

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.

MICHAEL O. LEAVITT,
Administrator, United States
Environmental Protection Agency, and
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

C.A. No. 03-778 (ESH)

EPA’S UNOPPOSED MOTION TO MODIFY CONSENT DECREE

Pursuant to Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6), and pursuant to Paragraph 4 of the Consent Decree entered by this Court on July 31, 2003, Defendants Michael O. Leavitt, Administrator, United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively “EPA”), hereby file this unopposed motion for further modification of the Consent Decree. Specifically, as set forth in the attached proposed order, EPA requests that the deadlines in Consent Decree Paragraphs 2.b. and 2.c., and the deadlines in Consent Decree Paragraphs 3.a., 3.b., and 3.c. be modified as follows:

- EPA requests that Paragraph 2.b. be modified to allow EPA until December 20, 2005, to sign for publication in the Federal Register a notice of proposed rulemaking setting forth its proposed decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for particulate matter promulgated under 42 U.S.C. § 7409, and proposing such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b);
- EPA requests that Paragraph 2.c. be modified to allow EPA until September 27, 2006, to sign for publication in the Federal Register a notice of final rulemaking setting forth its final decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for particulate matter and promulgating such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b);
- EPA requests that Paragraph 3.a. be modified to allow EPA until February 28, 2006, to issue a final Criteria Document for ozone;
- EPA requests that Paragraph 3.b. be modified to allow EPA until March 28, 2007, to sign for publication in the Federal Register a notice of proposed rulemaking setting forth its proposed decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for ozone promulgated under 42 U.S.C. § 7409, and proposing such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(d);
- EPA requests that Paragraph 3.c. be modified to allow EPA until December 19, 2007, to sign for publication in the Federal Register a notice of final rulemaking setting forth its final decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the national ambient air quality standards for ozone and promulgating such new standards and/or revisions of standards as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b).

Plaintiffs' counsel have authorized undersigned counsel to represent that Plaintiffs do not oppose the relief contained in EPA's proposed order.^{1/}

^{1/} Plaintiffs represent as follows: "Plaintiffs are very concerned about extensions – indeed, substantial extensions – of the consent deadlines, which involve actions of key importance to public health and the environment, that are already years past statutory deadlines. Plaintiffs again emphasize, as they have done in prior oral and written submissions to the Court, the importance of treating consent decree dates as real deadlines that EPA must meet, rather than simply as paper deadlines that invite further extension requests as each deadline draws near.

(continued...)

In further support of this motion, EPA states as follows:

Background

I. Statutory Background

Air quality criteria and National Ambient Air Quality Standards (“NAAQS”) are central to the Clean Air Act’s national program to control air pollution. *See generally American Trucking Ass’n v. EPA*, 283 F.3d 355, 358-59 (D.C. Cir. 2002). Clean Air Act section 108, 42 U.S.C. § 7408, requires EPA to identify certain ubiquitous air pollutants that may reasonably be anticipated to endanger public health and welfare and to issue comprehensive assessments – referred to as air quality criteria – that “accurately reflect” all pertinent scientific information bearing on the pollutants’ effects.^{2/} Clean Air Act section 109, 42 U.S.C. § 7409, requires EPA to promulgate NAAQS based on the air quality criteria for such pollutants. Section 109(d)(1), 42 U.S.C. § 7409(d)(1), requires periodic five-year review and, as appropriate, revision of air quality criteria and NAAQS.

^{1/}(...continued)

With the understanding that EPA is committed to meeting the extended deadlines set forth herein, and that EPA will (as described in the text of this motion) provide interim updates concerning the agency’s progress, Plaintiffs reluctantly state their nonopposition to the relief requested in this motion. In doing so, Plaintiffs do not endorse the assertions made in EPA’s motion concerning the legal standard governing consent decree modifications, or the agency’s contentions concerning the alleged need for an extension. For a discussion of Plaintiffs’ position on such matters, *see, e.g.*, Plaintiffs’ Memorandum in Opposition to EPA’s Motion to Modify Consent Decree (July 14, 2004).”

^{2/} EPA generally records the scientific assessments constituting air quality criteria in a “criteria document.”

II. The Instant Action and the Consent Decree

Plaintiffs, a group of environmental organizations, filed the instant action in March 2003 to compel EPA to (a) complete a thorough review of the air quality criteria and national ambient air quality standards (“NAAQS”) for particulate matter (“PM”) and for ozone, and (b) make such revisions to the criteria and NAAQS, and promulgate such new NAAQS, as may be appropriate, in accordance with sections 108 and 109(b) of the Clean Air Act, 42 U.S.C. §§ 7408 and 7409(b). Settlement discussions between the parties were successful, and a Consent Decree was entered by the Court on July 31, 2003. The Consent Decree establishes a series of deadlines for EPA to conclude its next review of the air quality criteria and NAAQS for PM and ozone.

With respect to PM, the original Consent Decree provided that EPA shall (1) issue a final PM Criteria Document by December 19, 2003, (2) sign a notice of proposed rulemaking concerning its review of the PM NAAQS by March 31, 2005, and (3) sign a notice of final rulemaking by December 20, 2005. With respect to ozone, the original Consent Decree provided that EPA shall (1) issue a final ozone Criteria Document by December 20, 2004, (2) sign a notice of proposed rulemaking concerning its review of the ozone NAAQS by March 31, 2006, and (3) sign a notice of final rulemaking by December 20, 2006.

