

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL INTEGRITY PROJECT,
et al.,

Plaintiffs,

v.

MICHAEL REGAN, in his official capacity as
Administrator, United States Environmental
Protection Agency,
Defendant.

Civil Action No. 20-cv-03119-TNM (L)

CONCERNED CITIZENS OF ST. JOHN,
et al.,

Plaintiffs,

v.

MICHAEL REGAN, in his official capacity as
Administrator, United States Environmental
Protection Agency,
Defendant.

Civil Action No. 21-cv-03063-TNM

**[PROPOSED] JOINT CONSENT DECREE REGARDING
GROUP I POLYMERS AND RESINS CLAIMS**

WHEREAS, on October 29, 2020, Plaintiffs Environmental Integrity Project, Clean Air Council, Air Alliance Houston, Chesapeake Climate Action Network, Earthworks, Environment America, Environment Texas, Hoosier Environmental Council, PennEnvironment, and Texas Campaign for the Environment (collectively, “EIP Plaintiffs”) filed *EIP, et al. v. Regan*, 1:20-cv-03119-TNM (D.D.C.) (the “EIP Matter”) against the Administrator of the United States Environmental Protection Agency in his official capacity (“EPA” or “Defendant”), *see* EIP Compl. (D.D.C. No. 1:20-cv-03119-TNM, ECF No. 1);

WHEREAS, on December 10, 2021, EIP Plaintiffs filed a Third Amended Complaint (D.D.C. No. 1:20-cv-03119-TNM, ECF No. 30) (“EIP Third Am. Compl.”);

WHEREAS, on November 18, 2021, Plaintiffs Concerned Citizens of St. John, Louisiana Environmental Action Network, and Sierra Club (collectively, “CCSJ Plaintiffs”) filed *CCSJ, et al. v. Regan*, 1:21-cv-03063 (D.D.C.) (the “CCSJ Matter”) against EPA, *see* CCSJ Compl. (D.D.C. No. 1:21-03063-CJN, ECF No. 1);

WHEREAS, on March 30, 2022, CCSJ Plaintiffs filed a First Amended Complaint (D.D.C. No. 1:21-cv-03063-TNM, ECF No. 18) (“CCSJ First Am. Compl.”);

WHEREAS, on March 31, 2022, the Court consolidated the EIP Matter and the CCSJ Matter, with the EIP Matter identified as the lead case, Min. Order (Mar. 31, 2022);

WHEREAS, EIP Plaintiffs and CCSJ Plaintiffs (collectively, “Plaintiffs”) allege that EPA has failed to undertake certain non-discretionary duties under the Clean Air Act, 42 U.S.C. §§ 7401–7671q, and that such alleged failure is actionable under Clean Air Act Section 304(a)(2), 42 U.S.C. § 7604(a)(2), *see* CCSJ First Am. Compl. ¶¶ 5, 7, 130–33; EIP Third Am. Compl. ¶¶ 1–2, 6, 8–10;

WHEREAS, Plaintiffs allege that EPA failed to perform its obligations under Clean Air Act Section 112(d)(6), 42 U.S.C. § 7412(d)(6), to “review, and revise as necessary (taking into account developments in practices, processes, and control technologies)” the National Emission Standards for Hazardous Air Pollutants (“NESHAP”) for Group I Polymers and Resins, 40 C.F.R. Part 63, Subpart U (“P&R I”), at least every eight years, *see* CCSJ First Am. Compl. ¶¶ 130–31; EIP Third Am. Compl. ¶¶ 62, 94;

WHEREAS, the relief requested in the CCSJ First Amended Complaint and EIP Third Amended Complaint includes, among other things, an order from the Court to establish a date

certain by which EPA must fulfill its alleged obligations under Clean Air Act Section 112(d)(6), *see* CCSJ First Am. Compl. ¶ 3; EIP Third. Am. Compl. ¶ 8;

WHEREAS, before filing this action, on May 6, 2021, CCSJ submitted an administrative petition for rulemaking and emergency action requesting, among other things, that EPA conduct a residual risk review rulemaking for the NESHAP for the Neoprene Production source category—which is contained within the P&R I source category—under Clean Air Act Section 112(f)(2) to identify and address any remaining health or environmental risks after the application of Clean Air Act Section 112(d) standards;

