

US EPA ARCHIVE DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN LUNG ASSOCIATION,
ENVIRONMENTAL DEFENSE,
NATURAL RESOURCES DEFENSE
COUNCIL, SIERRA CLUB,
ALABAMA ENVIRONMENTAL
COUNCIL, CLEAN AIR COUNCIL,
MICHIGAN ENVIRONMENTAL
COUNCIL, OHIO ENVIRONMENTAL
COUNCIL, and SOUTHERN ALLIANCE
FOR CLEAN ENERGY,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN,
Administrator, United States Environmental
Protection Agency, and United States
Environmental Protection Agency

Defendants.

C.A. No. 02-2239 (RMU)

CONSENT DECREE

WHEREAS, Plaintiffs filed the complaint in this Action on November 13, 2002, against Defendants Christine Todd Whitman, Administrator of the United States Environmental Protection Agency, and United States Environmental Protection Agency (collectively "EPA");

WHEREAS, Plaintiffs' complaint seeks *inter alia* an order directing EPA, under 42 U.S.C. § 7407(d)(1)(B) and (d)(2)(A) and under Pub. L. 105-178, § 6103, 112 Stat. 465 (June 9, 1998), codified at 42 U.S.C. § 7407 Note, to promulgate and publish in the Federal Register attainment status designations referred to in 42 U.S.C. § 7407(d)(1)(A), for the revised 8-hour ozone national ambient air quality standard promulgated at 62 Fed. Reg. 38856 (July 18, 1997), 40 C.F.R. § 50.10;

WHEREAS, the Parties agree that this Court has jurisdiction under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a);

WHEREAS, the Parties seek to effect a settlement of this Action without expensive and protracted litigation;

WHEREAS, the Parties have agreed to a settlement of this Action without any admission or adjudication of fact or law;

WHEREAS, the Parties agree that this settlement represents a good faith compromise of disputed claims;

WHEREAS, it is EPA's intent to conclude a rulemaking on implementation of the 8-hour ozone NAAQS pursuant to the Court's remand in Whitman v. American Trucking Assns., 531 U.S. 457, 486 (2001), by December 2003;

WHEREAS, for any areas where the 120-day notice provision of 42 U.S.C. § 7407(d)(1)(B)(ii) is triggered with respect to 8-Hour Ozone NAAQS Attainment Status Designations, EPA intends to provide notice to the applicable States pursuant to 42 U.S.C. § 7407(d)(1)(B)(ii) by December 17, 2003;

WHEREAS, EPA agrees that the April 15, 2004 deadline -- contained in Paragraph 2 of this agreement -- for promulgation of the 8-Hour Ozone NAAQS Attainment Status Designations provides a sufficient and appropriate period of time for EPA to promulgate such Designations; that the April 30, 2004 deadline for publication of notice in the Federal Register concerning such promulgation provides a sufficient and appropriate period of time to effectuate publication; and that the timeframe specified in Paragraph 2 for submission of such promulgation to the Federal Register is likewise sufficient and appropriate;

WHEREAS, it is EPA's intent to consider the most recent air quality monitoring data available at the time it promulgates such designations, including data from the three-year 2001-2003 period, if available and quality assured;

WHEREAS, the Parties agree that after entry of the Consent Decree, they will meet periodically to discuss ways in which areas that approach or monitor minimal exceedances of the 8-hour standard could be encouraged to develop and implement early action plans offering a more expeditious time line for achieving emission reductions;

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ordered, adjudged, and decreed that:

DEFINITIONS

1. For the purposes of this Consent Decree, the following term shall have the following meaning:

"8-Hour Ozone NAAQS Attainment Status Designations" shall mean the designations for the 8-hour ozone national ambient air quality standard, 40 C.F.R. § 50.10, that are required to be promulgated and published in the Federal Register by the Administrator

pursuant to 42 U.S.C. § 7407(d)(1)(B) and (d)(2)(A), and Pub. L. 105-178, § 6103, 112 Stat. 465 (June 9, 1998), codified at 42 U.S.C. § 7407 Note.

EPA OBLIGATIONS

2. a. No later than April 15, 2004, EPA shall sign a notice promulgating the 8-Hour Ozone NAAQS Attainment Status Designations.

b. i. No later than April 30, 2004, EPA shall publish in the Federal Register a notice announcing the availability of the promulgation referenced in subparagraph a of this paragraph.

ii. No later than five calendar days following signature of the promulgation referenced in paragraph 2.a above, EPA shall deliver the promulgation to the Office of the Federal Register for prompt publication. Following such delivery to the Office of the Federal Register, EPA shall not take any step (other than as necessary to correct within 10 calendar days after submittal any typographical or other errors in form) to delay or otherwise interfere with publication of such promulgation in the Federal Register. EPA shall make available to Plaintiffs, within five business days following signature by the Administrator or her delegate, copies of the promulgation referenced in paragraph 2.a.

MODIFICATION OF THIS DECREE

3. The Parties may extend the deadlines established in Paragraph 2 by written stipulation executed by counsel for the Parties and filed with the Court. In addition, any provision of this Consent Decree may be modified by the Court upon motion by any party to this Consent Decree demonstrating that such modification is consistent with law and in the public interest, after consideration of any response by the non-moving party.

