Michael S. Regan in his official capacity as Administrator of the United States Environmental Protection Agency (“EPA”) submits for lodging only with this Court a proposed consent decree in the above-referenced action. The proposed consent decree should not be entered unless EPA subsequently moves this Court to do so.

1. On January 13, 2022, Plaintiffs East Yard Communities for Environmental Justice, Ironbound Community Corporation and Sierra Club (collectively “East Yard”) filed the above-captioned suit alleging that EPA failed to fulfill a non-discretionary duty under the Clean Air Act, 42 U.S.C. § 7429(a)(1) and (a)(5), to review and if appropriate revise performance standards for large municipal solid waste incinerators at five-year intervals. ECF No. 1.

2. East Yard and EPA have resolved the substantive claims in this case, and have set forth their agreement in the proposed consent decree that is being submitted to the Court herewith for LODGING ONLY (not for entry).

3. Pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g), notice of the proposed consent decree must be given to the general public and an opportunity for comment provided. EPA will publish the required notice in the Federal Register as soon as is practicable. Interested parties then will have thirty (30) days during which to comment or object to the proposed consent decree.

4. If no comments are received within the thirty (30) day public comment period, the United States will so advise the Court and move the Court to enter the proposed consent decree.

5. Should comments be received during the thirty (30) day public comment period, the United States will consider the submitted comments and make an appropriate motion.

6. A copy of the proposed consent decree is attached hereto as Exhibit A. The United States respectfully requests that this Court lodge the proposed consent decree, but not file it unless the United States affirmatively moves for its entry after evaluating any public comments received during the thirty (30) day Clean Air Act section 113(g) public comment period.

Respectfully Submitted,

Dated: May 23, 2023

/s/ Heather E. Gange
HEATHER E. GANGE
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
Tel. 202.514.4206
Fax. 202.514.8865

Counsel for Defendants

CERTIFICATE OF SERVICE

I, Heather E. Gange, certify that on this 23rd day of May, 2023, I electronically filed the foregoing NOTICE OF LODGING OF CONSENT DECREE through the CM/ECF system which caused all Parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Heather E. Gange

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CONSENT DECREE

WHEREAS, Plaintiffs East Yard Communities for Environmental Justice, Ironbound Community Corporation and Sierra Club (collectively “East Yard”) filed a Complaint on January 13, 2022, initiating the above-captioned matter against Defendants the U.S. Environmental Protection Agency and Michael S. Regan in his official capacity as Administrator (collectively “EPA”) alleging that EPA failed to fulfill a non-discretionary duty under the Clean Air Act, 42 U.S.C. § 7429(a)(1) and (a)(5), to review and if appropriate revise performance standards for large municipal solid waste incinerators at five-year intervals;

WHEREAS, East Yard filed its Complaint more than sixty days after notifying EPA, under 42 U.S.C. § 7604(b)(2), of its intent to bring this action;

WHEREAS, Plaintiffs also filed a related petition in the United States Court of Appeals for the District of Columbia Circuit on December 21, 2021 (“Petition Matter”), seeking a writ of mandamus related to a 2008 order of that court remanding to EPA performance standards for large municipal solid waste incinerators. *See In re East Yard Communities for Env’t. Justice*, Case No. 21-1271 (D.C. Cir.);

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 alleged obligation;

WHEREAS, East Yard and EPA (collectively, “the Parties”) have agreed to a settlement of this action without admission of any issue of fact or law, except as expressly provided herein;

WHEREAS, the agreement embodied in this Consent Decree includes a date certain by which EPA must review and if appropriate revise the performance standards for large municipal solid waste incinerators;

WHEREAS, the Parties agree that resolution of this matter without further litigation is in the interest of the public, East Yard, EPA, and judicial economy; and

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 undecided issues of fact or law, and upon the consent of the Parties, it is hereby ordered, adjudged, and decreed that:

1. This Court has jurisdiction over the claims set forth in the Complaint and may order the relief contained in this Consent Decree. Venue is proper in the United States District Court for the District of Columbia.
2. The Parties to this Consent Decree are East Yard and EPA.
3. The Parties shall not challenge the terms of this Consent Decree or this Court’s jurisdiction to enter and enforce this Consent Decree.
4. No later than December 31, 2023, EPA shall sign a notice of proposed rulemaking that proposes to review and if appropriate revise, in accordance with 42 U.S.C. § 7429, the emission standards for large municipal waste incinerators.

5. No later than November 30, 2024, EPA shall sign a final rule reviewing and if appropriate revising the emission standards for large municipal waste incinerators in accordance with 42 U.S.C. § 7429.

6. Upon the signing of the documents described in Paragraphs 4–5, the appropriate EPA official shall, within 15 business days of signature, forward each such document to the Office of the Federal Register for review and publication in the *Federal Register*. Following such delivery to the Office of the Federal Register, EPA shall not take any action (other than is necessary to correct any typographical errors or other errors in form) to delay or otherwise interfere with the publication of each such notice in the *Federal Register*.

7. The deadlines set forth in Paragraphs 4–6 may be modified (a) by written stipulation of the Parties with notice to the Court, or (b) by the Court following motion of EPA for good cause shown, and upon consideration of any response by East Yard and 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 and upon consideration of any response by the non-moving party.

