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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 24 1995

OFFICE OF GENERAL COUNSEL

MEMORANDUM

SUBJECT: Consent Decree in Natural Resources Defense Council, Inc. v. Browner, Civ. No. 95-634 PLF (Storm water Phase II litigation)

FROM: Susan G. Lepow
Associate General Counsel
Water Division (2355)

TO: Michael B. Cook
Director
Office of Wastewater Management (4201)

Attached is the Consent Decree settling litigation over EPA implementation of Section 402(p)(6) of the Clean Water Act, 33 U.S.C. § 1342(p)(6). The Consent Decree, entered by the court on April 7, 1995, contains schedules by which the Agency is to propose and publish regulations for storm water discharges other than those already regulated under 402(p)(2). As you know, these new regulations have been referred to as Phase II of the storm water program. Also attached is a Settlement Agreement addressing issues remanded by the Ninth Circuit in litigation over Phase I of the storm water program. Though NRDC could have sought judicial remedy to enforce the remand, they chose not to do so based on the Settlement Agreement.

To remind you of its terms, the Consent Decree requires the Administrator to sign and promptly forward to the Office of the Federal Register a notice proposing Phase II storm water rules for public comment by September 1, 1997. Signature on the final regulations is required by March 1, 1999. The Settlement Agreement contains identical dates for regulations addressing the portions of Phase I storm water regulations that were remanded by the Ninth Circuit.

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We have worked closely with your staff and we greatly appreciate all the time and effort they invested in settling this matter. Please extend our gratitude to them, especially Ephraim King. If you have any questions, please have your staff contact Stephen Sweeney of my staff at 260-8739.

Attachment

cc: Dana Minerva
Jim Pendergast
Ephraim King
Bill Swietlik
Pam Mazakas
Carrie Wehling

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
APR 7 1995
Clerk, U.S. District Court
District of Columbia

NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiff, v. CAROL M. BROWNER, As Administrator of the U.S. Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; Defendants.	Civ. No. 95-634 PLF

CONSENT DECREE

WHEREAS plaintiff the Natural Resources Defense Council, Inc. ("NRDC") filed a complaint in this Court pursuant to section 505(a)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(2), alleging that the defendants, Carol Browner, in her official capacity as Administrator, and the United States Environmental Protection Agency (collectively "EPA"), have violated nondiscretionary duties under sections 402(p)(5) & (6) of the CWA, 33 U.S.C. § 1342(p)(5) & (6), by failing to submit reports pursuant to section 402(p)(5) and issue storm water regulations pursuant to section 402(p)(6) ("Phase II storm water regulations");

WHEREAS plaintiff NRDC seeks in its complaint a declaration that EPA's alleged failure to perform the alleged nondiscretionary duties violates the CWA and is arbitrary and

capricious under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, and an order requiring the submission of the reports and the promulgation of the regulations by dates certain;

WHEREAS EPA issued on or about March 30, 1995 a direct final rule pursuant to CWA section 402(p)(6), 33 U.S.C. § 1342(p)(6), providing (a) that each stormwater discharge designated by the National Pollutant Discharge Elimination System ("NPDES") permitting authority as contributing to a violation of a water quality standard or as a significant contributor of pollutants to United States waters, shall apply for a NPDES permit within 180 days of designation or a later date specified by the NPDES permitting authority, and (b) that all other sources of stormwater discharges, not otherwise regulated under CWA section 402(p)(2)-(4), 33 U.S.C. § 1342(p)(2)-(4), must apply for a permit by March 31, 2001;

WHEREAS NRDC and EPA have agreed to execute this Consent Decree without trial or adjudication of any issue of law or fact herein in order to avoid protracted litigation and have agreed to a settlement which they consider to be fair, adequate and in the public interest;

WHEREAS NRDC and EPA agree that it is in the public interest that EPA seek and obtain recommendations from a broad-based advisory group in developing the Phase II storm water regulations on an orderly and expeditious basis;

WHEREAS EPA intends to convene an advisory group pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2, to determine

which point sources of storm water should be covered by the Phase II storm water regulations, relative priorities among such sources, and how they should be addressed;

WHEREAS EPA intends to convene the first meeting of this advisory group before April 30, 1995;

WHEREAS it is in the interest of the public, the parties, and judicial economy to resolve this action without continuing litigation and the Court finds and determines that this settlement represents a fair, just and equitable resolution of the claims raised in the complaint and is in the public interest;

WHEREAS by entering into this Consent Decree, NRDC and EPA do not waive any claims or defenses related to any final agency action taken pursuant to this Decree or admit to any contention of law or fact;

WHEREAS the parties have resolved issues related to the court's order in Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 966 F.2d 1292 (9th Cir. 1992), in a separate Settlement Agreement, a copy of which is attached hereto and filed with this Decree solely for informational purposes; and

WHEREAS on or about March 31, 1995, EPA submitted to Congress reports required by CWA section 402(p)(5), 33 U.S.C. § 1342 (p)(5).

