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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY
et al.,

Plaintiffs,

v.

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

Defendant.

Case No. 3:22-cv-00052-WHO
CONSENT DECREE

1 WHEREAS, on January 5, 2022, Plaintiffs Center for Biological Diversity and Center
2 for Environmental Health (collectively, “Plaintiffs”) filed the above-captioned matter against
3 Michael S. Regan, in his official capacity as the Administrator of the United States
4 Environmental Protection Agency (hereinafter “EPA” or “Defendant”) (Dkt. No. 1)
5 (“Compl.”);

6 WHEREAS, Plaintiffs amended their complaint on April 22, 2022 (Dkt. No. 18);

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

10 WHEREAS, in March of 2008, EPA revised the primary and secondary national
11 ambient air quality standards (“NAAQS”) for ozone (the “2008 Ozone NAAQS”), *see* National
12 Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008);

13 WHEREAS, in May of 2012, EPA issued a final rule establishing initial air quality
14 designations pursuant to 42 U.S.C. § 7407(d) for the 2008 Ozone NAAQS and determined that,
15 among other areas, Greater Connecticut, Connecticut; New York-North New Jersey-Long
16 Island, New York-New Jersey-Connecticut (Connecticut portion); and San Diego County,
17 California were not in attainment with the 2008 Ozone NAAQS. *See* Air Quality Designations
18 for the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30,088 (May 21,
19 2012);

20 WHEREAS, in August 2019, EPA designated and classified Greater Connecticut,
21 Connecticut; New York-North New Jersey-Long Island, New York-New Jersey-Connecticut
22 (Connecticut portion); and San Diego County, California as Serious nonattainment, effective
23 September 23, 2019, *see* Determinations of Attainment by the Attainment Date, Extensions of
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1 the Attainment Date, and Reclassification of Several Areas Classified as Moderate for the 2008
2 Ozone National Ambient Air Quality Standards, 84 Fed. Reg. 44,238, 44,244 (Aug. 23, 2019);

3 WHEREAS, in that same action, EPA set a deadline of August 3, 2020 for states to
4 submit state implementation plan (“SIP”) revisions that contain the elements required for areas
5 designated and classified as Serious nonattainment. *Id.* at 44,245. This requirement included
6 one exception: EPA set the deadline for Reasonably Available Control Technology (“RACT”)
7 measures not tied to attainment at 18 months after the effective date of the rule, or March 23,
8 2021. *Id.* at 44,246;

9
10 WHEREAS, CAA section 110(k) sets forth the process by which EPA reviews SIP
11 submissions and revisions. 42 U.S.C. § 7410(k). According to that process, EPA must
12 determine no later than 6 months after the date by which a state is required to submit a SIP
13 submittal whether a state has made a submission that meets the minimum completeness
14 criteria. *Id.* § 7410(k)(1)(B). EPA refers to the determination that a state has not submitted a
15 requisite SIP submittal as a “finding of failure to submit.” EPA believes that if a state were to
16 withdraw an already submitted SIP revision, in whole or in part, for which the submittal
17 deadline has passed, EPA would have a renewed obligation to make such a finding, unless the
18 state simultaneously or subsequently submits the required submission. *Id.* Further, EPA must
19 determine whether a SIP submission is complete within six months after EPA receives the
20 submission, and if EPA does not determine completeness of the plan or revision within six
21 months, then the submittal is deemed complete by operation of law, *id.*;

22
23 WHEREAS, Greater Connecticut, Connecticut, New York-North New Jersey-Long
24 Island, New York-New Jersey-Connecticut (Connecticut portion), and San Diego County,
25 California did not submit the elements identified in Table 1 *infra* by the EPA-set deadlines;

1 WHEREAS, EPA did not issue findings of failure to submit for the areas and elements
2 listed in Table 1;

3
4 **TABLE 1**

Area	Elements	EPA Deadline
Greater Connecticut, Connecticut	<ul style="list-style-type: none"> • Enhanced monitoring 	Feb. 3, 2021
New York-North New Jersey-Long Island, New York-New Jersey-Connecticut (Connecticut portion)	<ul style="list-style-type: none"> • Enhanced monitoring • Attainment demonstration — Serious • Clean-fuel vehicle programs • Contingency measures for attainment • Contingency measures for RFP milestones • I/M enhanced • RFP Serious 	Feb. 3, 2021
San Diego County, California	<ul style="list-style-type: none"> • RACT measures not tied to attainment¹ 	Sept. 23, 2021

13 WHEREAS, EPA received on June 23, 2022 a SIP revision from Connecticut
14 containing the items identified *supra* in Table I, and EPA sent Connecticut a letter dated July
15 21, 2022, finding the submission complete and rendering the claims for both Greater
16 Connecticut and the Connecticut portion of the metro area moot;

17
18 WHEREAS, pursuant to CAA section 110(k)(2)–(4), 42 U.S.C. § 7410(k)(2)–(4), EPA
19 is required to approve, disapprove, or conditionally approve, in whole or in part, each plan or
20 revision, within 12 months of EPA determining a submittal is complete or by a submittal being
21 deemed complete by operation of law;
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26 ¹ Plaintiffs additionally alleged in the Amended Complaint that EPA had failed to determine whether San Diego
27 County, California had submitted RACT measures tied to attainment by February 3, 2021. *See* Am. Compl. at
28 Table 1 – Amended. However, the parties agree that this claim is moot based on the SIP submissions by
California for San Diego County on August 9, 2017, September 21, 2020, and December 29, 2020, that address
the SIP requirement for RACT measures tied to attainment for the 2008 ozone NAAQS for this particular
nonattainment area.

1 WHEREAS, in May of 2012, EPA classified the West Mojave Desert area as “Severe-
2 15” nonattainment with respect to the 2008 Ozone NAAQS. *See* Air Quality Designations for
3 the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30,088 (May 21, 2012);
4

5 WHEREAS, EPA determined that submittals for the West Mojave Desert area
6 containing the SIP elements identified *infra* in Table II were administratively complete by June
7 11, 2019;

8 WHEREAS, in August 2019, EPA classified the Dallas-Fort Worth, Texas area as
9 “Serious” nonattainment with respect to the 2008 Ozone NAAQS. *See* Determination of
10 Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of
11 Several Areas Classified as Moderate for the 2008 Ozone National Ambient Air Quality
12 Standards, 84 Fed. Reg. 44,238 (Aug. 23, 2019);

13 WHEREAS, EPA determined that submittals for the Dallas-Fort Worth area containing
14 the SIP elements identified *infra* in Table II were administratively complete by November 13,
15 2020;
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18 WHEREAS, EPA determined that submittals for the Eastern Kern area containing the
19 elements identified *infra* in Table II were administratively complete by February 22, 2019;

20 WHEREAS, in July of 2020, Colorado submitted a SIP revision for the 2015 ozone
21 NAAQS for the Denver Metro/North Front Range Marginal nonattainment area covering
22 nonattainment new source review. *See* Approval and Promulgation of Implementation Plans;
23 Colorado; Denver Metro/North Front Range Nonattainment Area, 86 Fed. Reg. 60,434, 60,435
24 (Nov. 2, 2021);
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1 WHEREAS, EPA determined that submittals for the Denver Metro/North Front Range
2 area containing the elements identified *infra* in Table II were administratively complete by
3 January 27, 2021;

4 WHEREAS, in Claim 2, Plaintiffs allege that EPA has failed to perform its duty
5 mandated by CAA sections 110(k)(2)–(4), 42 U.S.C. §§ 7410(k)(2)–(4), to take final action to
6 approve, disapprove, or conditionally approve or disapprove, in whole or in part, SIP
7 submittals for the following states and air districts addressing the SIP-called provisions, Am.
8 Compl. ¶¶ 40–50;

TABLE II

Area	Elements	Completeness Date	EPA's Deadline
West Mojave Desert, California	<ul style="list-style-type: none"> • Contingency measures VOC and NOX for attainment • Contingency provisions for RFP milestones 	June 11, 2019	June 11, 2020
Dallas-Fort Worth, Texas	<ul style="list-style-type: none"> • Emissions inventory • Contingency measures for attainment • Contingency provisions for RFP milestones • I/M enhanced • Non-attainment NSR for Serious • RFP for Serious 	November 13, 2020	November 13, 2021
Eastern Kern Air Pollution Control District, California	<ul style="list-style-type: none"> • Rule 425.3, Portland cement kilns 	February 22, 2019	February 22, 2020
Denver Metro/North Front Range, Colorado	<ul style="list-style-type: none"> • Marginal nonattainment NNSR SIP revision (2015 ozone standards) 	January 27, 2021	January 27, 2022

WHEREAS, on May 13, 2022, EPA approved Colorado's SIP revision containing the element identified *supra* in Table II, *see* Air Plan Approval; Colorado; Denver Metro/North Front Range Nonattainment Area; Nonattainment NSR Permit Program Certification for the 2015 8-Hour Ozone Standard, 87 Fed. Reg. 29,232 (May 13, 2022), rendering this claim moot;

WHEREAS, by letter dated August 8, 2022, the California Air Resources Board stated it was withdrawing the SIP submission for Western Mojave Desert containing the elements identified *supra* in Table II, and on September 29, 2022, EPA published in the Federal Register a finding of failure to submit SIP revisions to satisfy these elements, *see* Finding of Failure to

1 Submit Contingency Measures for the 2008 8-Hour Ozone NAAQS; Coachella Valley,
2 California, and West Mojave Desert, California, 87 Fed. Reg. 59,012 (Sept. 29, 2022),
3 rendering this claim moot;

4
5 WHEREAS, on September 16, 2022 and October 3, 2022 EPA approved Texas' SIP
6 revisions containing the submittals regarding emissions inventory and non-attainment NSR for
7 Serious, *see* Air Plan Approval; Texas; Revised Emissions Inventory for the Dallas-Fort Worth
8 Ozone Nonattainment Area, 87 Fed. Reg. 56,891 (Sept. 16, 2022); Air Plan Approval; Texas;
9 Clean Air Act Requirements for Nonattainment New Source Review, 87 Fed. Reg. 59,697
10 (Oct. 3, 2022), rendering these claims moot;

11
12 WHEREAS, the relief requested in the Complaint includes, among other things, an
13 order from this Court to establish a date certain by which EPA must fulfill its obligations;

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

16 WHEREAS, Plaintiffs and EPA, by entering into this Consent Decree (the "Consent
17 Decree"), do not waive or limit any claim, remedy, or defense, on any grounds, related to any
18 final EPA action;

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

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

23 WHEREAS, Plaintiffs and EPA agree that this Court has jurisdiction over the matters
24 resolved in this Consent Decree pursuant to the citizen suit provision in CAA section
25 304(a)(2), 42 U.S.C. § 7604(a)(2), and that venue is proper in the Northern District of
26 California pursuant to 28 U.S.C. § 1391(e) and Civil L.R. 3-2(c)–(d); and

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

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

4 1. The appropriate EPA official shall sign a notice issuing a finding of failure to
 5 submit no later than the date indicated below for the following state and element of section
 6 182, 42 U.S.C. §§ 7511a, for the 2008 ozone NAAQS:

Area / State	Element(s) under CAA Section 182	Deadline
San Diego County, California	<ul style="list-style-type: none"> • RACT Measures Not Tied to Attainment 	April 30, 2023

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 10 2. If any State makes an above-listed SIP submittal, and EPA makes a
 11 completeness determination as to that submittal pursuant to CAA section 110(k)(1)(B), 42
 12 U.S.C. § 7410(k)(1)(B), at any time prior to the date specified in Paragraph 1, then EPA's
 13 obligation to take the action required by Paragraph 1 with respect to that submittal is
 14 automatically terminated.

15 3. The appropriate EPA official shall sign a notice of final rulemaking to approve,
 16 disapprove, conditionally approve, or approve in part and conditionally approve or disapprove
 17 in part, a SIP submittal addressing the following elements for the following areas for the 2008
 18 ozone NAAQS no later than the dates indicated below:

Area	Elements	Deadline
Dallas-Fort Worth, Texas	<ul style="list-style-type: none"> • Contingency Measures for Attainment • Contingency Provisions for RFP Milestones • I/M Enhanced • RFP for Serious 	September 30, 2023
Eastern Kern Air Pollution Control District, California	<ul style="list-style-type: none"> • Rule 425.3, Portland Cement Kilns 	June 30, 2023

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 25 4. EPA shall, within 15 business days of signature, send the rulemaking package for
 26 each action taken pursuant to Paragraphs 1 and 3 of this Consent Decree to the Office of the
 27 Federal Register for review and publication in the *Federal Register*.
 28

1 5. After EPA has completed the actions set forth in Paragraphs 1 and 3 of this Consent
2 Decree, after notice of each final action required by Paragraph 4 have been published in the
3 *Federal Register*, and the issue of costs of litigation (including reasonable attorney fees) has
4 been resolved, the above-captioned matter shall be dismissed with prejudice and this Consent
5 Decree shall terminate.

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

13 7. If a lapse in EPA appropriations occurs within one hundred twenty (120) days prior
14 to a deadline in Paragraphs 1, 3, or 4 in this Consent Decree, that deadline shall be extended
15 automatically one day for each day of the lapse in appropriations. Nothing in this Paragraph
16 shall preclude EPA from seeking an additional extension of time through modification of this
17 Consent Decree pursuant to Paragraph 6.

18 8. Plaintiffs and EPA agree that this Consent Decree constitutes a complete settlement
19 of all claims as described in Paragraphs 1 and 3.

20 9. In the event of a dispute between Plaintiffs and EPA concerning the interpretation or
21 implementation of any aspect of this Consent Decree, the disputing party shall provide the
22 other party with a written notice, via electronic mail or other means, outlining the nature of the
23 dispute and requesting informal negotiations. These parties shall meet and confer in order to
24 attempt to resolve the dispute. If these parties are unable to resolve the dispute within ten (10)
25 business days after receipt of the notice, either party may petition the Court to resolve the
26 dispute.

27 10. No motion or other proceeding seeking to enforce this Consent Decree or for
28 contempt of Court shall be properly filed unless the procedure set forth in Paragraph 9 has been

1 followed, and the moving party has provided the other party with written notice received at
2 least ten (10) business days before the filing of such motion or proceeding.

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

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

13 13. Nothing in the terms of this Consent Decree shall be construed (a) to confer upon
14 this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the
15 United States Courts of Appeals under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), or (b)
16 to waive any claims, remedies, or defenses that the parties may have under CAA section
17 307(b)(1), 42 U.S.C. § 7607(b)(1).

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

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

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1 16. Plaintiffs reserve the right to seek additional costs of litigation (including
2 reasonable attorney fees) incurred subsequent to entry of this Consent Decree. EPA reserves
3 the right to oppose any such request for additional costs of litigation (including attorney fees).

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

9 18. The parties agree and acknowledge that before this Consent Decree can be finalized
10 and entered by the Court, EPA must provide notice of this Consent Decree in the *Federal*
11 *Register* and an opportunity for public comment pursuant to CAA section 113(g), 42 U.S.C.
12 § 7413(g). After this Consent Decree has undergone notice and comment, the Administrator
13 and/or the Attorney General, as appropriate, shall promptly consider any written comments in
14 determining whether to withdraw or withhold their consent to the Consent Decree, in
15 accordance with CAA section 113(g). If the Administrator and/or the Attorney General do not
16 elect to withdraw or withhold consent, EPA shall promptly file a motion that requests that the
17 Court enter this Consent Decree.

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

21 For Plaintiffs: Victoria Bogdan Tejada
22 Center for Biological Diversity
23 1212 Broadway, Suite 800
24 Oakland, CA 95612
25 Tel: (510) 844-7100
26 Email: vbogdantejada@biologicaldiversity.org

27 For Defendant EPA: Jeffrey Hughes
28 U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044

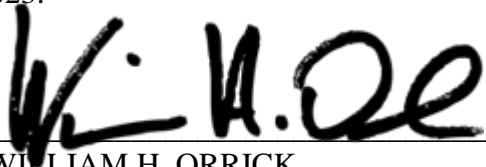
Tel: (202) 532-3080
Email: jeffrey.hughes@usdoj.gov

20. 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.

21. 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.

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

IT IS SO ORDERED on this 21st day of February, 2023.


WILLIAM H. ORRICK
UNITED STATES DISTRICT JUDGE

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/s/ Jeffrey Hughes

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