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23 **IN THE UNITED STATES DISTRICT COURT**
24 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
25 **SAN FRANCISCO DIVISION**

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Plaintiffs,

v.

MICHAEL S. REGAN, in his official
capacity as the Administrator of the United
States Environmental Protection Agency,

Defendant.

Case No. 3:23-cv-04979-RFL

~~[PROPOSED]~~ **CONSENT DECREE**

WHEREAS, on September 28, 2023, Plaintiffs Center for Biological Diversity, Sierra Club, and Center for Environmental Health (collectively, “Plaintiffs”) filed the above-

1 captioned matter against Michael S. Regan (“EPA” or “Defendant”), in his official capacity as
2 the Administrator of the United States Environmental Protection Agency (“EPA”) (Dkt. No. 1)
3 (“Compl.”);

4 WHEREAS, Plaintiffs allege that EPA has failed to perform certain non-discretionary
5 duties under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and that such alleged
6 failure is actionable under section 304(a)(2) of the CAA, *id.* § 7604(a)(2), Compl. ¶¶ 1–2, and
7 seek declaratory and injunctive relief as well as attorney fees and other costs of litigation
8 pursuant to CAA section 304(a)(2), *id.* § 7604(a)(2), Compl. at 13–14;

9 WHEREAS, pursuant to CAA section 109(d)(1), 42 U.S.C. § 7409(d)(1), “[n]ot later
10 than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete
11 a thorough review of the criteria published under section 7408 of this title and the national
12 ambient air quality standards promulgated under this section and shall make such revisions in
13 such criteria and standards and promulgate such new standards as may be appropriate in
14 accordance with section 7408 of this title and subsection (b) of this section”;

15 WHEREAS, Plaintiffs allege that EPA last completed its review of the primary
16 NAAQS for oxides of nitrogen and the air quality criteria more than five years ago, Compl. ¶
17 25;

18 WHEREAS, CAA section 109(b)(1), provides that “[n]ational primary ambient air
19 quality standards, prescribed under subsection (a) shall be ambient air quality standards the
20 attainment and maintenance of which in the judgment of the Administrator, based on such
21 criteria and allowing an adequate margin of safety, are requisite to protect the public health.
22 Such primary standards may be revised in the same manner as promulgated”;

23 WHEREAS, the CAA, 42 U.S.C. § 7409(d)(2), provides for the establishment of an
24 independent scientific review committee to advise the Administrator on the review, and
25 revision as appropriate, of the air quality criteria and the national ambient air quality standards
26 (“NAAQS”);

27 WHEREAS, consistent with the CAA, 42 U.S.C. § 7607(d)(3), EPA carefully considers
28 the advice of this committee, known as the Clean Air Scientific Advisory Committee

1 (“CASAC”), including its advice on whether the Integrated Science Assessment and other
2 scientific and technical documents (such as the Policy Assessment) provide an adequate basis
3 for EPA to use in reaching proposed decisions in its review of the NAAQS;

4 WHEREAS, Plaintiffs allege that EPA has violated a nondiscretionary duty under CAA
5 section 109(d)(1), 42 U.S.C. § 7409(d)(1), to complete a five-year review of the primary
6 NAAQS and air quality criteria for oxides of nitrogen, Compl. ¶¶ 35–39;

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

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

11 WHEREAS, EPA’s agreement to enter into this Consent Decree is premised on its
12 current expectation that the CASAC will not request, and EPA will not determine that it is
13 necessary to prepare, more than one draft of the Integrated Science Assessment or other
14 scientific and technical documents (such as the Policy Assessment) as part of the review of the
15 primary NAAQS and the air quality criteria for oxides of nitrogen;

16 WHEREAS, if the CASAC requests, or if EPA determines that it is necessary to
17 prepare, more than one draft of any Integrated Science Assessment or other scientific and
18 technical documents (such as the Policy Assessment), as part of the review of the primary
19 NAAQS and the air quality criteria for oxides of nitrogen, EPA anticipates that additional time
20 would be needed to complete the review of the air quality criteria and/or the NAAQS;

21 WHEREAS, Plaintiffs and EPA, by entering into this Consent Decree (the “Consent
22 Decree”), do not waive or limit any claim, remedy, or defense, on any grounds, related to any
23 final EPA action;

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

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

28

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

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

7 NOW THEREFORE, before the taking of testimony, without trial or determination of
8 any issues of fact or law, and upon the consent of Plaintiffs and Defendant, it is hereby
9 ordered, adjudged and decreed that:

10 1. The appropriate EPA official shall:

11 a. issue a final Integrated Science Assessment, a document containing the air
12 quality criteria, addressing human health effects of oxides of nitrogen pursuant to 42 U.S.C. §§
13 7408 and 7409(d)(1) no later than September 30, 2026; and

14 b. sign a notice of proposed rulemaking setting forth its proposed decision
15 pursuant to 42 U.S.C. § 7409(d)(1) concerning its review of the primary NAAQS for oxides of
16 nitrogen and including such revisions to these NAAQS and/or such new primary NAAQS for
17 oxides of nitrogen as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b) no
18 later than January 17, 2028; and

19 c. sign a notice of final rulemaking setting forth its final decision pursuant to 42
20 U.S.C. § 7409(d)(1) concerning its review of the primary NAAQS for oxides of nitrogen and
21 including such revisions to these NAAQS and/or such new primary NAAQS for oxides of
22 nitrogen as may be appropriate in accordance with 42 U.S.C. §§ 7408 and 7409(b) no later than
23 November 10, 2028.

24 2. EPA shall, within fifteen (15) business days of the issuance of the final Integrated
25 Science Assessment pursuant to Paragraph 1.a, send notice of the action to the Office of the
26 Federal Register for review and publication in the *Federal Register*. EPA shall, within fifteen
27 (15) business days of signature of the notice of proposed rulemaking pursuant to Paragraph 1.b,
28 send notice of the proposed action to the Office of the Federal Register for review and

1 publication in the *Federal Register*. EPA shall, within fifteen (15) business days of signature of
2 the notice of final rulemaking pursuant to Paragraph 1.c, send notice of the final action to the
3 Office of the Federal Register for review and publication in the *Federal Register*.

4 3. After EPA has completed the actions set forth in Paragraph 1 of this Consent Decree,
5 after notice of the final action required by Paragraph 1.c has been published in the *Federal*
6 *Register*, and the issue of costs of litigation, including reasonable attorney fees, has been
7 resolved, EPA may move to have this Consent Decree terminated and the above-captioned
8 matter shall be dismissed with prejudice. Plaintiffs shall have fourteen (14) calendar days to
9 respond to such motion unless the parties stipulate to a longer time for Plaintiffs to respond.
10 The basis of Plaintiffs' opposition to such motion shall be limited to whether EPA has failed to
11 perform or failed to completely perform the actions required by this Consent Decree.

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

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

24 6. Plaintiffs and EPA agree that this Consent Decree constitutes a complete settlement
25 of any and all claims in this case, except for costs of litigation (including attorney fees).

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

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

4 8. In the event that CASAC requests, or EPA determines that it is necessary to prepare,
5 more than one draft of any Integrated Science Assessment or other scientific and technical
6 documents (such as the Policy Assessment) as part of the review of the primary NAAQS and
7 the air quality criteria for oxides of nitrogen, EPA shall provide Plaintiffs with written notice of
8 such request or determination within fifteen (15) business days, via electronic mail, together
9 with EPA's estimate of how much additional time would be needed to accommodate the
10 request. When CASAC makes such a request as part of its deliberations concerning a draft
11 document, the fifteen (15) business days will begin when EPA receives a final signed letter
12 from CASAC providing its advice on that document that includes the request. After EPA
13 provides notice to the Plaintiffs, the parties shall then meet and confer in order to discuss what
14 modifications to EPA's deadlines under this Consent Decree would be appropriate, if any. If
15 the parties are able to agree to such modifications, the modifications may be made by
16 stipulation pursuant to Paragraph 4. If the parties are unable to agree upon such modifications
17 within ten (10) business days after receipt of the notice, EPA may petition the Court to grant
18 the requested modifications pursuant to Paragraph 4.

19 9. No motion or other proceeding seeking to enforce this Consent Decree or for
20 contempt of Court shall be properly filed unless the notification and meet and confer
21 procedures set forth in Paragraphs 7 and 8 have been followed, and the moving party has
22 provided the other party with written notice received at least ten (10) business days before the
23 filing of such motion or proceeding.

24 10. The deadline for filing a motion for costs of litigation (including attorney fees) for
25 activities performed prior to entry of the Consent Decree is hereby extended until ninety (90)
26 days after this Consent Decree is entered by the Court. During this period, the parties shall seek
27 to resolve any claim for costs of litigation (including attorney fees), and if they cannot,
28 Plaintiffs will file a motion for costs of litigation (including attorney fees) or a stipulation or

1 motion to extend the deadline to file such a motion. EPA reserves the right to oppose any such
2 request.

3 11. This Court shall retain jurisdiction over this matter to enforce the terms of this
4 Consent Decree, to resolve any motions to modify such terms, and to consider any requests for
5 costs of litigation (including attorney fees).

6 12. Nothing in the terms of this Consent Decree shall be construed (a) to confer upon
7 this Court jurisdiction to review any final rule or determination issued by EPA pursuant to this
8 Consent Decree, (b) to confer upon this Court jurisdiction to review any issues that are within
9 the exclusive jurisdiction of the United States Courts of Appeals under CAA section 307(b)(1),
10 42 U.S.C. § 7607(b)(1), or (c) to waive any claims, remedies, or defenses that the parties may
11 have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

12 13. Nothing in this Consent Decree shall be construed to limit or modify any discretion
13 accorded EPA by the CAA or by general principles of administrative law in taking the actions
14 that are the subject of this Consent Decree, including the discretion to alter, amend, or revise
15 any final actions promulgated pursuant to this Consent Decree. EPA's obligation to perform
16 each action specified in this Consent Decree does not constitute a limitation or modification of
17 EPA's discretion within the meaning of this paragraph.

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

22 15. Plaintiffs reserve the right to seek additional costs of litigation (including
23 reasonable attorney fees) incurred subsequent to entry of this Consent Decree. EPA reserves
24 the right to oppose any such requests for additional costs of litigation (including attorney fees).

25 16. It is hereby expressly understood and agreed that this Consent Decree was jointly
26 drafted by Plaintiffs and EPA. Accordingly, the parties hereby agree that any and all rules of
27 construction to the effect that ambiguity is construed against the drafting party shall be
28

inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

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

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

For Plaintiffs Center for Biological Diversity, et al.:

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1 19. EPA and Plaintiffs recognize and acknowledge that the obligations imposed upon
2 EPA under this Consent Decree can only be undertaken using appropriated funds legally
3 available for such purpose. No provision of this Consent Decree shall be interpreted as or
4 constitute a commitment or requirement that the United States obligate or pay funds in
5 contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision
6 of law. In the event that EPA asserts that an obligation under this Consent Decree would
7 obligate the United States to pay funds in contravention of the Anti-Deficiency Act, Plaintiffs
8 may initiate the dispute resolution provisions of this Consent Decree.

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

12 21. The undersigned representatives of Plaintiffs and Defendant certify that they are
13 fully authorized by the party they represent to consent to the Court's entry of the terms and
14 conditions of this Decree.

15
16
17 IT IS SO ORDERED on this 28th day of October, 2024.

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21 RITA F. LIN
22 UNITED STATES DISTRICT JUDGE
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COUNSEL FOR PLAINTIFFS:



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10 Of counsel:

11 Melina Williams
12 Office of General Counsel
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