NOW THEREFORE, before the taking of testimony, without trial or adjudication of any issue of fact or law, and upon the consent of the parties, the parties hereby stipulate and it is hereby

ADJUDGED, ORDERED AND DECREED as follows:

Issuance of Phase II Storm Water Reports and Regulations

1. By September 1, 1997, EPA shall sign and promptly forward to the Office of the Federal Register for publication a notice of proposed rulemaking concerning Phase II storm water regulations required by CWA section 402(p)(6), 33 U.S.C. § 1342(p)(6).

2. By March 1, 1999, EPA shall sign and promptly forward to the Office of the Federal Register for publication a notice of final rulemaking concerning Phase II storm water regulations required by CWA section 402(p)(6), 33 U.S.C. § 1342(p)(6).

3. The final rulemaking described in paragraph 2 shall fully and completely discharge EPA's obligations under CWA section 402(p)(6), 33 U.S.C. § 1342(p)(6) ("the Administrator . . . shall issue regulations . . . which designate stormwater discharges, other than those described in [CWA section 402(p)(2)], to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines."). NRDC has taken the legal position that, if EPA determines that performance standards, guidelines, guidance, management practices and/or treatment techniques are necessary to establish a comprehensive program, then EPA has a nondiscretionary duty to publish any such performance standards, guidelines, guidance,

management practices and/or treatment techniques by the date of the final rule described in paragraph 2. EPA does not necessarily agree with NRDC's legal position regarding the scope of the nondiscretionary duty under CWA section 402(p)(6). The parties reserve the right to contest the scope of the nondiscretionary duty under CWA section 402(p)(6) in a court having jurisdiction.

4. The final rulemaking described in paragraph 3 shall include either (1) regulations fully implementing CWA section 402(p)(6) with respect to all storm water discharges not already regulated under CWA section 402(p)(2)-(4) or by designation of the NPDES permitting authority under the direct final rule EPA intends to issue by March 31, 1995 ("otherwise unregulated storm water discharges"), or (2) regulations fully implementing CWA section 402(p)(6) with respect to some otherwise unregulated storm water discharges and a decision that no further rulemaking is necessary in order to fully discharge EPA's obligations under CWA section 402(p)(6) with respect to the remaining otherwise unregulated storm water discharges.

5. The direct final rule EPA issued on or about March 30, 1995 is not intended to and does not satisfy EPA's obligations under paragraphs 1 and 2.

Reporting and Modification of this Decree

6. Beginning on October 31, 1995 and each six months thereafter until the publication of the Final Rule under paragraph 2, EPA shall provide a written update to counsel for

NRDC concerning actions taken in the preceding period to effectuate this Decree and the attached Settlement Agreement. EPA shall make such reports publicly available upon request.

7. The provisions of this Decree shall be modified for good cause shown. The provisions relating to dates established by this Decree shall be modified according to the procedures set forth in paragraph 8 of this Decree. All other provisions of this Decree may be modified by written consent of NRDC and EPA, or by the Court upon request of either party.

8. Modification of the dates set forth in this Decree shall be by written consent of NRDC and EPA, or in accordance with the procedures specified below.

(a) If a party files a motion requesting modification of a date or dates established by this Decree and provides notice to the other party at least thirty (30) days prior to filing such motion, and files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of such motion, upon request, shall stay the date for which modification is sought. To be effective, any such notice must include the status of actions the party has made in attempt to comply with the deadline, its actions to expedite its compliance with the requirement, and the proposed date by which it expects to fulfill its obligations. Such stay shall remain in effect until the earlier to occur of (i) dispositive ruling by this Court on such motion, or (ii) the date sought in the modification, or (iii) the date which is sixty (60) days after

the date for which modification is sought. Only one such automatic stay shall be permitted for each deadline for which modification is sought.

