

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

Civil Action No. 12-cv-00754-RPM-MEH

WILDEARTH GUARDIANS,

Plaintiff,

v.

LISA JACKSON, in her official capacity as Administrator of the Environmental Protection Agency,

Defendant.

**NOTICE OF LODGING PROPOSED CONSENT DECREE
AND JOINT MOTION TO STAY PROCEEDINGS FOR NINETY DAYS**

Plaintiff WildEarth Guardians and Defendant Lisa Jackson, Administrator of the United States Environmental Protection Agency (hereinafter “EPA”), have agreed to settle this matter through a proposed Consent Decree, which the Parties hereby lodge with the Court.

For the reasons explained below, the Parties request that the proposed Consent Decree *not* be signed or entered by the Court at this time. The Parties also respectfully request that the Court stay all proceedings in this case, including Defendant’s obligation to respond to the complaint, for ninety days so that the mandatory public notice and comment process on the proposed Consent Decree under section 113(g) of the Clean Air Act (“CAA”), 42 U.S.C. § 7413(g), can go forward, without the unnecessary expenditure of the Court’s or the Parties’ time or resources.

WildEarth Guardians’ Complaint alleges that EPA has failed to take action on a State Implementation Plan (“SIP”) submission from the State of Utah within the time frame required

by section 110(k)(2) of the CAA, 42 U.S.C. § 7410(k)(2). Under the proposed Consent Decree, EPA agrees, among other things, to take final action on the SIP submission in question by February 14, 2013. If entered by the Court upon completion of the mandatory CAA section 113(g), 42 U.S.C. § 7413(g), public notice and comment process, the proposed Consent Decree will completely resolve the claims in WildEarth Guardians' complaint.

CAA section 113(g), 42 U.S.C. § 7413(g), requires that notice of the proposed Consent Decree be given to the public through publication in the *Federal Register*, and that the public shall have a reasonable opportunity to make any comments on the proposed Consent Decree. Congress has specifically required that EPA provide at least 30 days for this opportunity for public comment. *Id.* If any comments are received on the proposed Consent Decree, then the Administrator of EPA or the Attorney General, as appropriate, must consider those comments and determine whether to withdraw their consent to the proposed Decree. *Id.* The Parties acknowledge this requirement in paragraph 10 of the proposed Decree. EPA will promptly prepare the notice and transmit it to the Office of the *Federal Register*.

EPA has no control over when the Office of the *Federal Register* actually publishes the notice, and it could take several weeks for the notice to be published. EPA currently anticipates that it can get the notice published, provide the 30-day comment period, consider any comments received and make a determination on whether to withdraw its consent to the proposed Decree within 90 days. In the unlikely event that a longer period is necessary to complete the process, then EPA will confer with Plaintiff and file an appropriate motion.

Promptly upon completion of the public comment and evaluation process, EPA will inform the Court and WildEarth Guardians as to whether the Administrator and/or Attorney

General has determined to withdraw consent to the proposed Consent Decree or to proceed with entry of the proposed Consent Decree. In the former case, the Parties will confer on how to proceed and file a joint status report or an appropriate motion. In the latter case, EPA shall file an appropriate motion requesting entry of the Consent Decree.

In the meantime, the Court should stay all proceedings in this case, including Defendant's obligation to respond to the complaint, for 90 days while the CAA section 113(g) notice and comment process goes forward. The Parties have now lodged their proposed Consent Decree, which, if entered, will resolve Plaintiff's complaint in its entirety. Congress has mandated that EPA undertake the public comment process explained above, and the Parties have done everything within their power to achieve a final settlement in this case. However, the notice and comment process is required by law, and the Parties cannot proceed further with the settlement until after completion of the notice and comment process. Consequently, the case should be stayed, in the interest of both judicial economy and the economy of the Parties, while the final stage of the settlement process goes forward.

For these reasons, the Court should stay all proceedings in this case, including Defendant's obligation to respond to the Complaint, and all litigation scheduling and planning obligations, for 90 days while the mandatory CAA section 113(g) public notice and comment process goes forward on the proposed Consent Decree. The Court should not sign or enter the proposed Consent Decree at this time.

Respectfully submitted,

s/David A. Carson
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COUNSEL FOR PLAINTIFF

Date: July 11, 2012

CERTIFICATE OF SERVICE

I hereby certified that on July 11, 2012, I filed the foregoing NOTICE OF LODGING PROPOSED CONSENT DECREE AND JOINT MOTION TO STAY PROCEEDINGS FOR NINETY DAYS with the Clerk of the Court, who will send notification to all counsel of record

who are registered with the Court's ECF system.

s/David A. Carson
DAVID A. CARSON

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FOR THE DISTRICT OF COLORADO**

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WILDEARTH GUARDIANS,

Plaintiff,

v.

LISA JACKSON, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendant.

