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15
16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**
19

20 SIERRA CLUB,

21 Plaintiff,

22 v.

23
24 GINA McCARTHY, in her official capacity as
25 the Administrator of the United States
Environmental Protection Agency,

26 Defendant.
27
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Case No. 3:15-cv-04328-JD

**[PROPOSED] PARTIAL CONSENT
DECREE**

1 WHEREAS, on September 22, 2015, Plaintiff Sierra Club (“Plaintiff”) filed the
2 above-captioned matter against Gina McCarthy, in her official capacity as Administrator of
3 the United States Environmental Protection Agency (hereinafter “EPA” or “Defendant”)
4 (Dkt. No. 1);

5 WHEREAS, on August 29, 2016, pursuant to Fed. R. Civ. P. 15(a)(2), Plaintiff filed a
6 second amended complaint (Dkt. No. 39) (the “Complaint”);

7 WHEREAS, Plaintiff alleges that EPA has failed to undertake certain non-
8 discretionary duties under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and that
9 such alleged failure is actionable under section 304(a)(2) of the CAA, 42
10 U.S.C. § 7604(a)(2);

11 WHEREAS, on March 12, 2008, pursuant to CAA section 109(a)(1), 42 U.S.C. §
12 7409(d)(1), EPA promulgated a final rule revising the ozone National Ambient Air Quality
13 Standard (“NAAQS”), *Final Rule*, 73 Fed. Reg. 16,436 (Mar. 27, 2008) (the “2008 ozone
14 NAAQS”);

15 WHEREAS, pursuant to CAA section 110(d)(1), 42 U.S.C. § 7410(d)(1), “[e]ach
16 State shall, . . . submit to the Administrator, within 3 years . . . after the promulgation of a
17 [NAAQS] (or revision thereof) under section 7409 of this title for any air pollutant, a plan
18 which provides for implementation, maintenance, and enforcement of such primary standard
19 in each air quality control region (or portion thereof) with each State,” a state implementation
20 plan (“SIP”), often referred to as an infrastructure SIP;

21 WHEREAS, such SIP submittals must meet the requirements set forth in CAA
22 section 110(a)(2)(A)-(M), 42 U.S.C. § 7410(a)(2)(A)-(M);

23 WHEREAS, EPA must then determine whether a State’s submittal is complete within
24 six months after EPA receives the submission. 42 U.S.C. § 7410(k)(1)(B). If EPA does not
25 determine completeness of the plan or revision within six months, then the submittal is
26 deemed complete by operation of law after six months. *Id.*;

27 WHEREAS, pursuant to CAA section 110(k)(2)-(4), 42 U.S.C. § 7410(k)(2)-(4), EPA
28 is required to approve in whole or in part, disapprove, or conditionally approve in whole or in

1 part, each plan or revision, within 12 months of a determination of completeness by EPA or a
2 determination deemed by operation of law to be complete;

3 WHEREAS, pursuant to CAA section 110(d)(1), 42 U.S.C. § 7410(d)(1), states were
4 required to submit infrastructure SIPs within 3 years of promulgation of the 2008 ozone
5 NAAQS, i.e., by March 12, 2011;

6 WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty
7 mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to
8 approve or disapprove, in whole or in part, certain 2008 ozone NAAQS infrastructure SIP
9 submissions addressing the following element or elements under 42 U.S.C. § 7410(a)(2)
10 from the states listed below, *see* Compl. ¶¶19-37 (Dkt. No. 39):

AREA/STATE	ELEMENT(S) (under CAA section 110)
Louisiana	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prongs 3 & 4)
New York	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 3 only)
Wisconsin	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 3 only)
Wyoming	42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1-4)
New Jersey	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prongs 3 & 4)

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18 WHEREAS, on September 6, 2016, EPA partially approved and partially disapproved
19 elements of a New Jersey SIP submission addressing the infrastructure requirements of 42
20 U.S.C. § 7410(a)(2)(D)(i)(II) (prongs 3 and 4) for the 2008 ozone NAAQS. *Final Rule*, 81
21 Fed. Reg. 64,070 (Sept. 19, 2016). Claim 1 is therefore moot as to New Jersey as to the
22 requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(II) (prongs 3 and 4);

23 WHEREAS, on September 22, 2016, EPA approved Wyoming's SIP certification
24 addressing the infrastructure requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 3) for
25 the 2008 ozone NAAQS. *Final Rule*, 81 Fed. Reg. 70,362 (Oct. 12, 2016). Claim 1 is
26 therefore moot as to Wyoming as to the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(II)
27 (prong 3);
28

