

PROPOSED CONSENT DECREE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

SIERRA CLUB, <i>et al.</i> ,)	
)	No. 3:24-cv-00130
Plaintiffs,)	
)	[PROPOSED] CONSENT DECREE
v.)	
)	
ADAM ORTIZ, REGIONAL)	
ADMINISTRATOR OF THE)	
ENVIRONMENTAL PROTECTION)	
AGENCY, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

WHEREAS this Consent Decree resolves all claims asserted by Plaintiffs Sierra Club, West Virginia Highlands Conservancy, and West Virginia Rivers Coalition (collectively “Plaintiffs”) against Defendants Adam Ortiz, Regional Administrator of the United States Environmental Protection Agency (“EPA”) Region 3, Michael Regan, Administrator of the EPA, and the EPA (collectively “EPA”) in Plaintiffs’ Complaint;

WHEREAS, for purposes of this Consent Decree, the term “total maximum daily load” or “TMDL” has the meaning provided at 40 C.F.R. § 130.2(i) as of the date of entry of this Decree;

WHEREAS, ionic toxicity results from the presence of excessive amounts of dissolved solids (e.g., mineral salts) in a waterbody. Measurements of electrical conductivity, salinity and total dissolved solids (TDS) are often used to characterize the level of ions present within water;

WHEREAS, for purposes of this Consent Decree, the term “Ionic Toxicity TMDLs” means TMDLs for a biological impairment caused by ionic toxicity for waterbody segments that

PROPOSED CONSENT DECREE

have been identified on West Virginia's 303(d) List (pursuant to Clean Water Act ("CWA") section 303(d), 33 U.S.C. § 1313(d)) as biologically impaired and for which ionic toxicity has been identified by the West Virginia Department of Environmental Protection ("WVDEP") or EPA as a cause of the impairment;

WHEREAS, Plaintiffs allege that: (1) WVDEP's failure to adhere to certain agreed deadlines for Ionic Toxicity TMDLs for certain waters in the Lower Guyandotte River Watershed in a June 13, 2017 Memorandum of Agreement between EPA and WVDEP; (2) WVDEP's failure to submit to EPA Ionic Toxicity TMDLs for certain waters in the Lower Guyandotte River Watershed when WVDEP submitted to EPA other TMDLs for other pollutants causing water quality impairments in that watershed; and (3) WVDEP's failure to submit to EPA pursuant to 33 U.S.C. § 1313(d)(2) any Ionic Toxicity TMDLs for the Lower Guyandotte River Watershed give rise to a non-discretionary duty for EPA to establish Ionic Toxicity TMDLs for certain waters in the Lower Guyandotte River Watershed;

WHEREAS, Plaintiffs and EPA (collectively the "Parties") intend to resolve Plaintiffs' claims and this lawsuit without any further adjudication and without any admission of any issue of fact or law;

WHEREAS, the Parties agree that this Consent Decree is a complete and final settlement of Plaintiffs' claims set forth in the Complaint;

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

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

NOW THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

PROPOSED CONSENT DECREE

1) Subject to the last sentence of this paragraph, EPA shall release draft Ionic Toxicity TMDLs for public review and comment by October 31, 2024, and shall establish Ionic Toxicity TMDLs by January 15, 2025, for the following waters in the Lower Guyandotte River Watershed:

<u>Sub-watershed</u>	<u>Stream Name</u>	<u>WV Code</u>	<u>NHD Code¹</u>	<u>Impaired Segment AUID(s)²</u>
Upper Mud River	Upper Mud River	WVOGM	WV-OGL-10	WV-OGL-10_02 WV-OGL-10_03
Upper Mud River	Sugartree Branch	WVOGM-47	WV-OGL-10-DW	WV-OGL-10-DW_01
Upper Mud River	Stanley Fork	WVOGM-48	WV-OGL-10-DX	WV-OGL-10-DX_01
Upper Mud River	Ballard Fork	WVOGM-49	WV-OGL-10-EA	WV-OGL-10-EA_01
Big Ugly Creek	Big Ugly Creek	WVOG-38	WV-OGL-89	WV-OGL-89_02
Limestone Branch	Limestone Branch	WVOG-48	WV-OGL-111	WV-OGL-111_01
Big Creek	Ed Stone Branch	WVOG-49-A	WV-OGL-112-D	WV-OGL-112-D_01
Crawley Creek	Crawley Creek	WVOG-51	WV-OGL-117	WV-OGL-117_01 WV-OGL-117_02
Crawley Creek	South Fork Crawley Creek	WVOG-51-G.5	WV-OGL-117-M	WV-OGL-117-M_01
Rocky Branch	Rocky Branch	WVOG-55	WV-OGL-130	WV-OGL-130_01
Merrick Creek	Merrick Creek	WVOGM-1	WV-OGL-10-A	WV-OGL-10-A_01

If on or before January 15, 2025, EPA approves pursuant to 33 U.S.C. 1313(d)(2) a state-submitted Ionic Toxicity TMDL for a water segment identified in the table above, EPA shall not be required under this paragraph to establish a final Ionic Toxicity TMDL for that water, and if that EPA approval occurs before October 31, 2024, EPA shall not be required to release a draft Ionic Toxicity TMDL for that water for public notice and comment.