(b) If a party files a motion requesting modification of a date or dates established by this Decree totalling thirty (30) days or less and provides notice, as described above, to the other party at least thirty (30) days prior to the filing of such motion, then the filing of such motion shall, upon request, stay the date for which modification is sought. Such stay shall remain in effect until the earlier to occur of (i) a dispositive ruling by this court on such motion, or (ii) the date sought in the modification. Only one such automatic stay shall be permitted for each deadline for which modification is sought.

(c) If a party seeking modification does not provide notice pursuant to subparagraphs (a) or (b) above, that party may move the Court for a stay of the date for which modification is sought. The party seeking modification under this subparagraph (c) shall give notice to the other party as soon as possible of its intent to seek a modification and/or stay of the date sought to be modified. The notice provided under this subparagraph and any motion for a stay shall demonstrate convincingly why the party could not have utilized the notification procedures set forth in subparagraphs (a) and (b) above.

(d) If the Court denies a motion by EPA to modify a date established by this Decree, then the date for which modification had been requested shall be (i) the later of ten

days after the date of the Court's denial or the date set forth in this Decree, or (ii) such other date as the Court may specify.

(e) Any motion to modify the schedule established in this Decree shall be accompanied by a motion for expedited consideration. All parties to this Decree shall join any such motion for expedited consideration.

(f) Nothing in this Decree, or in the parties' agreement to its terms, shall be construed to limit the equitable powers of the Court to modify the terms of this Decree upon a showing of good cause by any party.

9. Nothing in this Consent Decree relieves EPA of the obligation to act in a manner consistent with applicable law, including the notice and comment and other provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706; and CWA section 402, 33 U.S.C. § 1342. 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, 5 U.S.C. § 1341; or any other applicable appropriations law or regulation. If EPA believes that compliance with any applicable law may lead to noncompliance with the terms of this Consent Decree, EPA shall utilize the procedures for modification of this Consent Decree specified herein.

10. If subsequent legislation alters or relieves EPA of its obligations with respect to this Decree, then the relevant portions of this Decree shall be altered to the extent applicable

and the parties shall jointly inform the Court.

11. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Decree, the disputing party shall provide the other party with a written notice outlining the nature of the dispute and requesting negotiations. If the parties cannot reach an agreed-upon resolution within twenty (20) working days after the receipt of the notice, either party may move the Court to resolve the dispute.

Costs and Attorney Fees

12. EPA agrees that pursuant to CWA section 505(d), 33 U.S.C. § 1365(d), NRDC is entitled to costs (including reasonable attorneys' fees) accrued as of the date of this Decree and fees to be incurred in obtaining those fees. NRDC shall submit any claim and supporting documents after entry of this Decree to EPA. Within a period of 90 days, beginning with the date EPA receives NRDC's claim and supporting documentation, EPA will examine NRDC's claim for reasonable fees and costs, and the parties will make a good faith effort to agree as to the appropriate amount to be paid to NRDC. If the parties are unable to agree on this issue, NRDC will file an application with the Court for the recovery of costs incurred in connection with this Decree and EPA may file a response thereto within 30 days from receipt of NRDC's application.

Recipients of Notification

13. Any notices or notifications required or provided for

by this Decree should be sent to the following:

For NRDC: Peter H. Lehner
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, NY 10011

OFFICE: (212) 727-2700
FAX: (212) 727-1773

or to such other person as NRDC may subsequently identify in writing to EPA.

For EPA: Stephen J. Sweeney
U.S. Environmental Protection Agency
Office of General Counsel (2355)
401 M Street, S.W.
Washington, DC 20460

OFFICE: (202) 260-7700
FAX: (202) 260-7702

Jeffrey K. Lee
U.S. Department of Justice
Environmental Defense Section
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

OFFICE: (202) 514-1880
FAX: (202) 514-2584

or to such other person or persons as EPA or DOJ may subsequently identify in writing to NRDC.

Jurisdiction, Termination and Authority

14. The Court shall retain jurisdiction to construe and to determine and effectuate compliance with this decree and to decide any motion to modify and any petition for attorneys' fees and costs that may be filed by NRDC. This Consent Decree shall terminate upon publication of the final regulations described in paragraphs 1 and 2. After publication, EPA shall so notify the parties and the Court.