1 WHEREAS, on September 29, 2016, EPA partially approved and partially
2 disapproved elements of Louisiana’s SIP submission addressing the infrastructure
3 requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(II) (prongs 3 and 4) for the 2008 ozone
4 NAAQS. *Final Rule*, 81 Fed. Reg. 68,322 (Oct. 4, 2016). Claim 1 is therefore moot as to
5 Louisiana as to the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(II) (prongs 3 and 4);

6 WHEREAS, pursuant to 42 U.S.C. § 7410(c)(1), EPA must “promulgate a Federal
7 implementation plan [(“FIP”)] at any time within 2 years after the Administrator--

8 (A) finds that a State has failed to make a required submission or finds that the plan
9 or plan revision submitted by the State does not satisfy the minimum criteria established
10 under subsection (k)(1)(A) of this section, or

11 (B) disapproves a [SIP] submission in whole or in part, unless the State corrects the
12 deficiency, and the Administrator approves the plan or plan revision, before the
13 Administrator promulgates such [FIP];”

14 WHEREAS, on January 4, 2013, EPA found that California failed to submit a SIP
15 addressing the requirements of 42 U.S.C. § 7410(a)(2)(A)-(C), (D)(i)(II)-(H), & (J)-(M)
16 for the 2008 ozone NAAQS, *Notice*, 78 Fed. Reg. 2882 (Jan. 15, 2013) (effective
17 February 14, 2015);

18 WHEREAS, on November 24, 2015, EPA approved in part and disapproved in
19 part California’s SIP submission addressing certain requirements of 42 U.S.C. §
20 7410(a)(2)(A)-(C), (D)(i)(II)-(H), & (J)-(M) for the 2008 ozone NAAQS, *Final Rule*, 81
21 Fed. Reg. 18,766 (Apr. 1, 2016);

22 WHEREAS, in Claim 2, Plaintiff alleges that EPA has failed to perform a duty
23 mandated by CAA section 110(c)(1)(B), 42 U.S.C. § 7410(c)(1)(B), to promulgate a FIP
24 addressing the requirements of 42 U.S.C. § 7410(a)(2)(B)(with respect to the ambient air
25 quality monitoring/data system for the Bakersfield Metropolitan Statistical Area (“MSA”) in
26 the San Joaquin Valley Air Pollution Control District (“APCD”)) and 42 U.S.C. § 7410(a)(2)
27 (C), (D)(i)(II) (prong 3 only), & (J) (with respect to the Northern Sonoma, Mendocino, and
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1 North Coast Air Districts) for the 2008 ozone NAAQS within 2 years after finding that
2 California failed to make the required submission, Compl. ¶¶ 38-41;

3 WHEREAS, the relief requested in the Complaint includes, among other things, an
4 order from this Court to establish a date certain by which EPA must fulfill its obligations;

5 WHEREAS, Plaintiff and EPA have agreed to a partial settlement of this action
6 without admission of any issue of fact or law, except as expressly provided herein;

7 WHEREAS, Plaintiff and EPA, by entering into this partial Consent Decree (the
8 “Consent Decree”), do not waive or limit any claim, remedy, or defense, on any grounds,
9 related to any final EPA action;

10 WHEREAS, Plaintiff and EPA consider this Consent Decree to be an adequate and
11 equitable resolution of some of the claims in this matter and therefore wish to effectuate a
12 partial settlement;

13 WHEREAS, it is in the interest of the public, Plaintiff Sierra Club, Defendant EPA,
14 and judicial economy to resolve a substantial portion of this matter without protracted
15 litigation;

16 WHEREAS, Plaintiff and EPA agree that this Court has jurisdiction over the matters
17 resolved in this Consent Decree pursuant to the citizen suit provision in CAA section
18 304(a)(2), 42 U.S.C. § 7604(a)(2), and that venue is proper in the Northern District of
19 California pursuant to 28 U.S.C. § 1391(e) and Civil L.R. 3-2(c)-(d); and

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

22 NOW THEREFORE, before the taking of testimony, without trial or determination of
23 any issues of fact or law, and upon the consent of Plaintiff Sierra Club and Defendant EPA, it
24 is hereby ordered, adjudged and decreed that:

25 1. The appropriate EPA official shall:

26 a. sign a notice of final rulemaking to approve, disapprove, conditionally
27 approve, or approve in part and conditionally approve or disapprove in part, certain plans
28 pursuant to sections 110(k)(2)-(4) of the CAA, 42 U.S.C. §§ 7410(k)(2)-(4), no later than the

1 date indicated below for the following states and elements of section 110(a)(2), 42 U.S.C. §§
2 7410(a)(2) for the 2008 ozone NAAQS:

	STATE	SIP ELEMENT(S)	DATE	
4	a.	New York	42 U.S.C. § 7410(a)(2)(D)(i) (prong 3)	December 1, 2016
5	b.	Wisconsin	42 U.S.C. § 7410(a)(2)(D)(i)(II) (prong 3 only)	December 16, 2016
6	c.	Wyoming	42 U.S.C. § 7410(a)(2)(D)(i)(I)-(II) (prongs 1, 2, and 4)	January 17, 2017

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9 b. sign a notice of final rulemaking to approve a revised SIP submission,
10 promulgate a FIP, or partially approve a revised SIP submission and promulgate a partial FIP
11 for California no later than the date indicated below for the following elements of section
12 110(a)(2), 42 U.S.C. §§ 7410(a)(2) for the 2008 ozone NAAQS:

	SIP ELEMENT(S)	DATE	
14	1.	42 U.S.C. § 7410(a)(2)(B)(with respect to the ambient air quality monitoring/data system for the Bakersfield MSA in the San Joaquin Valley APCD)	December 15, 2017
15	2.	42 U.S.C. § 7410(a)(2)(C), (D)(i)(II) (prong 3 only), (J) (with respect to the Northern Sonoma Air District)	December 16, 2016
16	3.	42 U.S.C. § 7410(a)(2)(C), (D)(i)(II) (prong 3 only), (J) (with respect to the Mendocino Air District)	March 15, 2017
17	4.	42 U.S.C. § 7410(a)(2)(C), (D)(i)(II) (prong 3 only), (J) (with respect to the North Coast Air District)	March 15, 2017

21 2. If any State withdraws a submittal listed above in Paragraph 1(a), then EPA's
22 obligation to take the action required by Paragraph 1(a) with respect to that submittal is
23 automatically terminated unless Plaintiff moves the Court to address EPA's obligation in
24 light of the withdrawn submittal. If Plaintiff files such a motion, EPA's obligation to act on
25 the submittal is stayed pending resolution of said motion. EPA shall notify Plaintiff within
26 ten business days of receiving a written request from a state to withdraw any submittal listed
27 in Paragraph 1(a). Nothing in this Consent Decree shall be construed as an admission of any
28 issue of fact or law nor to waive or limit any claim, remedy, or defense, on any grounds,

1 related to EPA's obligation in the event that any State withdraws a submittal listed above in
2 Paragraph 1(a) and Plaintiff files a motion pursuant to this Paragraph. If EPA signs a finding
3 of failure to submit for the withdrawn submittal while such a motion is pending, Plaintiff
4 shall withdraw its motion.

5 3. EPA shall, within 15 business days of signature, send the rulemaking package for
6 each action taken pursuant to Paragraph 1 of this Consent Decree to the Office of the Federal
7 Register for review and publication.

8 4. After EPA has completed the actions set forth in Paragraph 1 of this Consent
9 Decree, after notice of each final action required by Paragraph 1 has been published in the
10 Federal Register, and the issue of costs of litigation (including reasonable attorney fees) has
11 been resolved), EPA may move to have this Decree terminated. Plaintiff shall have fourteen
12 (14) days in which to respond to such motion, unless the parties stipulate to a longer time for
13 Plaintiff to respond.

14 5. The deadlines established by this Consent Decree may be extended (a) by written
15 stipulation of Plaintiff and EPA with notice to the Court, or (b) by the Court upon motion of
16 EPA for good cause shown pursuant to the Federal Rules of Civil Procedure and upon
17 consideration of any response by Plaintiff and any reply by EPA. Any other provision of this
18 Consent Decree also may be modified by the Court following motion of an undersigned party
19 for good cause shown pursuant to the Federal Rules of Civil Procedure and upon
20 consideration of any response by a non-moving party and any reply.

21 6. If a lapse in EPA appropriations occurs within ninety (90) days prior to a deadline
22 in Paragraph 1 in this Decree, that deadline shall be extended automatically one day for each
23 day of the lapse in appropriations. Nothing in this Paragraph shall preclude EPA from
24 seeking an additional extension of time through modification of this Consent Decree pursuant
25 to Paragraph 5.