WHEREAS, on March 4, 2022, EPA partially granted CCSJ’s administrative petition for rulemaking and stated its intention “to conduct a human health risk assessment concurrently with the Section 112(d) technology review for ... the neoprene [source] category in P&R I, and based on the results of this risk assessment, to take appropriate action to ensure that the standards in P&R I continue to provide an ample margin of safety to protect public health”;

WHEREAS, through this Joint Consent Decree (the “Joint P&R I Consent Decree”), all Parties to both lawsuits have agreed to a full settlement of all claims brought in the CCSJ Matter and full settlement of the claim in the EIP Matter regarding EPA’s obligations with respect to the P&R I NESHAP, without admission of any issue of fact or law except as expressly provided herein;

WHEREAS, concurrent with this Joint P&R I Consent Decree, EIP Plaintiffs and EPA are together entering into a separate consent decree (the “Flares Consent Decree”) that resolves all other claims in the EIP Matter, such that the combination of this Joint P&R I Consent Decree and the Flares Consent Decree fully resolve all claims in the EIP Matter, without any admission of law or fact except as expressly provided in the two consent decrees;

WHEREAS, the Parties, by entering into this Joint P&R I Consent Decree, do not waive or

limit any claim, remedy, or defense, on any grounds, related to any final EPA action;

WHEREAS, the Parties consider this Joint P&R I Consent Decree to be an adequate and equitable resolution of all the claims in the CCSJ Matter and all of the claims regarding P&R I in the EIP Matter and therefore wish to effectuate a settlement;

WHEREAS, it is in the interest of the public, Plaintiffs, EPA, and judicial economy to resolve these matters without protracted litigation;

WHEREAS, the Court, by entering this Joint P&R I Consent Decree, finds that the Joint P&R I Consent Decree is fair, reasonable, in the public interest, and consistent with the Clean Air Act.

NOW THEREFORE, before the taking of testimony, without trial or determination of any issues of fact or law, and upon the consent of the Parties, it is hereby ordered, adjudged, and decreed that:

1. This Court has jurisdiction over the Clean Air Act Section 112(d)(6) claims set forth in the CCSJ First Amended Complaint and the EIP Third Amended Complaint concerning EPA's review of the NESHAP for P&R I and may order the relief contained in the Joint P&R I Consent Decree. Venue is proper in the United States District Court for the District of Columbia.

2. For the NESHAP for P&R I, 40 C.F.R. Part 63, Subpart U:

- a. No later than March 31, 2023, EPA shall sign a proposed rule containing all "necessary" revisions (taking into account developments in practices, processes, and control technologies) to Subpart U under Section 112(d)(6) of the Act, 42 U.S.C. § 7412(d)(6).
- b. No later than March 29, 2024, EPA shall sign a final rule promulgating all "necessary" revisions (taking into account developments in practices,

processes, and control technologies) to Subpart U under Section 112(d)(6) of the Act, 42 U.S.C. § 7412(d)(6).

3. Upon the signing of any of the documents described in Paragraph 2, the appropriate EPA official shall, within fifteen (15) business days of signature, forward each such document to the Office of the Federal Register for review and publication in the *Federal Register*. Following such delivery to the Office of the Federal Register, EPA shall not take any action (other than is necessary to correct any typographical errors or other errors in form) to delay or otherwise interfere with the publication of each such notice in the *Federal Register*.

4. Within seven (7) business days after forwarding the documents described in Paragraph 2 to the Office of the Federal Register, EPA shall send copies of such documents to Plaintiffs.

5. The deadlines set forth in Paragraph 2 may be extended (a) by written stipulation of the Parties with notice to the Court, or (b) by the Court following motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure, and upon consideration of any response by Plaintiffs and any reply by EPA. Any other provision of this Joint P&R I Consent Decree also may be modified by the Court following motion of an undersigned party for good cause shown pursuant to the Federal Rules of Civil Procedure and upon consideration of any response by a non-moving party and any reply.

