

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|                                                                       |   |                 |
|-----------------------------------------------------------------------|---|-----------------|
| LOUISIANA ENVIRONMENTAL<br>ACTION NETWORK,                            | ) |                 |
|                                                                       | ) |                 |
| Plaintiff,                                                            | ) |                 |
|                                                                       | ) |                 |
| v.                                                                    | ) | Civ. Action No. |
|                                                                       | ) | 1:09-CV1333-RMC |
| LISA JACKSON, Administrator,<br>U.S. Environmental Protection Agency, | ) |                 |
|                                                                       | ) |                 |
| Defendant.                                                            | ) |                 |

**JOINT MOTION TO HOLD THIS CASE IN ABEYANCE  
PENDING IMPLEMENTATION OF PROPOSED SETTLEMENT AGREEMENT**

Plaintiff Louisiana Environmental Action Network (“LEAN”) and Defendant Lisa Jackson, Administrator, United States Environmental Protection Agency (“EPA”) (collectively “the Settling Parties”) hereby request that the Court enter an order holding litigation in this case in abeyance pending the public comment process required by 42 U.S.C. § 7413(g) and satisfaction of a proposed settlement that the parties have negotiated. In support of this motion, the Settling Parties state the following:

1. LEAN filed the above-captioned case alleging that EPA has failed to perform nondiscretionary duties under the Clean Air Act related to the attainment of national ambient air quality standards for ozone in the Baton Rouge Area.

2. The Settling Parties have negotiated a comprehensive proposed settlement of the claims raised in LEAN’s Amended Complaint. The proposed settlement agreement is attached hereto as Exhibit A.

3. Pursuant to section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), EPA will publish a notice of the proposed settlement for public comment, and the Administrator and Attorney General reserve their right to withdraw consent to the settlement agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate.

4. Among other things, the proposed settlement agreement provides that if by February 28, 2012, EPA has not taken final action redesignating the Baton Rouge Area to attainment for the 1997 8-hour ozone NAAQS, EPA will, by that date, sign a notice, to be published in the Federal Register, proposing action on (1) LDEQ's June 15, 2005 submittal titled "Severe Area Rule Update," (2) LDEQ's December 20, 2005, submittal titled "New Source Review State Implementation Plan (SIP)," and (3) LDEQ's November 9, 2007, submittal titled "General Rule Update." See Exhibit A ¶ 4. The proposed agreement further provides that EPA will, by September 30, 2012, take final action on these three proposed actions if it has not taken final action redesignating the Baton Rouge area to attainment by that date. See id. ¶ 5.

5. The proposed settlement agreement provides that after within 30 days after EPA's completion of the obligations in the agreement, or within 30 days after EPA has taken final action redesignating the Baton Rouge Area to attainment for the 1997 8-hour ozone NAAQS, LEAN and EPA shall jointly file with the Court a motion pursuant to Fed. R. Civ. P. 41(a) to dismiss the Amended Complaint. See Exhibit A ¶ 6.

WHEREFORE, the parties respectfully request that the Court enter an order continuing to hold this case in abeyance pending the public comment process and, if the settlement becomes final following the public comment process, satisfaction of the proposed settlement that the parties have negotiated.

Respectfully submitted this 23rd day of November:

Igancia S. Moreno  
Assistant Attorney General

          /s/ Adam Babich            
Adam Babich  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, LA 70118-6324  
(504) 862-8800  
ababich@tulane.edu

*Counsel for LEAN*

          /s/ Eric Hostetler            
Eric G. Hostetler  
Environmental Defense Section  
Environment & Natural Resources  
          Division  
United States Department of Justice  
P.O. Box 23986  
Washington, DC 20026-3986  
(202) 305-2326  
eric.hostetler@usdoj.gov

*Counsel for EPA*

# **EXHIBIT A**

## SETTLEMENT AGREEMENT

WHEREAS, on July 17, 2009, the Louisiana Environmental Action Network (“LEAN”) filed a complaint (civil action no. 1:09-0133) against Lisa Jackson, Administrator, United States Environmental Protection Agency (“EPA”) in the United States District Court for the District of Columbia (hereinafter LEAN v. Jackson), which complaint was amended on February 17, 2010;

WHEREAS, in its complaint LEAN alleges that EPA has failed to perform nondiscretionary duties under the Clean Air Act related to the attainment of national ambient air quality standards for ozone in the Baton Rouge Area;

WHEREAS, on March 5, 2010, EPA filed its answer to LEAN’s amended complaint, denying any liability;

WHEREAS, Clean Air Act sections 172(c)(5) and 182(d) and 185, 42 U.S.C. §§ 7502(c)(5) and 7511a(d), and 7511d, set forth certain requirements applicable to areas classified as “severe” ozone nonattainment areas;

WHEREAS, EPA reclassified the Baton Rouge area as a severe 1-hour ozone nonattainment area effective June 23, 2003, and established a schedule for Louisiana to submit State Implementation Plan (SIP) revisions addressing the Clean Air Act’s pollution control requirements for severe ozone nonattainment areas;