2) Circumstances may arise that warrant modifying this Consent Decree, including the January 15, 2025, and October 31, 2024, deadlines in paragraph 1 above. The deadlines may be extended by written agreement of Plaintiffs and EPA, with notice provided to the Court. If the

¹ National Hydrology Dataset Code.

² Impaired Segment Assessment Unit Identification.

PROPOSED CONSENT DECREE

Parties are not able to agree to an extension of the deadlines in paragraph 1 of this Consent Decree, or if any Party concludes that some other modification to the Consent Decree is appropriate, then that Party (after conferring with the other Parties) may file a motion to modify the Consent Decree in accordance with standards in Federal Rule of Civil Procedure 60(b). The non-moving Parties reserve their right to contest any such motion.

3) Before Plaintiffs or EPA may file a motion to enforce any requirement of this Consent Decree, they shall provide the other Parties with no less than 30 days advance written notice of the basis for any alleged non-compliance and an opportunity to meet to discuss this matter.

4) Except as explicitly provided for in this Consent Decree, nothing in this Consent Decree shall be construed to curtail the discretion afforded EPA under the Clean Water Act or the Administrative Procedure Act, including but not limited to, the discretion to alter, amend, or revise any final actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to otherwise confer upon this Court jurisdiction to review any action, either procedural or substantive, taken by EPA pursuant to this Consent Decree, including the Ionic Toxicity TMDLs established by EPA pursuant to paragraph 1, except for the limited purpose of determining EPA's compliance with any requirement of this Consent Decree. Plaintiffs' sole remedy should they dispute any Ionic Toxicity TMDL that EPA establishes pursuant to this Consent Decree (or any alterations, amendments, or revisions thereto) is to challenge EPA's action establishing that TMDL (or altering, amending, or revising it) in a new lawsuit or lawsuits and thus Plaintiffs expressly reserve their rights to file such lawsuit or lawsuits. EPA reserves all its defenses to any such lawsuit or lawsuits.

PROPOSED CONSENT DECREE

5) Plaintiffs reserve the right to seek an award of reasonable attorneys' fees and costs under the CWA fee-shifting provision (33 U.S.C. § 1365(d)), and EPA reserves the right to contest any such fees and costs claimed by Plaintiffs. If such a claim for fees and costs cannot be resolved through a separate settlement, Plaintiffs may file a petition with the Court for the award of such fees and costs no later than 165 days after the effective date of this Consent Decree. Plaintiffs may file such a petition before such time if the Parties agree that a fee settlement cannot be reached.

6) No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that the United States or EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

7) This Consent Decree is the product of good faith, arm's length negotiations by the Plaintiffs and EPA. Each of the Parties contributed to its drafting. In any dispute over the meaning of any provision of this Consent Decree, Plaintiffs and EPA shall be treated as having contributed equally to the drafting of that provision.

8) This Consent Decree represents the full, final, and permanent resolution of any and all claims, whether known or unknown and based on past, present, or future facts, that have been, could have been, could now be, or could in the future be asserted by Plaintiffs under any federal, state, or local law or regulation against the United States (including EPA) based on assertions that Ionic Toxicity TMDLs are required for waterbody segments in the Lower Guyandotte River Watershed in West Virginia, and Plaintiffs covenant in perpetuity not to file any and all such claims against the United States (including EPA) or serve a Notice of Intent (33 U.S.C. 1365(b)(2)) regarding the same, except that the aforementioned resolution of any and all such claims and corresponding covenant shall extend only to January 15, 2039, for the following

PROPOSED CONSENT DECREE

waterbody segments in the Lower Guyandotte River Watershed: (a) Vickers Branch (WV Code WVOG-49-C; AUID WV-OGL-112-F_01); (b) portions of the Lower Guyandotte River identified in the parenthetical (WV Code WVOG-lo; AUID WV-OGL_09, WV-OGL_10, WV-OGL_11, WV-OGL_12, WV-OGL_13); (c) Rockhouse Fork (WV Code WVOG-44-D; AUID WV-OGL-99-H_01); (d) Perrys Branch (WV Code WVOG-49-E-1; AUID WV-OGL-112-H-1_01); (e) Godby Branch (WV Code WVOG-53; AUID WV-OGL-125_01); (f) Fowler Branch (WV Code WVOG-51.5; AUID WV-OGL-121_01); and (g) any waterbody segment in the Lower Guyandotte River Watershed added for the first time as biologically impaired by WVDEP or EPA to a West Virginia list of impaired waters pursuant to section 303(d) of the Clean Water Act (33 U.S.C. § 1313(d)) subsequent to June 1, 2023.