6. The Parties shall not challenge the terms of this Joint P&R I Consent Decree or this Court's jurisdiction to enter and enforce this Joint P&R I Consent Decree.

7. Except as provided herein, nothing in this Joint P&R I Consent Decree shall be construed to limit or modify any discretion accorded to EPA by the Clean Air Act or by general principles of administrative law in taking the actions that are the subject of this Joint P&R I Consent Decree, including the discretion to alter, amend, or revise any final actions promulgated

pursuant to this Joint P&R I Consent Decree. EPA's obligation to perform each action specified in this Joint P&R I Consent Decree does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

8. Nothing in this Joint P&R I 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 Courts of Appeals pursuant to Clean Air Act Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Joint P&R I Consent Decree shall be construed to waive, limit, or modify any remedies, rights to seek judicial review, or defenses the Parties may have under Clean Air Act Section 307(b)(1), 42 U.S.C. § 7607(b)(1).

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

- a. For Plaintiffs Environmental Integrity Project, Clean Air Council, Air Alliance Houston, Chesapeake Climate Action Network, Earthworks, Environment America, Environment Texas, Hoosier Environmental Council, PennEnvironment, and Texas Campaign for the Environment:

Patton Dycus
Environmental Integrity Project
316 South 6th Ave.
Bozeman, MT 59715
Email: pdycus@environmentalintegrity.org

- b. For Plaintiffs Concerned Citizens of St. John, Louisiana Environmental Action Network, and Sierra Club:

Emma Cheuse
Deena Tumeh
Earthjustice
1001 G St. NW, Suite 1000
Washington, D.C. 20001
Email: echeuse@earthjustice.org
Email: dtumeh@earthjustice.org

- c. For Defendant EPA:
Elliot Higgins
Kimere J. Kimball
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Email: Elliot.Higgins@usdoj.gov
Email: Kimere.Kimball@usdoj.gov

10. The obligations imposed on EPA under this Joint P&R I Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Joint P&R I Consent 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 statute.

11. The Parties recognize that the possibility exists that a lapse in the appropriations that fund EPA could delay compliance with the timetables in this Joint P&R I Consent Decree. If a lapse in appropriations for EPA occurs within one hundred twenty (120) days before any deadline in this Joint P&R I Consent Decree, 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 Joint P&R I Consent Decree under Paragraph 5.

12. The Parties agree that this Joint P&R I Consent Decree shall constitute a complete and final settlement of all claims in the CCSJ First Amended Complaint and, in combination with the Flares Consent Decree, of all claims in the EIP Third Amended Complaint.

13. In the event of a dispute between the Parties concerning the interpretation or implementation of any aspect of this Joint P&R I 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 reach an agreed-upon resolution within fifteen (15) business days after receipt of the notice, any party may move the Court to resolve the dispute.

14. No motion or other proceeding seeking to enforce this Joint P&R I Consent Decree or for contempt of court shall be filed unless the procedure set forth in Paragraph 13 has been followed.

15. The Court shall retain jurisdiction to determine and effectuate compliance with this Joint P&R I Consent Decree, to resolve any disputes thereunder, and to consider any requests for costs of litigation (including reasonable attorneys' fees). After publication of notice in the *Federal Register* for the rule described in Paragraph 2 and resolution of Plaintiffs' claims for costs of litigation, including attorneys' fees, EPA may move to have this Joint P&R I Consent Decree terminated. Plaintiffs shall have thirty (30) days in which to respond to such a motion, unless the Parties stipulate to a longer time for Plaintiffs to respond.

16. The deadline for CCSJ Plaintiffs to file a motion for their costs of litigation (including reasonable attorneys' fees) for activities performed prior to entry of the Joint P&R I Consent Decree is hereby extended until ninety (90) days after this Joint P&R I Consent Decree is entered by the Court. The deadline for EIP Plaintiffs to file a motion for their costs of litigation (including reasonable attorneys' fees) for activities performed prior to entry of the Joint P&R I Consent Decree is hereby extended until ninety (90) days after the later of: entry of this Joint P&R I Consent Decree by the Court, or entry of EIP Plaintiffs' and EPA's separate Flares Consent Decree resolving the remainder of the claims from the EIP Third Amended Complaint (*i.e.*, the claims not concerning the NESHAP for P&R I). During this period (or these periods), the Parties shall seek to resolve informally any claims for costs of litigation (including reasonable attorneys' fees), and if they cannot, CCSJ Plaintiffs and/or EIP Plaintiffs will file separate motions for costs

of litigation (including reasonable attorneys' fees) or a separate stipulation or motion to extend the deadline to file such a motion. EPA reserves the right to oppose any such requests.