III. Previous Amendments to Consent Decree

Because of unanticipated delays, the first deadline within the Consent Decree – the deadline for completion of the particulate matter Criteria Document (*See* Consent Decree, ¶ 2.a.) – was previously amended by stipulation of the parties and by the Court. First, pursuant to Paragraph 4 of the Consent Decree, the parties on December 12, 2003, filed a joint stipulation providing that the deadline to issue a final Criteria Document for PM was extended until April 30, 2004. The parties in April 2004 then filed an additional Joint Stipulation further modifying

the deadline for issuing a final criteria document for PM to July 30, 2004. Subsequently, on July 12, 2004, EPA filed an opposed motion for a further extension of the PM Criteria Document until October 29, 2004. By order dated July 23, 2004, this Court granted EPA's motion. EPA then issued the Criteria Document on October 29, 2004.

As part of its July order granting EPA's opposed motion for a further extension of the PM Criteria Document deadline, the Court directed the parties to consult to address the remaining Consent Decree deadlines.^{3/} Consistent with the Court's July order, the parties have engaged in good-faith discussions and have reached an agreement in principle concerning modifications to the remaining Consent Decree deadlines. Among other things, the parties have agreed that Plaintiffs will not oppose the relief requested in the instant motion for modification of remaining Consent Decree deadlines, and have agreed that EPA and Plaintiffs will conference by telephone on or about the following dates for the purpose of discussing the status of EPA's progress towards meeting modified Consent Decree deadlines: December 17, 2004, January 12, 2005, May 11, 2005, July 13, 2005, August 31, 2005, October 28, 2005, November 29, 2005, January 11, 2006, March 15, 2006, August 9, 2006, November 29, 2006, January 31, 2007, March 7, 2007, June 20, 2007, and October 31, 2007.

^{3/} While EPA's July 2004 motion sought an extension of the PM Criteria Document deadline only, EPA advised the Court in that motion that it believed that delays related to the PM Criteria Document would require extensions of the remaining deadlines in the Consent Decree as well. *See* EPA July 2004 Motion to Amend Consent Decree at 11, n. 3.

Discussion

I. Standard of Review

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application . . . (6) any other reason justifying relief from the operation of the judgment.

As long recognized by the Supreme Court, “[t]here is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen.” *System Fed’n No. 91, Ry. Employees’ Dep’t. v. Wright*, 364 U.S. 642, 647 (1961).

The decision to grant or deny a request to modify the terms of a consent decree rests with the discretion of the district court. *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1240 (D.C. Cir. 1980). A more flexible approach to requested modifications is called for when addressing the modification of decrees that regulate the conduct of government agencies and affect the public interest. *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000).

Such flexibility is particularly justified in a case such as this where the decree at issue places a government agency on a schedule for completion of certain rulemaking-related tasks whose object is to protect human health and the environment. *Cronin v. Browner*, 90 F. Supp. 2d at 373. In such cases, “[t]he public has a significant interest in ensuring that the government does not promulgate rules via a process that emphasizes expediency over quality and accuracy.” *Id.* The public interest is furthered when the schedule allows for rules to be promulgated which have a “sound, scientific basis,” “comport with the requirements” of the underlying statute, and “further EPA’s broad policy goals of protecting human health and the environment.” *Id.*

II. The Need for Additional Modifications to the Consent Decree

Establishing revised air quality criteria and NAAQS for particulate matter and ozone is an extraordinarily complex and time-consuming endeavor. EPA must review all of the latest relevant scientific research and accurately summarize and critically assess such research for the purpose of determining the health and welfare effects associated with the presence of varying concentrations of particulate matter and ozone in the ambient air. As EPA advised the Court in its July 12, 2004, motion for an extension of the PM Criteria Document Deadline, and at the hearing on such Motion, unanticipated delays in the schedule associated with completion of the PM Criteria Document have made it impossible for EPA to comply with the remainder of the current Consent Decree schedule. *See generally* EPA Motion to Modify Consent Decree and Declaration of Dr. Lester D. Grant filed with that motion.

EPA is committed to carrying out and completing the current review of the air quality criteria and NAAQS for ozone and PM as rapidly as possible, consistent with satisfying applicable legal requirements and assuring a sound and scientifically supportable decision. See Attached Declaration of Dr. Lester D. Grant ¶ 7. Accordingly, EPA has given considerable thought as to how remaining obligations under the Consent Decree may be performed as expeditiously as possible while assuring the scientific soundness of the reviews. Id. ¶¶ 8-9. Each step in the review process has been scrutinized by EPA professional staff and managers knowledgeable in the NAAQS review process to produce the shortest possible schedule for completing that review. Id. ¶ 9. It is EPA's judgment that imposition of a shorter schedule than the one sought in this unopposed motion would potentially jeopardize its ability to make sound and scientifically supportable decisions in the current review. Id.

Conclusion

For these reasons, EPA requests that the deadlines in Paragraphs 2 and 3 of the Consent Decree be modified as reflected in the attached proposed order.

Respectfully Submitted,

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Dated: December 14, 2004