

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

ENVIRONMENTAL INTEGRITY PROJECT, et al.,)	
)	
<i>Plaintiffs,</i>)	Civil Action No. 20-cv-03119-TNM (L)
v.)	
)	
MICHAEL REGAN, in his official capacity as Administrator, United States Environmental Protection Agency,)	
<i>Defendant.</i>)	

CONCERNED CITIZENS OF ST. JOHN, et al.,)	
)	
<i>Plaintiffs,</i>)	Civil Action No. 21-cv-03063-TNM
v.)	
)	
MICHAEL REGAN, in his official capacity as Administrator, United States Environmental Protection Agency,)	
<i>Defendant.</i>)	

**[PROPOSED] CONSENT DECREE REGARDING
REMAINING FLARES CLAIMS IN *EIP, ET AL. v. REGAN* MATTER**

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 the above-captioned matter (“the EIP Matter”) against the Administrator of the United States Environmental Protection Agency in his official capacity (“EPA” or “Defendant”), *see* Compl. (ECF No. 1);

WHEREAS, on December 10, 2021, EIP Plaintiffs filed a Third Amended Complaint (ECF No. 30) (the “EIP Third Am. Compl.”);

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

WHEREAS, on March 31, 2022, the Court consolidated the EIP Matter with *Concerned Citizens of St. John, et al., v. Regan*, 1:21-cv-03063 (TNM) (“the CCSJ Matter”), Min. Order (Mar. 31, 2022);

Whereas, in both the EIP Matter and the CCSJ Matter, the plaintiffs claim that EPA has failed to perform its obligations under CAA 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 the Group I Polymers and Resins (“P&R I”) source category under 40 C.F.R. Part 63, Subpart U, at least every 8 years, *see* EIP Third Am. Compl. ¶¶ 91, 94; CCSJ First Am. Compl. ¶¶ 130–31;

WHEREAS, EIP Plaintiffs, CCSJ Plaintiffs, and EPA are together entering into a separate joint consent decree that fully resolves EIP Plaintiffs’ and CCSJ Plaintiffs’ P&R I claims (“the Joint P&R I Consent Decree”);

WHEREAS, the instant consent decree concerns only EIP’s remaining claims, which relate to general control device requirements for flares (the “Flares Consent Decree”);

WHEREAS, EIP Plaintiffs allege that EPA failed to perform its obligations under CAA section 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B), to “review and, if appropriate, revise” the New

Source Performance Standards (“NSPS”), or to promulgate a determination that revision “is not appropriate in light of readily available information on the efficacy of such standard[s],” addressing the general control device requirements for flares (“NSPS General Flare Requirements”), 40 C.F.R. § 60.18(b)-(f), or, in the alternative, certain source categories that reference and incorporate the NSPS General Flare Requirements, including Volatile Organic Liquid Storage Vessels, 40 C.F.R. Part 60, Subpart Kb, at least every 8 years, *see* EIP Third Am. Compl. ¶¶ 81, 84;

WHEREAS, EIP Plaintiffs allege that EPA failed to perform its obligations under CAA 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)” NESHAP addressing the general control device requirements for flares (“NESHAP General Flare Requirements”), 40 C.F.R. § 63.11(b), or, in the alternative, certain source categories that reference and/or incorporate the NESHAP General Flare Requirements, including Epoxy Resins Production and Non-Nylon Polyamides Production, and Marine Tank Vessel Loading Operations, 40 C.F.R. part 63, Subparts W and Y, at least every 8 years, *see* EIP Third Am. Compl. ¶¶ 91, 94;

WHEREAS, the relief requested in the EIP Third Amended Complaint includes, among other things, an order from this Court to establish a date certain by which EPA must fulfill its alleged obligations under CAA sections 111(b)(1)(B) and 112(d)(6), *see* EIP Third Am. Compl. 30;

WHEREAS, EIP Plaintiffs and Defendant EPA (collectively, “the Parties”) have agreed through the combination of this Flares Consent Decree and the separate Joint P&R I Consent Decree to a settlement of all claims in the EIP Matter without admission of any issue of fact or law, except as expressly provided herein;

WHEREAS, the Parties, by entering into this Flares 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 Flares Consent Decree to be an adequate and equitable resolution of all the claims in the EIP Matter except the P&R I claims addressed by the separate Joint P&R I Consent Decree, and therefore wish to effectuate a settlement;

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

WHEREAS, the Court, by entering this Flares Consent Decree, finds that the Flares Consent Decree is fair, reasonable, in the public interest, and consistent with the CAA;

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 CAA sections 111(b)(1)(B) and 112(d)(6) claims set forth in the EIP Third Amended Complaint concerning EPA's review of the NSPS for Volatile Organic Liquid Storage Vessels, 40 C.F.R. Part 60, Subpart Kb—as well as the NESHAP for Epoxy Resins Production and Non-Nylon Polyamides Production, 40 C.F.R. part 63, Subpart W, and Marine Tank Vessel Loading Operations, 40 C.F.R. part 63, Subpart Y. The Court may order the relief contained in the Flares Consent Decree. Venue is proper in the United States District Court for the District of Columbia.

2. For the NSPS for the **Volatile Organic Liquid Storage Vessels** source category, 40 C.F.R. Part 60, Subpart Kb:

- a. No later than September 29, 2023, EPA shall either: (i) sign a determination under section 111(b)(1)(B) of the Act, 42 U.S.C. § 7411(b)(1)(B), that

“review” of Subpart Kb “is not appropriate in light of readily available information on the efficacy of [the] standard”; or (ii) review Subpart Kb under section 111(b)(1)(B) of the Act, 42 U.S.C. § 7411(b)(1)(B), and sign either: (A) a proposed rule containing revisions to Subpart Kb; or (B) a proposed determination not to revise Subpart Kb.

