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

17 CENTER FOR BIOLOGICAL DIVERSITY
18 and CENTER FOR ENVIRONMENTAL
19 HEALTH,

20 Plaintiffs,

21 v.

22 SCOTT PRUITT, in his official capacity as
23 the Administrator of the United States
24 Environmental Protection Agency,¹

25 Defendant.

Case No. 3:16-cv-03796-VC

~~PROPOSED~~ CONSENT DECREE

26 WHEREAS, on July 7, 2016, Plaintiffs Center for Biological Diversity and Center
27 for Environmental Health filed the above-captioned matter against Gina McCarthy, in her

28 ¹ Pursuant to Fed. R. Civ. P. 25(d), Defendant Gina McCarthy's successor, Scott Pruitt,
Administrator of the U.S. Environmental Protection Agency, is automatically substituted
as the Defendant in this case.

1 official capacity as Administrator of the United States Environmental Protection Agency
2 (collectively “EPA” or the “Agency”) (the “Complaint”) (Dkt. No. 1);

3 WHEREAS, Plaintiffs allege that EPA has failed to undertake certain non-
4 discretionary duties under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and
5 that such alleged failure is actionable under section 304(a)(2) of the CAA, § 7604(a)(2),
6 and seeking declaratory and injunctive relief as well as attorney fees and other costs of
7 litigation pursuant to 42 U.S.C. § 7604(a), Compl. at 11-13;

8 WHEREAS, Plaintiffs allege that EPA has violated a nondiscretionary duty under
9 the Clean Air Act, 42 U.S.C. § 7409(d)(1), to complete a five-year review of the primary
10 national ambient air quality standards (“NAAQS”) for oxides of nitrogen (“NO_x”),
11 Compl. ¶¶35-39;

12 WHEREAS, Plaintiffs allege that EPA has violated a nondiscretionary duty under
13 the Clean Air Act, 42 U.S.C. § 7409(d)(1), to complete a five-year review of the air
14 quality criteria and primary NAAQS for sulfur oxides (“SO_x”), Compl. ¶¶41-44;

15 WHEREAS, the relief requested in the Complaint includes, among other things,
16 an order from this Court to establish dates certain by which EPA must fulfill its
17 obligations;

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

20 WHEREAS, the Clean Air Act, 42 U.S.C. § 7409(d)(2), provides for the
21 establishment of an independent scientific review committee to advise the Administrator
22 on the review, and revision as appropriate, of the air quality criteria and NAAQS;

23 WHEREAS, consistent with the CAA, 42 U.S.C. § 7607(d)(3), EPA carefully
24 considers the advice of this committee, known as the Clean Air Scientific Advisory
25 Committee, including its advice whether the air quality criteria and other scientific
26 documents (such as Risk and Exposure Assessments and Policy Assessments) provide an
27 adequate basis for EPA to use in reaching proposed decisions in its review of the
28 NAAQS;

1 WHEREAS, EPA's agreement to enter into this Consent Decree is premised on
2 its current expectation that the Clean Air Scientific Advisory Committee will not request,
3 and EPA will not determine that it is necessary to prepare, more than one draft of either
4 the Policy Assessment or the Health Risk and Exposure Assessment, if any, as part of the
5 reviews of the primary NAAQS for either NO_x or SO_x, or more than two drafts of the
6 Integrated Science Assessment addressing human health effects of SO_x;

7 WHEREAS, if the Clean Air Scientific Advisory Committee requests, or if EPA
8 determines that it is necessary to prepare, more than one draft of any Policy Assessment
9 or Health Risk and Exposure Assessment as part of the review of the primary NAAQS
10 for either NO_x or SO_x, or more than two drafts of the Integrated Science Assessment
11 addressing human health effects of SO_x, EPA anticipates that additional time would be
12 needed to complete its review of the corresponding NAAQS;

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

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

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

21 WHEREAS, Plaintiffs and EPA agree that this Court has jurisdiction over this
22 matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C.
23 § 7604(a)(2), and that venue is proper in the Northern District of California pursuant to
24 28 U.S.C. § 1391(e) and N.D. Cal. Civ. Local Rule 3-2(c)-(d);

25 WHEREAS, the Court, by entering this Consent Decree, finds that the Consent
26 Decree is fair, reasonable, in the public interest, and consistent with the CAA;

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

4 1. The appropriate EPA official shall:

5 a. sign a notice of proposed rulemaking setting forth its proposed
6 decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the primary
7 NAAQS for NO_x and including such revisions to these NAAQS and/or such new primary
8 NAAQS for NO_x as may be appropriate in accordance with 42 U.S.C. §§ 7408 and
9 7409(b) no later than July 14, 2017;

