

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITIZENS FOR CLEAN AIR, *et al.*,

Plaintiffs,

v.

GINA MCCARTHY, *et al.*,

Defendants.

CASE NO. C16-0857-JCC

ORDER GRANTING JOINT
MOTION TO ENTER CONSENT
DECREE

This matter comes before the Court on the parties' joint motion for entry of their proposed Consent Decree. (Dkt. No. 31.) The United States Environmental Protection Agency (EPA) published notice of the proposed Consent Decree in the Federal Register and received only one anonymous comment, which was incomplete in that it contained no substance or attachments. (Dkt. No. 31 at 2.) The United States consents to entry of the Consent Decree. (*Id.*) Having thoroughly considered the joint motion and the relevant record, the Court hereby GRANTS the motion and ENTERS the following consent decree:

WHEREAS, on June 14, 2016, Plaintiffs Citizens for Clean Air and Sierra Club (Plaintiffs) filed the above-captioned matter against Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency, and Dennis McLerran, in his official capacity as Regional Administrator of the United States Environmental Protection Agency, Region 10 (collectively, EPA or Defendant);

1 WHEREAS, Plaintiffs allege that EPA has failed to undertake certain nondiscretionary
2 duties under the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, and that such alleged failure is
3 actionable under section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2);

4 WHEREAS, section 110(a)(1) of the CAA, 42 U.S.C. § 7410(a)(1), requires States to
5 adopt and submit to EPA for review State implementation plans (SIP), which establish specific
6 control measures and other requirements that apply to particular sources of air pollution within a
7 State and are designed to attain, maintain, and enforce National Ambient Air Quality Standards
8 (NAAQS) established by EPA that specify the maximum permissible concentrations for those
9 pollutants in the ambient air, *see* 42 U.S.C. §§ 7408, 7409;

10 WHEREAS, Plaintiffs allege that EPA has failed to perform a duty mandated by CAA
11 section 110(k)(2)-(4), 42 U.S.C. § 7410(k)(2)-(4), to take final action to approve, disapprove or
12 conditionally approve, in whole or in part, the portions of the Fairbanks North Star Borough
13 Moderate Area Attainment Plan for attainment of the 2006 24-hour fine particulate matter
14 (PM_{2.5}) NAAQS, which Alaska submitted to EPA in two parts on December 31, 2014, and
15 January 29, 2015 (the Fairbanks 2015 PM_{2.5} Plan), and which EPA deemed complete pursuant
16 to CAA section 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B), on February 18, 2015, *see* Compl. ¶¶
17 28-30;

18 WHEREAS, the relief requested in the Complaint is an order from this Court to establish
19 a date certain by which EPA must make and publish a decision to approve, in whole or in part, or
20 disapprove the Fairbanks 2015 PM_{2.5} Plan;

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

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

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

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

3 WHEREAS, Plaintiffs and EPA agree that this Court has jurisdiction over this matter
4 pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2), and that
5 venue is proper in the Western District of Washington pursuant to 28 U.S.C. § 1391(e);

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

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

- 11 1. EPA shall sign a notice or notices of proposed rulemaking to approve, disapprove, or
12 conditionally approve, in whole or in part, the Fairbanks 2015 PM2.5 Plan pursuant to
13 section 110(k)(2)-(4) of the CAA, 42 U.S.C. § 7410(k)(2)-(4), no later than January 19,
14 2017.
- 15 2. EPA shall sign a notice or notices of final rulemaking on its proposal to approve,
16 disapprove, or conditionally approve, in whole or in part, the Fairbanks 2015 PM2.5 Plan
17 pursuant to section 110(k)(2)-(4) of the CAA, 42 U.S.C. § 7410(k)(2)-(4), no later than
18 August 28, 2017.
- 19 3. If Alaska withdraws the Fairbanks 2015 PM2.5 Plan or any portion thereof, then EPA's
20 obligation to take the actions required by Paragraphs 1 and 2 with respect to such
21 withdrawn portions is automatically terminated.
- 22 4. EPA shall, within 15 business days after signature of proposed rulemaking in Paragraph 1
23 and within 15 business days after signature of final rulemaking in Paragraph 2, deliver
24 notice of each action taken pursuant such Paragraphs to the Office of the Federal Register
25 for review and publication.
- 26 5. After EPA has completed the action set forth in Paragraph 2 of this Consent Decree and

1 after notice of final action required by Paragraph 2 has been published in the Federal
2 Register and the issue of costs of litigation, including reasonable attorney fees, has been
3 resolved, EPA may move to have this Decree terminated and the action dismissed.

4 Plaintiffs shall have fourteen (14) days in which to respond to such a motion, unless the
5 parties stipulate to a longer time for Plaintiffs to respond.

6 6. The deadlines established by this Consent Decree may be extended (a) by written
7 stipulation of Plaintiffs and EPA with notice to the Court, or (b) by the Court upon
8 motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure
9 and upon consideration of any response by Plaintiffs and any reply by EPA.

10 7. If a lapse in appropriations occurs within one hundred and twenty (120) days prior to the
11 deadline in either Paragraph 1 or Paragraph 2 in this Consent Decree, that deadline shall
12 be extended automatically one day for each day of the lapse in appropriations. Nothing in
13 this paragraph shall preclude EPA from seeking additional time pursuant to Paragraph 6.

14 8. Plaintiffs and EPA agree that this Consent Decree shall constitute a complete and final
15 settlement of all claims that Plaintiffs have asserted against the United States, including
16 EPA, under any provision of law in connection with *Citizens for Clean Air v. EPA*, Case
17 No. 2:16-cv-00857-MAT (W.D. Wash.). Plaintiffs therefore discharge and covenant not
18 to sue the United States, including EPA, for any such claims.

19 9. In the event of a dispute between Plaintiffs and EPA concerning the interpretation or
20 implementation of any aspect of this Consent Decree, the disputing party shall provide
21 the other party with a written notice outlining the nature of the dispute and requesting
22 informal negotiations. These parties shall meet and confer in order to attempt to resolve
23 the dispute. If these parties are unable to resolve the dispute within ten (10) business days
24 after receipt of the notice, either party may petition the Court to resolve the dispute.

25 10. No motion seeking to enforce this Consent Decree or for contempt of Court shall be
26 properly filed unless the procedure set forth in Paragraph 9 has been followed, and the

1 non-moving party has been provided with written notice at least ten (10) business days
2 before the filing of such motion.

3 11. The deadline for filing a motion for costs of litigation (including reasonable attorney
4 fees) for activities performed prior to entry of the Consent Decree is hereby extended
5 until ninety (90) days after this Consent Decree is entered by the Court. During this
6 period, the parties shall seek to resolve informally any claim for costs of litigation
7 (including reasonable attorney fees), and if they cannot, Plaintiffs will file a motion for
8 costs of litigation (including reasonable attorney fees) or a stipulation or motion to extend
9 the deadline to file such a motion. EPA reserves the right to oppose any such request.

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

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

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

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

5 16. Plaintiffs reserve the right to seek additional costs of litigation, including reasonable
6 attorney fees, incurred subsequent to entry of this Consent Decree and arising from
7 Plaintiffs' need to enforce or defend against efforts to modify its terms or the underlying
8 schedule outlined herein, or for any other unforeseen continuation of this action. EPA
9 reserves the right to oppose any such request for additional costs of litigation, including
10 reasonable attorney fees.

11 17. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted
12 by Plaintiffs and EPA. Accordingly, the parties hereby agree that any and all rules of
13 construction to the effect that ambiguity is construed against the drafting party shall be
14 inapplicable in any dispute concerning the terms, meaning, or interpretation of this
15 Consent Decree.

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

25 19. Any notices required or provided for by this Consent Decree shall be in writing, via
26 electronic mail, and sent to the following (or to any new address of counsel as filed and

1 listed in the docket of the above-captioned matter, at a future date):

2 For Plaintiffs Citizens for Clean Air and Sierra Club:

3 Erik Grafe
4 Earthjustice
5 441 W 5th Avenue, Suite 301
6 Anchorage, AK 99501
7 Tel: (907) 792-7102
8 Email: egrafe@earthjustice.org

9 Kenta Tsuda
10 Earthjustice
11 325 Fourth Street
12 Juneau, AK 99801
13 Tel: (907) 500-7129
14 Email: ktsuda@earthjustice.org

15 For Defendant EPA:

16 Amanda Berman
17 U.S. Department of Justice
18 Environment & Natural Resources Division
19 Environmental Defense Section
20 601 D Street N.W., Suite 8000
21 Washington D.C. 20004
22 Tel. (202) 514-1950
23 Email: amanda.berman@usdoj.gov

24 20. EPA and Plaintiffs recognize and acknowledge that the obligations imposed upon EPA
25 under this Consent Decree can only be undertaken using appropriated funds legally
26 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.

21 21. If for any reason the Court should decline to approve this Consent Decree in the form
22 presented, this agreement is voidable at the sole discretion of either party and the terms of
23 the proposed Consent Decree may not be used as evidence in any litigation between the
24 parties.

25 22. The undersigned representatives of Plaintiffs Citizens for Clean Air and Sierra Club and
26 Defendant EPA certify that they are fully authorized by the party they represent to

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consent to the Court’s entry of the terms and conditions of this Decree.

DATED this 5th day of January 2017.



John C. Coughenour
UNITED STATES DISTRICT JUDGE