

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB,

Plaintiff,

v.

ANDREW WHEELER, in his official
capacity as Acting Administrator, U.S.
Environmental Protection Agency,

Defendant.

Case No. 1:17-cv-02174-APM

PROPOSED PARTIAL CONSENT DECREE

This partial consent decree is entered into by Plaintiff Sierra Club and Defendant Andrew Wheeler, in his official capacity as Acting Administrator of the U.S. Environmental Protection Agency (EPA or the Administrator; each a Party and collectively the Parties).

WHEREAS, on October 19, 2017, Sierra Club filed a Complaint under section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), alleging that EPA violated non-discretionary duties under the Clean Air Act and the Energy Independence and Security Act, 42 U.S.C. §§ 7545 note, 7545(v)(1)-(2), by failing to: (1) complete and submit to Congress its second and third Triennial Reports on the environmental and resource-conservation impacts of the Renewable Fuel Standard program; and (2) complete “a study to determine whether the renewable fuel volumes required by this section will adversely impact air quality as a result of changes in vehicle and engine emissions of air pollutants regulated under this chapter” (the Antibraking Study) and to “(A) promulgate fuel regulations to implement appropriate measures to mitigate, to the

greatest extent achievable, considering the results of the [Antibacksliding Study], any adverse impacts on air quality, as the result of the renewable volumes required by this section; or (B) make a determination that no such measures are necessary” (the Follow-up Action);

WHEREAS, the Complaint requested, among other relief, declaratory judgment that the Administrator violated the Clean Air Act and the Energy Independence and Security Act by failing to complete the second and third Triennial Reports, the Antibacksliding Study, and the Follow-up Action, and an order compelling the Administrator to take those actions by certain dates;

WHEREAS, on June 29, 2018, EPA issued its second Triennial Report;

WHEREAS, the Parties wish to settle this case without expensive and protracted litigation, and without a litigated resolution of any issue of law or fact;

WHEREAS, the Parties consider this consent decree to be an adequate and equitable resolution of the claims addressed; and

WHEREAS, the Court, by entering this consent decree, finds that it is fair, reasonable, in the public interest, and consistent with the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*;

NOW THEREFORE, without determination of any issue of fact or law, and upon the Parties’ consent, it is ORDERED that:

1. This Court has subject matter jurisdiction to order the relief provided in this consent decree. Venue is proper in the U.S. District Court for the District of Columbia.
2. On or before March 30, 2020, EPA shall complete the Antibacksliding Study.
3. If the Parties cannot reach agreement on a deadline for the Follow-up Action within three months of completion of the Antibacksliding Study, they will promptly submit a joint

motion (or, if the Parties are unable to agree, separate motions) to govern further proceedings.

4. The deadlines established by this consent decree, including the period set forth in Paragraph 3, may be extended (a) by written stipulation of the Parties with notice to the Court, or (b) by the Court upon motion by EPA for good cause shown under the Federal Rules of Civil Procedure and upon consideration of any response by Sierra Club and any reply by EPA. Any other provision of this consent decree may be modified by the Court following motion by a Party for good cause shown under the Federal Rules of Civil Procedure and upon consideration of any response by the non-moving Party and any reply.
5. The Parties hereby stipulate to dismiss, without prejudice, the First Claim for Relief under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). Sierra Club retains the right to sue for any future violations of the statutory deadlines.
6. The Parties recognize that the possibility exists that a lapse in the appropriations that fund EPA could delay compliance with the timetables in this consent decree. If a lapse in appropriations for EPA occurs within 120 days before any deadline in this decree, including but not limited to the periods set forth in Paragraphs 2 and 3, that deadline shall be automatically extended one day for each day of the lapse in appropriations. Nothing in this paragraph shall preclude EPA from seeking an additional extension through stipulation of the parties or modification of this consent decree under Paragraph 4.
7. The Parties shall not challenge in court this consent decree's terms or this Court's jurisdiction to enter and enforce this consent decree.

8. The Parties agree that this consent decree shall constitute a complete and final settlement of Sierra Club's claim that the Administrator has failed to fulfill his nondiscretionary duty under 42 U.S.C. § 7545(v)(1) to complete "a study to determine whether the renewable fuel volumes required by this section will adversely impact air quality as a result of changes in vehicle and engine emissions of air pollutants regulated under this chapter[.]" Sierra Club thus discharges and covenants not to sue the United States, including EPA, for that claim.
9. Nothing in this consent decree shall be construed to limit or modify any discretion given to EPA by the Clean Air Act or by general principles of administrative law in taking the actions that are the subject of this consent decree, including discretion to alter, amend, or revise actions contemplated by this consent decree. EPA's obligation to perform the actions specified in Paragraphs 2 and 3 does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.
10. Nothing in this consent decree shall be construed as an admission of any issue of fact or law nor as a waiver or limitation regarding any claim or defense, on any grounds, related to any EPA action addressed in this decree or any aspect of the Complaint.
11. Nothing in this consent decree shall be construed (a) to confer upon the District Court jurisdiction to review any final decision made by EPA pursuant to this decree or to review any issues that are within the exclusive jurisdiction of the U.S. Court of Appeals pursuant to 42 U.S.C. § 7607(b)(1), or (b) to waive any remedies or defenses the Parties may have under 42 U.S.C. § 7607(b)(1).

12. The Parties acknowledge that the obligations imposed on EPA under this consent decree can only be undertaken using appropriated funds legally available for such purpose. 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, 31 U.S.C. § 1341, or any other applicable provision of law.

13. Any notices required or provided for by this consent decree shall be made in writing and sent to the following (or to any new address of counsel as filed and listed in the docket of this matter, at a future date):

For Plaintiff:

Devorah Ancel
Senior Attorney
Sierra Club Environmental Law Program
6406 North Interstate 35 Frontage Road
Suite 1806
Austin, TX 78752
(415) 845-7847
devorah.ancel@sierraclub.org

For Defendant:

Sue Chen
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
(202) 305-0283
Sue.Chen@usdoj.gov

14. If the Parties dispute the interpretation or implementation of any aspect of this consent decree, the disputing Party shall provide the other Party with a written notice outlining

the nature of the dispute and requesting informal negotiations. The Parties shall meet and confer to attempt to resolve the dispute. If the Parties cannot resolve the dispute within 20 business days after receipt of the notice (or a longer period as stipulated by the Parties), either Party may move the Court to resolve the dispute.

15. No motion or other proceeding seeking to enforce this consent decree or for contempt of Court shall be filed unless the Party seeking to enforce this decree has followed the procedure set forth in Paragraph 14.

16. The Court shall retain jurisdiction to enforce the terms of this consent decree and to resolve any disputes thereunder, and to consider any requests for costs of litigation, including attorney fees. When EPA's obligation under Paragraph 2 has been completed, and at the end of the period set forth in Paragraph 3, the Parties may either jointly notify the Court that the consent decree should be terminated, or EPA may so notify the Court by motion. If EPA notifies the Court by motion, then Sierra Club shall have 20 days to respond (unless the Parties stipulate to a longer period).

17. It is expressly understood and agreed that this consent decree was jointly drafted by Sierra Club and EPA. The Parties thus agree that any and all rules of construction that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning this decree's terms, meaning, or interpretation.

18. The Parties shall seek to resolve any claim for costs of litigation (including attorney fees) in separate settlement agreements. If they cannot, then Sierra Club reserves the right to file a motion for costs of litigation (including attorney fees), including a motion for interim fees up to and including entry of this consent decree. EPA reserves the right to

oppose any such requests. The Parties reserve all claims and defenses as to any future costs-of-litigation claim.

19. If for any reason the Court declines to approve this consent decree in the form presented, this agreement is voidable at the sole discretion of either Party and the proposed decree's terms may not be used as evidence in any litigation between the Parties.

20. The undersigned representatives of Sierra Club and 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 decree.

SO ORDERED on this ____ day of _____, 2019.

Amit P. Mehta
United States District Judge

For Plaintiff

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Tel: (415) 845-7847
devorah.ancel@sierraclub.org

Dated: _____

For Defendant

Jonathan D. Brightbill
Deputy Assistant Attorney General

Sue Chen
Trial Attorney
N.Y. Bar 4866802
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
Tel: (202) 305-0283
Sue.Chen@usdoj.gov

Dated: _____