26 7. Plaintiff and EPA agree that this Consent Decree constitutes a complete settlement
27 of Claim 1 as described in Paragraph 1 and Claim 2 as to California as described in
28 Paragraph 1.

1 8. In the event of a dispute between Plaintiff and EPA concerning the interpretation
2 or implementation of any aspect of this Consent Decree, the disputing party shall provide the
3 other party with a written notice, via electronic mail or other means, outlining the nature of
4 the dispute and requesting informal negotiations. These parties shall meet and confer in
5 order to attempt to resolve the dispute. If these parties are unable to resolve the dispute
6 within ten (10) business days after receipt of the notice, either party may petition the Court to
7 resolve the dispute.

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

12 10. The deadline for filing a motion for costs of litigation (including attorney fees)
13 for activities performed prior to entry of the Consent Decree is hereby extended until ninety
14 (90) days after Claim 2 as to Kentucky, *see* Compl. ¶¶42-44, is resolved either by settlement
15 or an order and judgment of the Court. During this period, the Parties shall seek to resolve
16 informally any claim for costs of litigation (including attorney fees), and if they cannot, the
17 Sierra Club will file a motion for costs of litigation (including attorney fees) or a stipulation
18 or motion to extend the deadline to file such a motion. EPA reserves the right to oppose any
19 such request. The Court shall retain jurisdiction to resolve any requests for costs of
20 litigation, including attorney fees.

21 11. This Court shall retain jurisdiction over this matter to enforce the terms of this
22 Consent Decree and to consider any requests for costs of litigation (including attorney fees).

23 12. Nothing in the terms of this Consent Decree shall be construed (a) to confer upon
24 this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the
25 United States Courts of Appeals under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1),
26 including final action take pursuant to section 110(k) of the CAA, 42 U.S.C. § 7410(k),
27 approving, disapproving, or approving in part and disapproving in part a SIP submittal, or (b)
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1 to waive any claims, remedies, or defenses that the parties may have under CAA section
2 307(b)(1), 42 U.S.C. § 7607(b)(1).

3 13. Nothing in this Consent Decree shall be construed to limit or modify any
4 discretion accorded EPA by the Clean Air Act or by general principles of administrative law
5 in taking the actions which are the subject of this Consent Decree, including the discretion to
6 alter, amend, or revise any final actions promulgated pursuant to this Consent Decree. EPA's
7 obligation to perform each action specified in this Consent Decree does not constitute a
8 limitation or modification of EPA's discretion within the meaning of this paragraph.

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

13 15. Plaintiff reserves the right to seek additional costs of litigation (including
14 reasonable attorney fees) related to Claim 1, *see* Compl. ¶¶20-37, and Claim 2 as to
15 California, *see* Compl. ¶¶39-41, incurred subsequent to entry of this Consent Decree. EPA
16 reserves the right to oppose any such request for additional costs of litigation (including
17 attorney fees).

18 16. It is hereby expressly understood and agreed that this Consent Decree was jointly
19 drafted by Plaintiff and EPA. Accordingly, the parties hereby agree that any and all rules of
20 construction to the effect that ambiguity is construed against the drafting party shall be
21 inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent
22 Decree.

23 17. The parties agree and acknowledge that before this Consent Decree can be
24 finalized and entered by the Court, EPA must provide notice of this Consent Decree in the
25 Federal Register and an opportunity for public comment pursuant to CAA section 113(g), 42
26 U.S.C. § 7413(g). After this Consent Decree has undergone notice and comment, the
27 Administrator and/or the Attorney General, as appropriate, shall promptly consider any
28 written comments in determining whether to withdraw or withhold their consent to the

1 Consent Decree, in accordance with CAA section 113(g). If the Administrator and/or the
2 Attorney General do not elect to withdraw or withhold consent, EPA shall promptly file a
3 motion that requests that the Court enter this Consent Decree.

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

7 For Plaintiff Sierra Club:

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20 For Defendant EPA:

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

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

5 21. The undersigned representatives of Plaintiff Sierra Club and Defendant EPA
6 certify that they are fully authorized by the party they represent to consent to the Court's
7 entry of the terms and conditions of this Decree.

8
9 SO ORDERED on this 23 day of May, 2019.

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12 _____
13 JAMES DONATO
14 UNITED STATES DISTRICT JUDGE

15 COUNSEL FOR PLAINTIFF:

16 /s/ Robert Ukeiley (email authorization 10/14/16)
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