15. Nothing in the terms of this Decree shall be construed to confer jurisdiction upon this Court to review any decision, either procedural or substantive, to be made by the Administrator pursuant to this Decree, except for the purposes of determining EPA's compliance with this Decree.

16. Nothing in this Decree shall be construed to limit or modify EPA's discretion under the Clean Water Act, or by general principles of administrative law to alter, amend, or revise regulations, performance standards, guidelines, guidance, management practices or treatment requirements related to the matters resolved in this Decree, if any, from time to time, or to promulgate superseding regulations.

17. Nothing in this Decree shall be construed to limit NRDC's remedies or claims against EPA if EPA does not comply with the obligations of this Decree or the obligations as modified in the manner provided for in this Decree.

18. The undersigned representatives of each party certify that they are fully authorized by the party they represent to consent to the Court's entry of, and bind the party to the terms of, this Decree.

THE PARTIES SO AGREE:

FOR THE PLAINTIFF NATURAL RESOURCES DEFENSE COUNCIL, INC.

PETER H. LEHNER
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, NY 10011
(212) 727-2700

DATED: April 3, 1995

DAVID HAWKINS (D.C. Bar No. 89540)
Natural Resources Defense Council, Inc.
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7800

DATED: April 3, 1995

FOR THE DEFENDANT UNITED STATES OF AMERICA on behalf of THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CAROL M. BROWNER, Administrator:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division

JEFFREY K. LEE
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, DC 20026-3986
(202) 514-1880

DATED: April 3, 1995

Stephen J. Sweeney by JKL

STEPHEN J. SWEENEY
U.S. Environmental Protection Agency
Office of General Counsel (2355)
401 M Street, S.W.
Washington, DC 20460
(202) 260-7700

DATED: April 3, 1995

SO ORDERED:

Paul L. Friedman

United States District Judge

DATED: April 6, 1995

FILED
APR 1995
Clerk, U. S. District Court
District of Columbia

SETTLEMENT AGREEMENT

WHEREAS the Administrator of the United States Environmental Protection Agency ("EPA") promulgated National Pollutant Discharge Elimination System ("NPDES") permit application regulations for discharges composed entirely of storm water associated with industrial activity on November 16, 1990, pursuant to Clean Water Act ("CWA") sections 402(p)(2), (3) & (4), 33 U.S.C. §§ 1242(p)(2), (3) & (4), ("Phase I storm water regulations");

WHEREAS in Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency ("NRDC v. EPA"), 966 F.2d 1292 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit held (a) that EPA's decision in the Phase I storm water regulations that construction activity disturbing less than five acres was not "associated with industrial activity" was arbitrary and capricious and remanded that portion of the rule for further proceedings, and (b) that the portion of the Phase I stormwater regulations governing certain categories of manufacturing facilities, as determined by their Standard Industrial Classification (SIC) code, that are covered only if certain work areas or materials are exposed to stormwater ("nonexposed light industry") was arbitrary and capricious, vacated that portion of the rule and remanded it for further proceedings;

WHEREAS NRDC has taken the position that EPA has not taken action pursuant to the remand ordered by the Ninth Circuit in NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992);

WHEREAS NRDC has agreed not to file a Petition for Mandamus in the United States Court of Appeals seeking an order requiring EPA to take action pursuant to the remand ordered in NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992);

WHEREAS EPA intends to convene by April 30, 1995 an advisory group ("wet weather advisory group") pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2, to develop broad-based consensus relating to wet weather issues under the CWA, including regulation of storm water;

WHEREAS Under CWA 104(b)(3), EPA has awarded approximately $30,000.00 in grants in fiscal year 1994 and has budgeted approximately $400,000.00 for grant awards in fiscal year 1995 to be awarded to applicants seeking to conduct storm water industrial permitting effectiveness projects under the CWA;

WHEREAS the parties wish to effect a settlement of this matter without expensive and protracted litigation;

NOW THEREFORE, NRDC and EPA hereby agree as follows:

Request for Recommendations and Issuance of Regulations

1. If the wet weather advisory group is convened, EPA shall request that group assess and provide recommendations regarding (a) public participation in storm water permitting and regulation and (b) facilities where material handling equipment or activities, raw materials, intermediate products, final

products, waste materials, byproducts, or industrial machinery are not exposed to storm water.