10 b. sign a notice of final rulemaking setting forth its final decision
11 pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the primary NAAQS for
12 NO_x and including such revisions to these NAAQS and/or such new primary NAAQS for
13 NO_x as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b) no later
14 than April 6, 2018;

15 c. issue a final Integrated Science Assessment, a document
16 containing the air quality criteria, addressing human health effects of SO_x pursuant to 42
17 U.S.C. §§ 7408 and 7409(d)(1) no later than December 14, 2017;

18 d. sign a notice of proposed rulemaking setting forth its proposed
19 decision pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the primary
20 NAAQS for SO_x and including such revisions to these NAAQS and/or such new primary
21 NAAQS for SO_x as may be appropriate in accordance with 42 U.S.C. §§ 7408 and
22 7409(b) no later than May 25, 2018; and

23 e. sign a notice of final rulemaking setting forth its final decision
24 pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the primary NAAQS for SO_x
25 and including such revisions to these NAAQS and/or such new primary NAAQS for SO_x
26 as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b) no later than
27 January 28, 2019.

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1 2. EPA shall, within 15 business days of the issuance of the final Integrated
2 Science Assessment pursuant to Paragraph 1.c or signature of each action set forth in
3 Paragraphs 1.a, 1.b, 1.d, and 1.e, send notice of the action to the Office of the Federal
4 Register for review and publication.

5 3. After EPA has completed the actions set forth in Paragraph 1 of this
6 Consent Decree and the issue of costs of litigation, including attorney fees, has been
7 resolved, EPA may move to have this Decree terminated. Plaintiffs shall have fourteen
8 (14) days in which to respond to such a motion, unless the parties stipulate to a longer
9 time for Plaintiffs to respond.

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

18 5. If a lapse in EPA appropriations occurs within one hundred twenty (120)
19 days prior to a deadline in Paragraph 1 or 2 in this Decree, that deadline shall be extended
20 automatically one day for each day of the lapse in appropriations. Nothing in this
21 Paragraph shall preclude EPA from seeking an additional extension of time through
22 modification of this Consent Decree pursuant to Paragraph 4.

23 6. Plaintiffs and EPA agree that this Consent Decree shall constitute a
24 complete and final settlement of all claims in the Complaint.

25 7. In the event of a dispute between Plaintiffs and EPA concerning the
26 interpretation or implementation of any aspect of this Consent Decree, the disputing party
27 shall provide the other party with a written notice via electronic mail or other means,
28 outlining the nature of the dispute and requesting informal negotiations. The parties shall

1 meet and confer in order to attempt to resolve the dispute. If the parties are unable to
2 resolve the dispute within ten (10) business days after receipt of the notice, either party
3 may petition the Court to resolve the dispute.

4 8. No motion or other proceeding seeking to enforce this Consent Decree or
5 for contempt of Court shall be filed unless the procedure set forth in Paragraph 7 has been
6 followed.

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

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

18 11. Nothing in the terms of this Consent Decree shall be construed (a) to
19 confer upon this Court jurisdiction to review any final rule or determination issued by
20 EPA pursuant to this Consent Decree, (b) to confer upon this Court jurisdiction to review
21 any issues that are within the exclusive jurisdiction of the United States Courts of
22 Appeals under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), or (c) to waive any
23 claims, remedies, or defenses that the parties may have under CAA section 307(b)(1),
24 42 U.S.C. § 7607(b)(1).

25 12. Nothing in this Consent Decree shall be construed to limit or modify any
26 discretion accorded EPA by the Clean Air Act or by general principles of administrative
27 law in taking the actions which are the subject of this Consent Decree, including the
28 discretion to alter, amend, or revise any final actions promulgated pursuant to this

1 Consent Decree. EPA's obligation to perform each action specified in this Consent
2 Decree does not constitute a limitation or modification of EPA's discretion within the
3 meaning of this paragraph.

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

8 14. Plaintiff reserves the right to seek additional costs of litigation (including
9 reasonable attorney fees) incurred subsequent to entry of this Consent Decree. EPA
10 reserves the right to oppose any such request for additional costs of litigation (including
11 attorney fees).

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

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

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

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For Plaintiffs Center for Biological Diversity and Center for Environmental Health:

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

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

20. The undersigned representatives of Plaintiffs and Defendant EPA certify that they are fully authorized by the party they represent to consent to the Court’s entry of the terms and conditions of this Consent Decree.

SO ORDERED on this 28th day of April, 2017.



Vince Chhabria
United States District Judge

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COUNSEL FOR PLAINTIFFS:

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*Attorneys for Plaintiffs Center for Biological
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