- b. If EPA signs a proposed rule or a proposed determination pursuant to paragraph 2.a(ii) above, then no later than September 30, 2024, EPA shall sign either: (i) a final rule containing revisions to Subpart Kb under section 111(b)(1)(B) of the Act, 42 U.S.C. § 7411(b)(1)(B); or (ii) a final determination under section 111(b)(1)(B) not to revise Subpart Kb.

3. For the NESHAP for the **Epoxy Resins Production and Non-Nylon Polyamides Production** source category, 40 C.F.R. Part 63, Subpart W:

- 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 W 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 W under section 112(d)(6) of the Act, 42 U.S.C. § 7412(d)(6).

4. For the NESHAP for the **Marine Tank Vessel Loading Operations** source category, 40 C.F.R. Part 63, Subpart Y:

- a. No later than December 19, 2025, EPA shall sign a proposed rule containing all “necessary” revisions (taking into account developments in practices, processes, and control technologies) to Subpart Y under section 112(d)(6) of the Act, 42 U.S.C. § 7412(d)(6).
- b. No later than December 18, 2026, EPA shall sign a final rule promulgating all “necessary” revisions (taking into account developments in practices, processes, and control technologies) to Subpart Y under section 112(d)(6) of the Act, 42 U.S.C. § 7412(d)(6).

5. Upon signing any of the documents described in Paragraphs 2–4, 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*.

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

7. The deadlines set forth in Paragraphs 2–4 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 EIP Plaintiffs and any reply by EPA. Any other provision of this Flares 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.

8. The Parties shall not challenge the terms of this Flares Consent Decree or this Court's jurisdiction to enter and enforce this Flares Consent Decree.

9. Except as provided herein, nothing in this Flares Consent Decree shall be construed to limit or modify any discretion accorded to EPA by the CAA or by general principles of administrative law in taking the actions that are the subject of this Flares Consent Decree, including the discretion to alter, amend, or revise any final actions promulgated pursuant to this Flares Consent Decree. EPA's obligation to perform each action specified in this Flares Consent Decree does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

10. Nothing in this Flares 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 CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Flares Consent Decree shall be construed to waive, limit, or modify any remedies, rights to seek judicial review, or defenses the Parties may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1)—including (but not limited to) any right that EIP Plaintiffs may have to seek judicial review of any determination by EPA, under CAA section 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B), that “review” of 40 C.F.R. Part 60, Subpart Kb “is not appropriate in light of readily available information on the efficacy of [the] standard.”

11. Any notices required or provided for by this Flares 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, et al.:

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

b. For Defendant EPA:

Elliot Higgins
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

12. The obligations imposed on EPA under this Flares Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Flares 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.

13. The Parties recognize that the possibility exists that a lapse in the appropriations that fund EPA could delay compliance with the timetables in this Flares Consent Decree. If a lapse in appropriations for EPA occurs within one hundred twenty (120) days before any deadline in this Flares 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 Flares Consent Decree under Paragraph 7.

14. The Parties agree that this Flares Consent Decree—together with the Joint P&R I Consent Decree—shall constitute a complete and final settlement of all claims in the EIP Third Amended Complaint.

15. In the event of a dispute between the Parties concerning the interpretation or implementation of any aspect of this Flares 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.

16. No motion or other proceeding seeking to enforce this Flares Consent Decree or for contempt of court shall be filed unless the procedure set forth in Paragraph 15 has been followed.

17. This Court shall retain jurisdiction over this matter to determine and effectuate compliance with this Flares Consent Decree, to resolve any disputes thereunder, and to consider any requests for costs of litigation (including reasonable attorney fees). After publication of notice in the *Federal Register* for the rules described in Paragraphs 2–4 and resolution of EIP Plaintiffs' claim for costs of litigation, including attorneys' fees, EPA may move to have this Flares Consent Decree terminated. EIP Plaintiffs shall have thirty (30) days in which to respond to such a motion, unless the Parties stipulate to a longer time for EIP Plaintiffs to respond.

18. The deadline for filing a motion for EIP Plaintiffs' costs of litigation (including reasonable attorneys' fees) for activities performed prior to entry of the Flares Consent Decree is hereby extended until ninety (90) days after the later of: entry of this Flares Consent Decree by the Court or entry of the separate Joint P&R I Consent Decree by the Court. During this period,

the Parties shall seek to resolve informally any claim for costs of litigation (including reasonable attorneys' fees), and if they cannot, EIP Plaintiffs will file a motion for costs of litigation (including reasonable attorneys' fees) or a stipulation or motion to extend the deadline to file such a motion. EPA reserves the right to oppose any such request.

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

20. The Parties treat this Flares 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 Flares Consent Decree.

21. The Parties agree and acknowledge that before this Flares Consent Decree can be finalized and entered by the Court, EPA must provide notice of this Flares Consent Decree in the *Federal Register* and an opportunity for public comment pursuant to CAA section 113(g), 42 U.S.C. § 7413(g). After this Flares 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 Flares Consent Decree, in accordance with CAA 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 Flares Consent Decree.

22. This Flares Consent Decree applies to, is binding upon, and inures to the benefit of the Parties (and their successors, assigns, and designees).

23. The undersigned representatives of EIP 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 Flares Consent Decree.

SO ORDERED on this _____ day of _____, 2022.

Hon. Trevor N. McFadden
United States District Judge

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