2. By September 1, 1997, EPA shall sign and forward to the Office of the Federal Register for publication a notice of proposed rulemaking that addresses the remanded portions of the Phase I storm water regulations.

3. By March 31, 1999, EPA shall to sign and forward to the Office of the Federal Register for publication a notice of final rulemaking that addresses the remanded portions of the Phase I storm water regulations.

4. The final rulemaking described in paragraph 3 shall fully and completely discharge EPA's obligations under the remand ordered in NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992).

Modification of this Agreement

5. The provisions of this Agreement may be modified for good cause shown by written consent of NRDC and EPA.

6. If subsequent legislation alters or relieves EPA of its obligations with respect to this Agreement, then the relevant portions of this Agreement shall be altered to the extent applicable and the parties shall jointly inform the Court.

7. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 5 U.S.C. § 1341; or any other applicable appropriations law or regulation. If EPA believes that compliance with any applicable law may lead

to noncompliance with the terms of this Agreement, EPA shall utilize the procedures for modification of this Agreement specified above.

Recipients of Notification

8. Any notices or notifications required or provided for by this Agreement should be sent to the following:

For NRDC:

Peter H. Lehner
Natural Resources Defense Council
40 West 20th Street
New York, NY 10011

OFFICE: (212) 727-2700
FAX: (212) 727-1773

or to such other person as NRDC may subsequently identify in writing to EPA.

For EPA:

Stephen J. Sweeney
U.S. Environmental Protection Agency
Office of General Counsel (2355)
401 M Street, S.W.
Washington, DC 20460

OFFICE: (202) 260-7700
FAX: (202) 260-7702

Jeffrey K. Lee
U.S. Department of Justice
Environmental Defense Section
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

OFFICE: (202) 514-1880
FAX: (202) 514-2584

or to such other person or persons as EPA or DOJ may subsequently identify in writing to NRDC.

Costs and Attorney Fees

9. EPA agrees that a claim for costs and fees accrued by NRDC in negotiating this Agreement should be governed by the

process described in paragraph 13 of the Consent Decree entered in NRDC v. Browner, to which a copy of this Agreement is attached. NRDC and EPA agree that costs and fees which may be claimed by NRDC in negotiating the Consent Decree and this Settlement Agreement are related to one joint, negotiated settlement and NRDC need not separately identify costs and fees associated with the Consent Decree and this Agreement for purposes of submitting a claim to EPA.

Jurisdiction, Termination and Authority

10. Nothing in this Agreement shall be construed to limit or modify EPA's discretion under the Clean Water Act, or by general principles of administrative law to alter, amend, or revise regulations, performance standards, guidelines, guidance, management practices or treatment requirements related to the matters resolved in this Agreement, if any, from time to time, or to promulgate superseding regulations.

11. Nothing in the terms of this Agreement shall be construed to confer upon a district court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Agreement.

12. EPA's obligations under this Agreement terminate immediately upon EPA's promulgation of the regulations described in paragraph 3.

13. If EPA does not act by the dates identified in this Agreement or as modified by the parties, NRDC may institute, in a court having jurisdiction, an appropriate action to seek an order

requiring EPA to take action pursuant to the remand order
NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992) or pursue any o
remedy available at law.

14. Nothing in this Agreement relieves EPA of the obligation to act in a manner consistent with applicable l including the notice and comment and other provisions of t Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 section 402, 33 U.S.C. § 1342.

15. The undersigned representatives of each party ce that they are fully authorized by the party or parties the represent to bind the respective parties to the terms of t Agreement. This Agreement will be deemed to be executed a shall become effective when it has been signed by the representatives of the parties set forth below.

THE PARTIES SO AGREE:

FOR THE PLAINTIFF NATURAL RESOURCES DEFENSE COUNCIL, INC.

PETER H. LEHNER
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, NY 10011
(212) 727-2700

DATED: April 3, 1995

David Hawkins (PL)
DAVID HAWKINS (D.C. Bar No. 89540)
Natural Resources Defense Council, Inc.
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7800

DATED: April 3, 1995

FOR THE DEFENDANT UNITED STATES OF AMERICA on behalf of THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CAROL M. BROWNER, Administrator:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division

JEFFREY K. LEE
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Environment and Natural Resources Division
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P.O. Box 23986
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(202) 514-1880

DATED: April 3, 1995

Stephen J. Sweeney by JKL

STEPHEN J. SWEENEY
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DATED: April 3, 1995