WHEREAS, in 2004 EPA promulgated a final rule (“the Phase 1 Implementation Rule”) to implement the 8-Hour Standard, and purported to remove the need for states to include 1-hour ozone new source review elements as part of their federally approved State Implementation Plan;

WHEREAS, the U.S. Court of Appeals for the District of Columbia Circuit in South Coast Air Quality Management Dist. v. EPA, 472 F.3d 882 (D.C. Cir. 2006) vacated those portions of the Phase 1 Implementation Rule that purported to remove the need for States to include 1-hour ozone new source review elements as part of their federally approved State Implementation Plan;

WHEREAS, the Louisiana Department of Environmental Quality (“LDEQ”) has submitted to EPA for approval certain State Implementation Plan revisions relevant to Severe 1-Hour Requirements for major sources in the Baton Rouge Area, which submissions include: (1) a June 15, 2005 submittal titled “Severe Area Rule Update,” (2) a December 20, 2005, submittal titled “New Source Review State Implementation Plan (SIP),” and (3) a November 9, 2007, submittal titled “General Rule Update.”

WHEREAS, EPA has not made any determination whether the June 15, 2005, December 20, 2005, and November 9, 2007, state implementation revisions submitted by LDEQ meet applicable requirements of the Clean Air Act;

WHEREAS, the EPA’s Office of Air and Radiation issued a memorandum dated October 3, 2007, noting that the effect of the South Coast decision is to restore the obligation for areas designated nonattainment for the 8-hour ozone standard to have in their State Implementation Plans new source review applicability thresholds and emission offsets pursuant to the nonattainment classification in effect for the area for the 1-hour ozone standard at the time of designation for the 8-hour standard;

WHEREAS, EPA's Acting Regional Administrator, EPA Region 6, on April 29, 2009, sent a letter to the Secretary of the Louisiana Department of Environmental Quality strongly encouraging the State to comply with the court decision in South Coast, and advising LDEQ that "EPA expects States to implement 1-hour nonattainment NSR requirements using thresholds and emission offsets based on the classifications for areas designated nonattainment for the 1-hour ozone standard;"

WHEREAS, the Baton Rouge Area is currently designated nonattainment for the 8-hour ozone standard;

WHEREAS, recent monitoring data suggests that the Baton Rouge area is currently meeting the 8-Hour Standard and may be eligible for redesignation to attainment;

WHEREAS, LDEQ has submitted a request to redesignate to attainment for the 8-hour NAAQS the Baton Rouge nonattainment area;

WHEREAS, certain requirements applicable to nonattainment areas terminate when an area is redesignated to attainment;

WHEREAS, on March 27, 2008, EPA promulgated a revised 8-hour ozone standard of 0.75 ppm, 73 Fed. Reg. 16,436 (Mar. 27, 2008). EPA is reconsidering whether that standard is sufficient to protect public health. EPA has proposed to promulgate a revised ozone standard within the range of 0.060 to 0.070 ppm. 75 Fed. Reg. 2938 (Jan. 19, 2010). Complete, quality-assured data for 2008 and 2009, and preliminary data through September 30, 2010, suggests that the Baton Rouge area is not meeting the 0.75 standard; this same data suggests that the area is not meeting a standard within the range of 0.060 to 0.070 ppm.

WHEREAS, the Parties have agreed to a settlement of the claims raised in this action without any admission or adjudication of fact or law, which they consider to be a just, fair, and equitable resolution of the claims raised;

NOW, THEREFORE, the Parties agree to this settlement in the manner, terms, and conditions as follows:

### **GENERAL TERMS**

1. The parties to this Settlement Agreement ("Agreement") are LEAN and EPA.
2. For purposes of this Agreement, the following terms shall have the meanings provided below:

"Agreement" refers to this document.

"Baton Rouge Area" refers to the five-parish Baton Rouge Nonattainment Area, which includes Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge Parishes.

"EPA" means the Administrator of the United States Environmental Protection Agency, or the Administrator's duly authorized representative, and the United States Environmental Protection Agency.

"1-Hour Standard" refers to the 1-hour ozone national ambient air quality standard of 0.12 parts per million promulgated in 1979, 44 Fed. Reg. 8202 (Feb. 8, 1979).

“8-Hour Standard” refers to the 8-hour ozone national ambient air quality standard of 0.08 parts per million promulgated in 1997, 62 Fed. Reg. 38,856 (July 18, 1997).

“Settling Parties” refers to LEAN and EPA.

### **AGREED DEADLINES**

3. Within five (5) days of the execution of this Agreement by both Settling Parties, the Settling Parties shall file a joint motion with the Court in *LEAN v. Jackson*, notifying it of this Agreement and requesting the Court enter an order holding litigation in abeyance pending completion of the process under section 113(g) of the Clean Air Act and during the period required to effectuate the terms of this Agreement, if EPA gives final approval and consents to this Agreement after the Clean Air Act section 113(g) process addressed in paragraphs 16 and 17 below.

4. If, by February 28, 2012, EPA has not taken final action redesignating the Baton Rouge Area to attainment for the 1997 8-hour ozone NAAQS, EPA will, by that date, sign a notice, to be published in the Federal Register, proposing action on (1) LDEQ’s June 15, 2005 submittal titled “Severe Area Rule Update,” (2) LDEQ’s December 20, 2005, submittal titled “New Source Review State Implementation Plan (SIP),” and (3) LDEQ’s November 9, 2007, submittal titled “General Rule Update.”