CONSENT DECREE

WHEREAS, on March 26, 2012, Plaintiff WildEarth Guardians filed its Complaint in this action against Lisa Jackson, in her official capacity as Administrator of the United States Environmental Protection Agency (“EPA”);

WHEREAS, Plaintiff alleges that EPA has failed to take action on a State Implementation Plan (“SIP”) submission from the State of Utah within the time frame required by section 110(k)(2) of the Clean Air Act, 42 U.S.C. § 7410(k)(2);

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

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as

follows:

1. This Court has subject matter jurisdiction over the claims set forth in the Complaint and to order the relief contained in this Consent Decree.
2. Venue lies in the District of Colorado.
3. Plaintiff and Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Upon entry, no party shall challenge the terms of this Consent Decree. This Consent Decree constitutes a complete and final resolution of all claims which have been asserted or which could have been asserted in the Complaint.
4. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Decree are null and void.
5. By February 14, 2013, EPA shall sign a notice of final action: to approve in whole, or to approve in part and disapprove in part, or to disapprove in whole, the State of Utah's proposed SIP revision for maintenance of the 1997 eight-hour National Ambient Air Quality Standard for ozone in Salt Lake and Davis Counties, which Utah submitted to EPA on March 22, 2007. After signature, EPA shall promptly submit the notice for review and publication to the Office of Federal Register.
6. The deadline in Paragraph 5 may be extended for a period of 60 days or less by written stipulation executed by counsel for Plaintiff and Defendant and filed with the Court. Any other extension to the deadline in Paragraph 5 or any other modification to this Consent Decree (excluding changes in counsel or addresses under Paragraph 17), may be approved by the

Court upon motion made pursuant to the Federal Rules of Civil Procedure by either party to this Consent Decree and upon consideration of any response by the non-moving party and reply by the moving party.

7. EPA agrees to settle Plaintiff's claim for costs and attorneys' fees by paying \$2,446.00 as soon as reasonably practicable after entry of this Consent Decree. This amount shall be paid by Fed Wire Electronic Funds Transfer to WildEarth Guardians, pursuant to payment instructions provided by Ashley Wilmes. Plaintiff agrees to provide counsel for Defendant all necessary information for processing the electronic funds transfer within five (5) business days of receipt of the Court's order entering this Consent Decree. Plaintiff agrees to accept payment of \$2,446.00 in full satisfaction of any and all claims for costs and attorneys' fees with respect to this case incurred up until the date of entry of this Consent Decree by the Court. EPA does not concede that Plaintiff will be entitled to fees for any efforts after the date of entry of this Consent Decree, and EPA reserves all defenses with respect to any such efforts and any related fee claim. The fees paid under this Paragraph shall have no precedential value in any future fee claim.

8. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree, to rule upon any motions filed in accordance with Paragraph 6 of this Consent Decree, and to resolve any disputes in accordance with Paragraph 13 of this Consent Decree. Once EPA has taken the actions called for in Paragraphs 5 and 7 of this Consent Decree, this Decree shall be terminated and the case dismissed with prejudice. The Parties may either jointly notify the Court that the Decree should be terminated and the case dismissed, or EPA may so notify the Court by motion. If EPA notifies the Court by motion, then

Plaintiff shall have twenty days in which to respond to such motion.

9. Except as provided herein, nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions which are the subject of this Consent Decree.

10. The parties agree and acknowledge that final approval and entry of this proposed Consent Decree are subject to the requirements of Clean Air Act § 113(g), 42 U.S.C. § 7413(g). That subsection provides that notice of this proposed Decree be given to the public, that the public shall have a reasonable opportunity to make any comments, and that the Administrator or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to this Consent Decree. After lodging this Consent Decree with the Court, EPA shall promptly submit a notice of availability of the Consent Decree for public comment to the Office of Federal Register for review and publication. After this Consent Decree has undergone an opportunity for notice and comment, the Administrator 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 section 113(g) of the CAA. If the federal government elects not to withdraw or withhold consent to this Consent Decree, Defendant or the parties shall promptly file a motion that requests the Court to enter this Consent Decree.

11. Nothing in the terms of this Consent Decree shall be construed to waive any remedies Plaintiff may have under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), with respect to any future challenges to the final action called for in Paragraph 5.

12. Nothing in this Consent Decree shall be construed to provide this Court with

jurisdiction over any challenges by Plaintiff or any other person or entity not a party to this litigation with respect to the final action called for in Paragraph 5.

13. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing party shall contact the other party to confer and attempt to reach an agreement on the disputed issue. If the parties cannot reach an agreed-upon resolution, then either party may move the Court to resolve the dispute.

14. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiff and Defendant and that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree. This Consent Decree shall be governed and construed under the laws of the United States.

15. The obligations imposed upon EPA under this Consent Decree may only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable law or regulation.

16. The undersigned representative of each party certifies that she or he is fully authorized to consent to the Court's entry of the terms and conditions of this Consent Decree.

17. Any written notices or other written communications between the parties contemplated under this Consent Decree shall be sent to the undersigned counsel at the addresses listed in the signature blocks below unless written notice of a change in counsel and/or address is provided.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

Dated: 7/10/2012

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Dated: 6/19/2012

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COUNSEL FOR PLAINTIFF

Upon consideration of the foregoing, the Court hereby finds that this Consent Decree is fair, reasonable, consistent with the Clean Air Act and in the public interest, and the Court

hereby enters the Consent Decree.

IT IS SO ORDERED.

Date: _____

United States District Judge