

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS,

and

AMERICAN PETROLEUM INSTITUTE

Plaintiffs,

v.

GINA MCCARTHY, in her official capacity as
Administrator, U.S. Environmental Protection
Agency,

and

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

Civil Action No. 1:15-cv-394
(Judge Christopher R. Cooper)

[PROPOSED] CONSENT DECREE

WHEREAS, American Fuel & Petrochemical Manufacturers and American Petroleum Institute (collectively “Plaintiffs”) initiated this action against Gina McCarthy, Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively “EPA” or the “Agency”), with a complaint filed March 18, 2015 (“Complaint”), alleging that EPA has violated a nondiscretionary duty under the Clean Air Act, 42 U.S.C. § 7545(o)(3)(B), to establish renewable fuel obligations applicable to the calendar years 2014 and 2015 and to approve or disapprove Plaintiffs’ petition to waive in part for calendar year 2014 the renewable fuel volumes established by 42 U.S.C. § 7545(o)(2);

WHEREAS, Plaintiffs filed their complaint pursuant to 42 U.S.C. § 7604(a)(2), which authorizes suits against EPA for failure to perform a nondiscretionary duty required by the Clean Air Act;

WHEREAS, 42 U.S.C. § 7545(o)(3)(B) requires that EPA determine and publish in the Federal Register by November 30 of each calendar year the renewable fuel obligations for the following year;

WHEREAS, to date, EPA has not taken final action with respect to renewable fuel obligations for 2014 and 2015;

WHEREAS, Plaintiffs' complaint alleges that EPA's failure to publish final 2014 and 2015 renewable fuel obligations has caused their member companies irreparable harm;

WHEREAS, Plaintiffs' complaint seeks declaratory and injunctive relief, as well as attorney's fees and other costs of litigation pursuant to 42 U.S.C. § 7604(d);

WHEREAS, Plaintiffs and EPA (collectively, the "Parties") wish to effectuate a settlement resolving Plaintiffs' claims without further litigation, and the terms of that settlement are set forth in this Consent Decree;

WHEREAS, it is EPA's intention to take proposed and final action with respect to renewable fuel obligations for 2016 on or before the same dates required by this Consent Decree for the renewable fuel obligations for 2015;

WHEREAS, Plaintiffs understand that the terms of this Consent Decree, if approved by the Court, will fully resolve the claims in Plaintiff's Complaint;

WHEREAS, under the terms of this Consent Decree, the Parties acknowledge and agree that Plaintiffs have not waived any rights to seek judicial review of any final action EPA takes with respect to renewable fuel obligations, or to file additional petitions pursuant to 42 U.S.C.

§ 7545(o), and that EPA has not waived any rights in response to any such claims for judicial review or petitions;

WHEREAS, the Parties agree that this Consent Decree should not be construed as representing any concession by Plaintiffs regarding EPA's statutory obligation under 42 U.S.C. § 7545(o)(3)(B) to promulgate renewable fuel obligations for 2016 and beyond;

WHEREAS, the Parties agree that this Consent Decree represents a good-faith compromise of disputed claims; and

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

NOW THEREFORE, before the taking of testimony, without trial or determination of any undecided issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED, ADJUDGED and DECREED as follows:

JURISDICTION, VENUE AND PARTIES

1. This Court has subject-matter jurisdiction over the claims set forth in the above-referenced complaint and to order the relief contained in this Consent Decree. Venue is proper in the United States District Court for the District of Columbia.

2. The Parties to this Consent Decree are Plaintiffs and EPA.

EPA OBLIGATIONS

3. EPA shall sign by June 1, 2015, and submit to the Office of the Federal Register as expeditiously as reasonably possible and in any event no later than ten (10) business days after such signature for publication in the Federal Register, a notice of proposed rulemaking to determine in accordance with 42 U.S.C. § 7545(o)(3)(B) the renewable fuel obligations for

calendar year 2015. Following its submission, EPA shall not take any action to delay or otherwise interfere with immediate publication of the notice in the Federal Register.

4. EPA shall sign by November 30, 2015, and submit to the Office of the Federal Register as expeditiously as reasonably possible and in any event no later than ten (10) business days after such signature for publication in the Federal Register, a final rule or rules determining in accordance with 42 U.S.C. § 7545(o)(3)(B) the renewable fuel obligations for calendar years 2014 and 2015. Following its submission, EPA shall not take any action to delay or otherwise interfere with immediate publication of the final rule or rules in the Federal Register.

5. No later than November 30, 2015, EPA shall approve or disapprove in accordance with 42 U.S.C. § 7545(o)(7) the waiver petition submitted to EPA by Plaintiffs on August 13, 2013.

MODIFICATION OF THIS CONSENT DECREE AND DISPUTE RESOLUTION

6. Any provision of this Consent Decree may be modified by written agreement of all Parties, which must be approved by the Court.

7. The Parties may extend a deadline established in Paragraphs 3, 4, or 5 above by written stipulation executed by counsel for all Parties and filed with the Court on or before the date of that deadline; such extension shall take effect immediately upon filing the stipulation. In addition, EPA reserves the right to file with the Court a motion seeking to modify any deadline or other obligation imposed on EPA by Paragraphs 3, 4 or 5 above. EPA shall give both Plaintiffs at least five (5) business days' written notice before filing such a motion with respect to any deadline or other obligation imposed by Paragraph 3, and at least ten (10) business days' written notice before filing such a motion with respect to any deadline or obligation imposed by

Paragraph 4 or 5. Each Plaintiff reserves its right to oppose any such motion on any applicable grounds.

8. In the event of a dispute among the Parties concerning the interpretation or implementation of, or compliance with, any provision of this Consent Decree, the disputing Party shall give the other Parties a written notice explaining the nature of the dispute and requesting informal negotiations. If the Parties cannot in good faith reach an agreed upon resolution within five (5) business days after receipt of the notice, any Party may move the Court to resolve the dispute.

CONTINUING JURISDICTION AND TERMINATION

9. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree. When EPA's obligations under Paragraphs 3, 4, and 5 above have been completed, the above captioned matter shall be dismissed with prejudice and this Consent Decree shall terminate. The Parties shall file the appropriate notice or motion with the Court so that the Clerk may close the file, except that if there is a dispute regarding whether EPA has completed its obligations, the Parties shall follow the procedures set forth in Paragraph 8 above.

SAVING PROVISIONS

10. The obligations imposed on EPA under this Consent Decree may only be undertaken using appropriated funds. No provision of this Consent 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 federal statute. If a lapse in appropriations occurs within ninety (90) days prior to any deadline in this Consent Decree, such deadline shall be extended automatically one day for each day of the lapse in appropriations.

Nothing in this Paragraph 10 shall preclude EPA from seeking an additional extension, either by stipulation or court order, pursuant to the procedures of Paragraphs 6 through 8 above.

11. Nothing in this Consent Decree shall be construed as an admission by any Party with respect to any issue of fact or law, or to waive or limit any claim or defense on any grounds except as expressly provided in this Consent Decree.

12. Nothing in this Consent Decree shall be construed to limit, expand, or otherwise modify the discretion accorded to EPA by the Clean Air Act or by general principles of administrative law, except the deadlines specified therein. EPA's obligation to perform the actions described in Paragraphs 3, 4, and 5 above by the times specified therein does not constitute a limitation, expansion or other modification of EPA's discretion within the meaning of this Paragraph 12.

13. Nothing in this Consent Decree shall be construed to confer upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Court of Appeals pursuant to 42 U.S.C. § 7607(b)(1), including but not limited to judicial review of the final rules issued by EPA pursuant to Paragraph 4 above. Nothing in this Consent Decree shall be construed to waive any remedies or defenses the Parties may have under 42 U.S.C. § 7607(b)(1) with respect to such final action.

14. Nothing in this Consent Decree shall be construed as an agreement, admission, or acknowledgement by Plaintiffs that EPA has discretion to disregard the statutory deadlines set forth in 42 U.S.C. § 7545(o).

NOTICE AND COMMENT UNDER 42 U.S.C. § 7413(g)

15. The Parties agree and acknowledge that before this Consent Decree may be finalized and entered by the Court, EPA must provide notice of the Consent Decree in the Federal Register and an opportunity for comment pursuant to 42 U.S.C. § 7413(g). EPA shall expeditiously prepare such notice and, within five (5) business days of lodging this Consent Decree with the Court, submit it to the Office of Federal Register for publication. After the Consent Decree has undergone the statutorily-required notice and comment opportunity, the Administrator of EPA and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree in accordance with 42 U.S.C. § 7413(g). If the Administrator and/or the Attorney General do not elect to withdraw and withhold their consent, EPA shall promptly file a motion that requests the Court to enter this Consent Decree.

16. No Party shall challenge any term of this Consent Decree or this Court's jurisdiction to enter and enforce the Consent Decree. This paragraph shall not be construed to limit or modify the discretion of the Administrator and/or the Attorney General pursuant to 42 U.S.C. § 7413(g).

COSTS OF LITIGATION

17. Each Party shall bear its own costs of litigation.

NOTICE TO PARTIES

18. Any notice required by or given in connection with this Consent Decree shall be made in writing, via facsimile, electronic mail or overnight delivery, and shall be sent to the following:

For American Fuel & Petrochemical Manufacturers:

RICHARD S. MOSKOWITZ
American Fuel & Petrochemical Manufacturers
1667 K Street, NW
Washington, DC 20006
Phone: 202-552-8474
Email: rmoskowitz@afpm.org

CHET M. THOMPSON
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-624-2500
Email: cthompson@crowell.com

For American Petroleum Institute:

ROBERT A. LONG, JR.
Covington & Burling LLP
One CityCenter
850 Tenth Street NW
Washington, D.C. 20001
Phone: 202-662-6000
Fax: 202-778-5612
Email: rlong@cov.com

For EPA:

BRIAN H. LYNK
United States Department of Justice
Environmental Defense Section
601 D Street, NW, Suite 8000
Washington, DC 20004
Phone: 202-514-6187
Fax: 202-514-8865
Email: brian.lynk@usdoj.gov

For U.S. Postal Service Overnight Mail Only:
P.O. Box 7611
Washington, DC 20044

EFFECT OF SIGNATURE

19. This Consent Decree may be signed in any number of separate counterparts. Once all Parties have signed, each separate counterpart shall be deemed to constitute an agreement among all Parties, subject to Paragraph 20.

20. This Consent Decree shall become effective upon entry by the Court following completion of the process described in Paragraph 15 above. If the Administrator and/or the Attorney General elects to withdraw or withhold consent at the conclusion of that process, then EPA will promptly notify Plaintiffs, this Consent Decree shall not take effect and the Parties reserve any and all rights.

21. The undersigned representatives of each Party hereby certify that they are fully authorized by the Party or Parties they represent to bind that Party to the terms of this Decree.

SO ORDERED on this _____ day of _____, 2015.

Christopher R. Cooper
United States District Judge

FOR EPA

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

By: _____

DATED: _____

BRIAN H. LYNK
Trial Attorney
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
(202) 514-6187

FOR AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS



DATED: 4/10/15

CHET M. THOMPSON
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-624-2500
Email: cthompson@crowell.com

FOR AMERICAN PETROLEUM INSTITUTE



DATED: 4/10/15

ROBERT A. LONG JR.
Covington & Burling LLP
One CityCenter
850 Tenth Street NW
Washington, D.C. 20001
Phone: 202-662-6000
Fax: 202-778-5612