5. If, by September 30, 2012, EPA has not taken final action redesignating the Baton Rouge Area to attainment for the 1997 8-hour ozone NAAQS, EPA will, by that date, sign a notice, to be published in the Federal Register, taking final action on the three proposed actions referenced in Paragraph 4.

6. Within 30 days after EPA’s completion of the obligations in paragraphs 4 and 5, or within 30 days after EPA has taken final action redesignating the Baton Rouge Area to attainment for the 1997 8-hour ozone NAAQS, LEAN and EPA shall jointly file with the Court in *LEAN v. Jackson* (civil action no. 1:09-01333) a motion pursuant to Fed. R. Civ. P. 41(a) to dismiss without prejudice its First Amended Complaint except that such dismissal shall be with prejudice as to any claim against EPA to require EPA to take final agency action on (1) LDEQ’s June 15, 2005 submittal titled “Severe Area Rule Update,” (2) LDEQ’s December 20, 2005, submittal titled “New Source Review State Implementation Plan (SIP),” and (3) LDEQ’s November 9, 2007, submittal titled “General Rule Update.” If LEAN fails to do so, EPA may file such a motion and LEAN shall not oppose it. Dismissal of this Action pursuant to this Agreement shall not serve as a waiver or relinquishment of any other rights that LEAN may have under the Clean Air Act. By way of example and not limitation, dismissal will not waive any of LEAN’s right with respect to its position that Severe 1-Hour Requirements apply until the Baton Rouge Area achieves attainment with the applicable ozone standard that is current as of the time of any redesignation decision by EPA.

### **REMEDY FOR NON-COMPLIANCE**

7. If EPA fails to timely fulfill any duty under this Agreement, LEAN’s sole judicial remedy shall be to the right to ask the Court to lift the stay described in paragraph 3, and to pursue the claims raised in its Complaint. EPA does not waive or limit any defense relating to

the claims raised in LEAN's Complaint, nor does EPA concede that it has any legal duty to take the actions called for in this Settlement Agreement.

8. The Settling Parties agree that contempt of court is not an available remedy under this Agreement.

#### **AGENCY DISCRETION**

9. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law.

#### **JURISDICTION**

10. Nothing in the terms of this Agreement shall be construed to confer upon the district court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Agreement.

#### **EFFECT OF SETTLEMENT AGREEMENT**

11. The Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any Settling Party.

12. Except as set forth in this Agreement, the Settling Parties retain all rights, claims, defenses, and discretion they may otherwise have.

13. Nothing herein shall constitute an EPA finding or determination with respect to the three State Implementation Plan submissions referenced in Paragraph 4.

#### **COSTS**

14. The Settling Parties shall each bear their own costs and fees, including but not limited to attorney's and expert witness fees

#### **MODIFICATION**

15. This Agreement, including the deadlines set forth in paragraphs 4 and 5, may be modified or amended by written agreement by counsel for the Settling Parties.

#### **CLEAN AIR ACT SECTION 113(g)**

16. The Settling Parties agree and acknowledge that final approval and entry of this Agreement is subject to the requirements of Clean Air Act § 113(g), 42 U.S.C. § 7413(g). That subsection provides that notice of this proposed Agreement be given to the public, that the public shall have a reasonable opportunity to make any comments, and that the Attorney General, as appropriate, must consider those comments in deciding whether to agree to this Settlement.

17. EPA shall submit a public notice of this Agreement to the Federal Register for publication and public comment within fourteen days of execution of this Agreement by the Settling Parties. Within 45 days of the close of the public comment period EPA shall notify

LEAN whether it consents to this Agreement. This Agreement shall become final and effective on the date EPA notifies LEAN in writing that it consents to the Agreement.

#### EFFECTIVE DATE

18. This Agreement shall become effective upon signature by all Settling Parties, completion of the public process under section 113(g) of the Clean Air Act, and EPA's notification to LEAN in writing of its final consent to the Agreement.

#### COMPLIANCE WITH OTHER LAWS

19. No provision of this Agreement shall be interpreted so as to constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the APA, 5 U.S.C. §§ 551-559, 701-706, the Clean Air Act, or any other law or regulation, either substantive or procedural.

#### REPRESENTATIVE AUTHORITY

20. Each undersigned representative of the parties to this Agreement certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Agreement. By signature below, all Settling Parties consent to this Agreement.

#### FOR EPA:

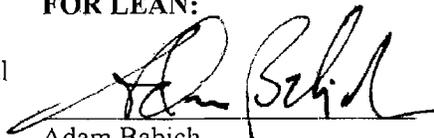
Ignacia S. Moreno, Assistant Attorney General  
Environment & Natural Resources Division



Eric G. Hostetler  
Environmental Defense Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 305-2326

Date: 11/23/10

#### FOR LEAN:



Adam Babich  
D.C. Bar. No. 382747  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, LA 70118-6321  
(504) 862-8800

Date: November 22, 2010