4. Consistent with paragraph 3, EPA may request modification of the deadlines set out in this Consent Decree in accordance with the following procedures:

a. If EPA seeks to modify a deadline established by this Consent Decree, EPA shall make its best efforts to provide notice to plaintiffs at least 30 days prior to the deadline that EPA seeks to modify;

b. If EPA seeks to modify a deadline established by this Consent Decree, but has not given plaintiffs' counsel the advance notice specified in subparagraph a of this paragraph, then EPA shall notify plaintiffs' counsel in writing, no later than the date when the motion to modify is filed with the Court, of the reasons why such prior notice was not practicable.

CONTINUING JURISDICTION AND TERMINATION

5. a. The Court shall retain jurisdiction to effectuate compliance with this Consent Decree and to consider any requests for costs of litigation (including attorney's fees). When EPA

has discharged its obligations under paragraph 2 above and all relevant notices have been published in the Federal Register, then this case shall be dismissed with prejudice.

b. Notwithstanding such dismissal, if (1) plaintiff(s) to this Consent Decree seek judicial review in the court of appeals of any action taken by EPA pursuant to this Consent Decree, and (2) the court of appeals rules that such challenge is not within the jurisdiction of the court of appeals, any dismissal of the instant action shall not preclude plaintiff(s) from bringing a district court action challenging any final action taken by EPA pursuant to this Consent Decree. Should any final action taken by EPA under paragraph 2 be vacated in whole or part by a United States Court of Appeals under section 307(b)(1) of the Clean Air Act, any dismissal of the instant case shall not preclude any party's right, which is expressly reserved, to argue in a new lawsuit whether a claim exists for EPA to promulgate 8-Hour Ozone NAAQS Attainment Status Designations, the court in which such a lawsuit and claim might be heard, and the jurisdictional basis for any such lawsuit and claim.

c. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Decree, the disputing party shall contact the other party to confer and attempt to reach an agreement on the disputed issue. If the parties cannot reach an agreed-upon resolution, then either party may move the Court to resolve the dispute.

SAVINGS PROVISIONS

6. The obligations imposed by EPA under Paragraph 2 of this Consent Decree can only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.

7. Nothing in this Consent Decree shall be considered to limit or modify any discretion EPA may have to alter, amend, or revise the actions taken pursuant to Paragraph 2 of this Consent Decree.

8. Nothing in the terms of this Decree shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law, in making the Designations referred to in Paragraph 2. EPA's obligation to perform the actions specified in paragraph 2 of this Decree, by the dates specified in said paragraph, does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

9. Nothing in the terms of this Consent Decree shall be construed either (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 section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), or (b) to waive any remedies plaintiffs may have under section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Decree shall be construed to confer upon the district court jurisdiction to review any decision, either procedural or substantive, to be made by

EPA pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree.

ATTORNEY FEES AND COSTS

10. The deadline for filing a motion for costs of litigation (including attorney's fees) for activities performed prior to entry of this Consent Decree in this case is hereby extended until 120 days after entry of this Consent Decree by the Court. During this time the parties shall seek to resolve informally any claim for costs of litigation (including attorney's fees), and if they cannot, will submit that issue to the Court for resolution. The Court shall retain jurisdiction to resolve any request for costs of litigation (including attorney's fees), notwithstanding any dismissal pursuant to paragraph 5 above.

SECTION 113(g)

11. The Parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). EPA will expeditiously prepare such notice and forward it to the Office of Federal Register within 15 days of lodging the draft Consent Decree with the Court. After this Consent Decree has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree, in accordance with section 113(g) of the Clean Air Act. If the federal government elects not to withdraw or withhold consent to this Consent Decree, the parties shall promptly file a motion that requests the Court to enter this Consent Decree. If a motion to enter the Consent Decree is not filed within 120 days after the notice is published in the Federal Register, any party may file dispositive motions in this matter.

RECIPIENTS OF NOTIFICATION

12. Any notices required or provided for by this Decree shall be in writing, effective upon receipt, and sent to the following:

For Plaintiffs:

Howard Fox
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington D.C. 20036-2212

Ann B. Weeks
Clean Air Task Force
77 Summer Street, 8th Floor

c/o Grants Management Associates
Boston, MA 02110

For Defendants:

Jan Tierney, Attorney,
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Eric Hostetler, Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Attn: DJ # 90-5-2-4-16726

or such other person as either party may subsequently identify in writing to the other party.

SIGNATURE OF PARTIES

13. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to consent to the Court's entry of the terms and conditions of this Consent Decree.

For Plaintiffs

Dated: _____

HOWARD I. FOX
(D.C. Bar No. 322198)
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., NW
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorney for plaintiffs
American Lung Association,
Environmental Defense,
Natural Resources Defense Council, and
Sierra Club

ANN B. WEEKS
JONATHAN LEWIS
Clean Air Task Force
77 Summer Street, 8th Floor
c/o Grants Management Association
Boston, MA 02110
(617) 292-0234 x13

JAMES DOUGHERTY
(D.C. Bar No. 939538)
709 Third Street, SW
Washington, D.C. 20024-3103
(202) 488-1140

Attorneys for plaintiffs
Alabama Environmental Council,
Clean Air Council,
Michigan Environmental Council,
Ohio Environmental Council, and
Southern Alliance for Clean Energy

For Defendants

Dated: _____

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources
Division
U.S. Department of Justice

ERIC G. HOSTETLER
(DC Bar No. 445917)
Environmental Defense Section
601 D Street, N.W.
Suite 8000
Washington, D.C. 20004
(202) 305-2326

Jan Tierney, Attorney,
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

SO ORDERED this _____ day of _____, 2002

UNITED STATES DISTRICT JUDGE