9) Plaintiffs covenant not to serve a Notice of Intent (33 U.S.C. § 1365(b)(2)) or to file a complaint or claim under any federal, state, or local law or regulation, against the United States including EPA that seeks to compel the establishment, or challenges the absence, of Ionic Toxicity TMDLs in any waterbody segment in any watershed in West Virginia other than in the Lower Guyandotte River Watershed, until after January 15, 2025.

10) Plaintiffs and EPA agree that this Consent Decree is fair, reasonable, and in the public interest. This Consent Decree is a fair and equitable compromise of disputed claims. This Consent Decree is not and shall not constitute or be construed as an admission by EPA of any factual or legal allegations made by Plaintiffs, an admission of liability, or an admission of any other kind or character whatsoever by EPA. Neither this Consent Decree nor EPA's performance under this Consent Decree is intended to have, and shall not be deemed to have, any evidentiary or precedential effect in any other judicial or administrative action involving claims asserted against EPA.

PROPOSED CONSENT DECREE

11) This Consent Decree shall be governed by and construed under federal law.

12) The individuals signing this Consent Decree on behalf of Plaintiffs and EPA hereby certify that they are authorized to bind their respective party to this Consent Decree. This Consent Decree may be executed by multiple signature pages.

13) This Consent Decree shall be 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 Consent Decree are null and void.

14) EPA's obligations under this Consent Decree terminate when EPA has established the Ionic Toxicity TMDLs required by paragraph 1 above and provided notification of that event to Plaintiffs.

15) All deliverables, modifications, notices, notifications, and requests specified in this Consent Decree must be in writing (including email) unless otherwise specified. Whenever, under this Decree, notice is required to be given, or a document is required to be sent, by one Party to another, it must be directed to the person(s) specified below at the address(es) or email address(es) specified below. Any Party may change the applicable person(s) and/or address(es) by providing notice of such change to all Parties in writing by mail or via email. All notices under this Decree are effective upon receipt, unless otherwise specified.

As to EPA:

David J. Kaplan
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044
david.kaplan@usdoj.gov

Alec Mullee
Water Law Office
Environmental Protection Agency

PROPOSED CONSENT DECREE

WJC Building North, Room 1448K
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
mullee.alec@epa.gov

Stefania D. Shamet
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 3
Four Penn Center
1600 John F. Kennedy Blvd. MC 3RC60
Philadelphia, Pennsylvania 19103-2852
shamet.stefania@epa.gov

As to Plaintiffs:

Derek Teaney
Appalachian Mountain Advocates
PO Box 507
Lewisburg, WV 24901
dteaney@appalmad.org

16) This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in this Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree.

17) This Consent Decree shall be binding upon the successors and assigns of the Parties.

18) This Court shall retain jurisdiction over this case until termination of this Consent Decree solely for the purpose of resolving disputes arising under this Decree, entering orders modifying this Decree, or enforcing compliance with the terms of this Consent Decree.

19) Upon entry of this Consent Decree by the Court, this Decree shall constitute a final judgment between and among the Parties. The Court finds that there is no just reason for

PROPOSED CONSENT DECREE

delay and, therefore, enters this judgment as a final judgment under Federal Rule of Civil Procedure 54 and 58.

IT IS SO ORDERED, this _____ day of _____ 2023.

United States District Judge

DRAFT

PROPOSED CONSENT DECREE

Signature Page for Consent Decree

FOR DEFENDANTS:

Todd Kim
Assistant Attorney General
Environment & Natural Resources Division

/s/ _____
David J. Kaplan
Attorneys for Federal Defendants
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
(202) 514-0997
David.kaplan@usdoj.gov

Dated:

FOR PLAINTIFFS:

/s/ _____
Derek O. Teaney
Elizabeth A. Bower
Appalachian Mountain Advocates, Inc.
P.O. Box 507
Lewisburg, WV 24901
(304) 646-1182
dteaney@appalmad.org

Dated: