

1 SHEILA BAYNES
2 sheila.baynes@usdoj.gov
3 Environmental Defense Section
4 601 D Street N.W., Suite 8000
5 Washington D.C. 20004
6 Tel. (202) 514-2617

7 *Attorney for Defendants*

8 [additional counsel listed on signature page]

9 **IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

10 CITIZENS FOR CLEAN AIR, a project of
11 ALASKA COMMUNITY ACTION ON
12 TOXICS, and SIERRA CLUB,

13 Plaintiffs,

14 v.

15 ANDREW WHEELER, in his official
16 capacity as Administrator of the United
17 States Environmental Protection Agency,
18 and CHRIS HLADICK, in his official
19 capacity as Regional Administrator of the
20 United States Environmental Protection
21 Agency Region 10,

22 Defendants,

23 STATE OF ALASKA,

24 Defendant-Intervenor

Case No. 2:18-cv-01803-TSZ

CONSENT DECREE

25 WHEREAS, on December 18, 2018, Citizens for Clean Air and Sierra Club
26 (“Plaintiffs”) filed the above-captioned matter against Andrew Wheeler, in his official
27 capacity as Administrator of the United States Environmental Protection Agency, and
28 Chris Hladick, in his official capacity as Regional Administrator of the United States
Environmental Protection Agency, Region 10 (collectively, “EPA”);

1 WHEREAS, Plaintiffs allege that EPA has failed to undertake a certain non-
2 discretionary duty under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and that
3 such alleged failure is actionable under section 304(a)(2) of the CAA, 42 U.S.C. §
4 7604(a)(2);

5 WHEREAS, EPA revised the 24-hour fine particulate matter (“PM_{2.5}”) National
6 Ambient Air Quality Standard (“NAAQS”) from 65 micrograms per cubic meter to 35
7 micrograms per cubic meter on October 17, 2006;

8 WHEREAS, EPA designated a portion of the Fairbanks North Star Borough
9 (“Area”) nonattainment for the 2006 24-hour PM_{2.5} NAAQS, and classified the Area as a
10 “moderate” nonattainment area on December 14, 2009;

11 WHEREAS, on May 10, 2017, EPA published a finding that the Area failed to
12 attain the 2006 24-hour PM_{2.5} NAAQS by the moderate area attainment date of
13 December 31, 2015;

14 WHEREAS, as a consequence of this finding and by virtue of section 188(b)(2) of
15 the CAA, 42 U.S.C. § 7513(b)(2), effective June 9, 2017, the Area was reclassified from
16 a “moderate” to a “serious” nonattainment area, which required the State of Alaska to
17 make a serious area state implementation plan (“SIP”) submission in accordance with
18 title I, part D, subparts 1 and 4 of the CAA and 40 C.F.R. part 51, subpart Z;

19 WHEREAS, Plaintiffs allege that EPA failed to perform a duty mandated by
20 CAA section 110(k)(1)(B), 42 U.S.C. § 7510(k)(1)(B), by failing to determine whether
21 the State of Alaska has made an administratively complete SIP submission intended to
22 meet serious area nonattainment plan requirements for purposes of the 2006 24-hour
23 PM_{2.5} NAAQS in the Area by the deadline triggered by the EPA’s May 10, 2017 finding
24 that the Area failed to attain the 2006 24-hour PM-2.5 NAAQS by December 31, 2015,
25 and failing to publish a notice in the Federal Register setting forth that determination;

26 WHEREAS, the relief requested in the Complaint is an order from this Court to
27 establish a date certain by which EPA must make and publish a determination whether
28 the State of Alaska has made an administratively complete SIP submission intended to

1 meet serious area nonattainment plan requirements for purposes of the 2006 24-hour
2 PM_{2.5} NAAQS in the Area;

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

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

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

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

13 WHEREAS, Plaintiffs and EPA agree that this Court has jurisdiction over this
14 matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C.
15 § 7604(a)(2), and that venue is proper in the Western District of Washington pursuant to
16 28 U.S.C. § 1391(e);

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

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

22 1. No later than January 15, 2020, EPA shall sign a notice of final rulemaking
23 determining whether the State of Alaska has made an administratively complete SIP
24 submission intended to meet serious area nonattainment plan requirements for purposes
25 of the 2006 24-hour PM_{2.5} NAAQS in the Fairbanks North Star Borough.

26 2. EPA shall, within 15 business days after signature of the final rulemaking
27 described in Paragraph 1, deliver the notice of action taken pursuant to Paragraph 1 to the
28 Office of the Federal Register for review and publication.

1 3. After EPA has completed the action set forth in Paragraph 1 of this Consent
2 Decree and after notice of that action has been published in the Federal Register and the
3 issue of costs of litigation, including reasonable attorneys' fees, has been resolved, EPA
4 may move to have this Decree terminated and the action dismissed. Plaintiffs shall have
5 fourteen (14) days in which to respond to such a motion, unless the parties stipulate to a
6 longer time for Plaintiffs to respond.

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

11 5. If a lapse in appropriations occurs within one hundred and twenty (120) days
12 prior to the deadline set forth in Paragraph 1 of this Consent Decree, that deadline shall
13 be extended automatically one day for each day of the lapse in appropriations. Nothing
14 in this paragraph shall preclude EPA from seeking additional time pursuant to Paragraph
15 4.

16 6. Plaintiffs and EPA agree that this Consent Decree shall constitute a complete
17 and final settlement of all claims that Plaintiffs have asserted against the United States,
18 including EPA, under any provision of law, in connection with *Citizens for Clean Air v*
19 *Wheeler*, Case No. 2:18-cv-01803 (W.D. Wash.). Plaintiffs therefore discharge and
20 covenant not to sue the United States, including EPA, for any such claims.

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

28

1 8. No motion seeking to enforce this Consent Decree or for contempt of Court
2 shall be properly filed unless the procedure set forth in Paragraph 7 has been followed,
3 and the non-moving party has been provided with written notice at least ten (10) business
4 days before the filing of such motion.

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

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

15 11. Nothing in the terms of this Consent Decree shall be construed (a) to confer
16 upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction
17 of the United States Courts of Appeals under CAA section 307(b)(1), 42 U.S.C.
18 § 7607(b)(1), including final action pursuant to section 110(k)(1)(B) of the CAA, 42
19 U.S.C. § 7510(k)(1)(B), determining whether the State of Alaska submitted an
20 administratively complete serious area nonattainment SIP addressing the 2006 24-hour
21 PM_{2.5} NAAQS in the Area, or (b) to waive any claims, remedies, or defenses that the
22 parties may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

23 12. Nothing in this Consent Decree shall be construed to limit or modify any
24 discretion accorded EPA by the CAA or by general principles of administrative law in
25 taking the actions that are the subject of this Consent Decree, including the discretion to
26 alter, amend, or revise any final actions promulgated pursuant to this Consent Decree.
27 EPA's obligation to perform each action specified in this Consent Decree does not
28

1 constitute a limitation or modification of EPA's discretion within the meaning of this
2 paragraph.

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

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

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

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

27
28

1 17. Any notices required or provided for by this Consent Decree shall be in
2 writing, via electronic mail, and sent to the following (or to any new address of counsel
3 as filed and listed in the docket of the above-captioned matter, at a future date):

4 For Plaintiffs Citizens for Clean Air and Sierra Club:

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

10 Jeremy Lieb
11 Earthjustice
12 441 W 5th Avenue, Suite 301
13 Anchorage, AK 99501
14 Tel: (907) 277-2500
15 Email: jlieb@earthjustice.org

16 Kristen L. Boyles
17 Earthjustice
18 705 Second Avenue, Suite 203
19 Seattle, WA 98104
20 Tel: (206) 343-7340
21 Email: kboyles@earthjustice.org

22 For Defendant EPA:

23 Sheila Baynes
24 U.S. Department of Justice
25 Environment & Natural Resources Division
26 Environmental Defense Section
27 601 D Street N.W., Suite 8000
28 Washington D.C. 20004
Tel. (202) 514-2617
Email: sheila.baynes@usdoj.gov

18. EPA and Plaintiffs 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

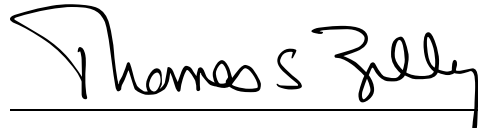
1 or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
2 applicable provision of law.

3 19. If for any reason the Court should decline to approve this Consent Decree in
4 the form presented, this agreement is voidable at the sole discretion of any party and the
5 terms of the proposed Consent Decree may not be used as evidence in any litigation
6 between the parties.

7 20. The undersigned representatives of Plaintiffs Citizens for Clean Air and
8 Sierra Club and Defendant EPA certify that they are fully authorized by the party or the
9 parties they represent to consent to the Court's entry of the terms and conditions of this
10 Decree.

11 IT IS SO ORDERED.

12 DATED this 23rd day of October 2019.

13 

14
15 Thomas S. Zilly
16 United States District Judge

17
18
19 COUNSEL FOR PLAINTIFFS:

s/ Jeremy C. Lieb

20 _____
21 Jeremy C. Lieb (WA Bar #47219)
22 EARTHJUSTICE
23 441 W 5th Avenue, Suite 301
24 Anchorage, AK 99501
25 Tel: (907) 277-2500
26 Email: jlieb@earthjustice.org

27 Erik Grafe (AK Bar #0804010)
28 (admitted *pro hac vice*)
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501
Tel: (907) 792-7102
Email: egrafe@earthjustice.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Kristen L. Boyles
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Tel: (206) 343-7340
Email: kboyles@earthjustice.org

*Attorneys for Citizens for Clean Air, a project of
Alaska Community Action on Toxics, and Sierra
Club*

COUNSEL FOR DEFENDANT: JEFFREY BOSSERT CLARK
Assistant Attorney General
Environment & Natural Resources Division

/s/ Sheila Baynes

SHEILA BAYNES
Environmental Defense Section
601 D Street N.W., Suite 8000
Washington D.C. 20004
Tel. (202) 514-2617
Email: sheila.baynes@usdoj.gov

Attorney for Defendant EPA

Of counsel:
Geoffrey L. Wilcox
Office of General Counsel
U.S. Environmental Protection Agency
Brett Dugan
Assistant Regional Counsel, Region 10
U.S. Environmental Protection Agency