8. Within 15 days after entry of this Consent Decree, the Parties shall move the United States Court of Appeals for the District of Columbia Circuit to hold in abeyance the Petition Matter, if not already held in abeyance. East Yard shall move to voluntarily withdraw the Petition Matter once EPA’s obligations under Paragraphs 4–6 have been completed.

9. The Court shall retain jurisdiction to determine and effectuate compliance with the Consent Decree. When EPA’s obligations under Paragraphs 4–6 have been completed, the Parties may either jointly notify the Court that the Consent Decree should be terminated and the case dismissed, or EPA may so notify the Court by motion. If EPA notifies the Court by motion, East Yard shall have 30 days in which to respond.

10. Except as provided herein, nothing in this Consent Decree shall be construed to limit or modify any discretion accorded to EPA by the Clean Air Act or by general principles of administrative law in taking the actions that 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.

11. Nothing in this consent decree shall be construed as an admission of any issue of fact or law, nor as a waiver or limitation regarding any claim, remedy, or defense, on any grounds, related to any EPA action addressed in this decree, the Complaint, or the Petition Matter.

12. Nothing in this Consent Decree shall be construed to confer upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals pursuant to the Clean Air Act, 42 U.S.C. § 7607(b)(1), including but not limited to judicial review of the final rule issued by EPA pursuant to Paragraphs 4–6. Nothing in the terms of this Consent Decree shall be construed to waive, limit, or modify any remedies, rights to seek judicial review, or defenses the Parties may have under the Clean Air Act, 42 U.S.C. § 7607(b)(1).

13. Any notices required or provided for by this Consent Decree shall be in writing, via email or other means, and sent to the following:

a. For Plaintiff East Yard:

Jonathan Smith
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
jjsmith@earthjustice.org

Khushi Desai
Earthjustice
1001 G St. NW, Ste. 1000
Washington, D.C. 20001
kdesai@earthjustice.org

b. For Defendant EPA:

Chief, Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20004
MailProcessing_EDS.ENRD@usdoj.gov

Gus Maxwell
Heather Gange
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Gustavus.Maxwell@usdoj.gov
Heather.Gange@usdoj.gov

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

15. If a lapse in EPA's appropriations occurs prior to any deadline in this Consent Decree, that deadline shall be extended automatically by one calendar day for each calendar day of delay caused by the lapse in appropriations. No notice is required to extend time in connection with a lapse in appropriations. EPA shall notify East Yard of the date of the modified deadline upon the restoration of appropriations. Nothing in this paragraph shall preclude EPA from seeking an additional extension through stipulation of the Parties or modification of this Consent Decree under Paragraph 6.

16. The Parties agree that this Consent Decree shall constitute a complete and final settlement of all claims in the complaint.

17. The deadline for filing a motion for costs of litigation, including attorney fees, is extended until 90 days after this Consent Decree is entered by the Court. During this period the Parties shall seek to resolve any claims for costs of litigation, including attorney fees, for time expended in both the above-captioned matter and the Petition Matter. If the Parties cannot so resolve these claims, the Parties will submit that issue for resolution to this Court and the court in the Petition Matter, as appropriate. The United States does not waive or limit any defenses it may have to such claim. The Court shall retain jurisdiction to resolve any requests for costs of litigation, including attorney fees.

18. If for any reason the Court declines to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Party and the proposed Consent Decree's terms may not be used as evidence in any litigation between the Parties.

19. The Parties treat this Consent Decree as jointly drafted, and any rules of construction that construe any ambiguities in this document against the drafting party shall be inapplicable in any dispute concerning the interpretation of this Consent Decree.

20. This Consent Decree constitutes the entire agreement between the Parties and supersedes any prior or contemporaneous agreements, discussions, or representations, oral or written, with respect to the resolution of this case.

21. The Parties acknowledge that EPA must provide notice of this Consent Decree in the Federal Register and an opportunity for public comment pursuant to the Clean Air Act, 42 U.S.C. § 7413(g). After the close of the public comment period, the Administrator of EPA and/or the Attorney General, as appropriate, shall promptly consider any written comments and decide whether to withdraw or withhold their consent to this Consent Decree, in accordance with the Clean Air Act, 42 U.S.C. § 7413(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.

22. This Consent Decree applies to, is binding upon, and inures to the benefit of the Parties and their successors, assigns, and designees. This Consent Decree shall not be construed to create any rights in, or grant any cause of action to, any third party that is not a party to this Consent Decree.

23. The undersigned representatives of the Parties 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 Consent Decree.

SO ORDERED on this _____ day of _____, 2023.

HON. JAMES E. BOASBERG
United States District Judge

FOR EAST YARD:

/s/ Khushi Desai
Khushi Desai (D.C. Bar No. 984119)
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DATED: May 17, 2023

Jonathan Smith, Esq.*
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(212) 845-7379
**Admitted pro hac vice*

FOR EPA:

HEATHER GANGE Digitally signed by HEATHER
GANGE
Date: 2023.05.23 10:10:28 -04'00'

DATED: May 23, 2023

Heather Gange (D.C. Bar 452615)
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