17. If for any reason the Court declines to approve this Joint P&R I Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Party and the Proposed Joint P&R I Consent Decree's terms may not be used as evidence in any litigation between the Parties.

18. The Parties treat this Joint P&R I Consent Decree as jointly drafted, and any rules of construction that construe any ambiguities in this document against the drafting party shall be inapplicable in any dispute concerning the interpretation of this Joint P&R I Consent Decree.

19. The Parties agree and acknowledge that before this Joint P&R I Consent Decree can be finalized and entered by the Court, EPA must provide notice of this Joint P&R I Consent Decree in the *Federal Register* and an opportunity for public comment pursuant to Clean Air Act Section 113(g), 42 U.S.C. § 7413(g). After this Joint P&R I Consent Decree has undergone notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any written comments in determining whether to withdraw or withhold their consent to this Joint P&R I Consent Decree, in accordance with Clean Air Act Section 113(g). If the Administrator and/or the Attorney General do not elect to withdraw or withhold consent, EPA shall promptly file a motion that requests that the Court enter this Joint P&R I Consent Decree.

20. This Joint P&R I Consent Decree applies to, is binding upon, and inures to the benefit of the Parties (and their successors, assigns, and designees).

21. The undersigned representatives of Plaintiffs and Defendant 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 Joint P&R I Consent Decree.

SO ORDERED on this _____ day of _____, 2022.

Hon. Trevor N. McFadden
United States District Judge

COUNSEL FOR CCSJ PLAINTIFFS:

Dated: , 2022

By: _____

EMMA C. CHEUSE, D.C. Bar No. 488201
DEENA TUMEH, D.C. Bar No. 1741543
Earthjustice
1001 G St. NW, Suite 1000
Washington, D.C. 20001
Telephone: (202) 667-4500
echeuse@earthjustice.org
dtumeh@earthjustice.org

*Counsel for CCSJ Plaintiffs (Concerned Citizens of
St. John, Louisiana Environmental Action Network,
and Sierra Club)*

COUNSEL FOR EIP PLAINTIFFS:

Dated: , 2022

By: _____

PATTON DYCUS, GA Bar No. 236636
Environmental Integrity Project
316 South 6th Ave.
Bozeman, Montana 59715
Telephone: (404) 446-6661
pdycus@environmentalintegrity.org

ERIC SCHAEFFER, D.C. Bar No. 427669
Environmental Integrity Project
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005
Telephone: (202) 263-4440
eschaeffer@environmentalintegrity.org

*Counsel for EIP Plaintiffs (Environmental Integrity
Project, Clean Air Council, Air Alliance Houston,
Chesapeake Climate Action Network, Earthworks,
Environment America, Environment Texas, Hoosier*

*Environmental Council, PennEnvironment, and
Texas Campaign for the Environment)*

COUNSEL FOR DEFENDANT:

Dated: , 2022

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division

By: _____
ELLIOT HIGGINS

KIMERE J. KIMBALL
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
Telephone: (202) 598-0240 (Higgins)
(202) 514-2285 (Kimball)
Fax: (202) 514-8865
Email: Elliot.Higgins@usdoj.gov
Kimere.Kimball@usdoj.gov

*Counsel for Defendant Michael S. Regan, in his
official capacity as Administrator, United States
Environmental Protection Agency*

Of counsel:

Hali Kerr, Mike Thrift
Office of the General Counsel
U.S. Environmental Protection Agency
Air and Radiation Law Office, Mail Code 2344-A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Amy Branning
Office of the General Counsel

U.S. Environmental Protection Agency
Air and Radiation Law Office, Mail Code 2344-A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460