

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

Our Children’s Earth Foundation,

Plaintiff,

v.

Michael Regan, in his official capacity as
Administrator, U.S. Environmental Protection
Agency,

Defendant.

Case No. 1:23-cv-2848

[PROPOSED] CONSENT DECREE

WHEREAS, on September 26, 2023, Plaintiff Our Children’s Earth Foundation filed the above-captioned matter against Defendant Michael Regan, in his official capacity as Administrator of the United States Environmental Protection Agency (“EPA,” and with Plaintiff, the “Parties”), ECF No. 1 (“Compl.”);

WHEREAS, Plaintiff alleges that EPA has failed to perform certain non-discretionary duties under the Clean Air Act (“CAA”), 42 U.S.C. § 7410(k), and that such alleged failure is actionable under section 304(a)(2) of the CAA, *id.* § 7604(a)(2), Compl. ¶¶ 33-40, and seeks declaratory and injunctive relief as well as attorneys’ fees and other costs of litigation pursuant to CAA section 304(a), 42 U.S.C. § 7604(d), Compl. at 9-10.

WHEREAS, CAA section 110(k), 42 U.S.C. § 7410(k), sets forth the process by which EPA reviews state implementation plan (“SIP”) submissions, which includes SIP revisions;

WHEREAS, pursuant to CAA section 110(k)(2)-(4), 42 U.S.C. § 7410(k)(2)-(4), EPA is required to approve, disapprove, or conditionally approve, in whole or in part, each SIP submission, within 12 months of a determination of completeness by EPA or a submission being deemed complete by operation of law;

WHEREAS, EPA must determine whether a SIP submission is complete within six months after EPA receives the submission. 42 U.S.C. § 7410(k)(1)(B). If EPA does not determine whether the submission is complete within six months, then the submission is deemed complete by operation of law. *Id.*

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *Birmingham 2006 24-hour PM2.5 Area Limited Maintenance Plan* (SPeCS Review Page ID No. 235034), an Alabama SIP submission sent to EPA on or about February 17, 2021, Compl. Ex. 1;

WHEREAS, on February 2, 2024, the *Federal Register* published EPA's final action approving that Alabama February 17, 2021 SIP submission. Air Plan Approval; Alabama; Birmingham Limited Maintenance Plan for the 2006 24-Hour PM2.5 NAAQS, 89 Fed. Reg. 7289 (Feb. 2, 2024). Plaintiff's claim regarding *Birmingham 2006 24-hour PM2.5 Area Limited Maintenance Plan* (SPeCS Review Page ID No. 235034) in Claim 1 is therefore moot;

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *Florida Regional Haze Plan for the Second Implementation Period* (SPeCS Review Page ID No. 245298), a Florida SIP submission sent to EPA on or about October 8, 2021, and *Regional Haze Requirements 'TX_2021 Regional Haze SIP_07202021* (SPeCS Review Page ID No. 241412), a Texas SIP submission sent to EPA on or about July 20, 2021, Compl. Ex. 1;

WHEREAS, different plaintiffs filed suit in *Sierra Club v. EPA*, Case No. 1:23-cv-01744 (D.D.C.) seeking deadlines by which EPA must take final action to approve, conditionally approve, or disapprove, in whole or in part, *Florida Regional Haze Plan for the Second Implementation Period* (SPeCS Review Page ID No. 245298) and *Regional Haze Requirements 'TX_2021 Regional Haze SIP_07202021* (SPeCS Review Page ID No. 241412), Plaintiff no longer seeks relief as to those submissions;

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *PM2.5 Part H SIP Revisions for Moderate SIPs* (SPeCS Review Page ID No. 9330), a Utah SIP submission sent to EPA on or about January 19, 2017, Compl. Ex. 1;

WHEREAS, Plaintiff filed suit in *Our Children's Earth Foundation v. EPA*, Case No. 3:23-cv-04955 (N.D. Cal.) seeking a deadline by which EPA must take final action to approve, conditionally approve, or disapprove, in whole or in part, *PM2.5 Part H SIP Revisions for Moderate SIPs* (SPeCS Review Page ID No. 9330), Plaintiff no longer seeks relief as to that submission;

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *Startup Shutdown and Malfunction (SSM) SIP Call Response* (SPeCS Review Page ID No. 6458), a Georgia SIP submission sent to EPA on or about November 17, 2016, Compl. Ex. 1;

WHEREAS, based on Georgia's withdrawal of *Startup Shutdown and Malfunction (SSM) SIP Call Response* (SPeCS Review Page ID No. 6458), Plaintiff no longer seeks relief as to that submission;

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *Dallas-Fort Worth 2008 O3 Serious Area RFP and Contingency Measures* (SPeCS Review Page ID No. 211973), a Texas SIP submission sent to EPA on or about May 13, 2020, Compl. Ex. 1;

WHEREAS, on April 24, 2023, the *Federal Register* published EPA's final action approving the Dallas-Fort Worth 2008 ozone serious area reasonable further progress plan, and on October 3, 2023, the *Federal Register* published EPA's final action disapproving the Dallas-Fort Worth 2008 ozone serious area contingency measures. Air Plan Approval; Texas; Reasonable Further Progress Plan for the Dallas-Fort Worth Ozone Nonattainment Area, 88 Fed. Reg. 24693 (Apr. 24, 2023); Air Plan Disapproval; Texas; Contingency Measures for the Dallas-Fort Worth and Houston-Galveston-Brazoria Ozone Nonattainment Area, 88 Fed. Reg. 67957 (Oct. 3, 2023). Plaintiff's claim regarding *Dallas-Fort Worth 2008 O3 Serious Area RFP and Contingency Measures* (SPeCS Review Page ID No. 211973) in Claim 1 is therefore moot;

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *Houston 2008 O3 Serious Area Attainment Demonstration* (SPeCS Review Page ID No. 238356), a Texas SIP submission sent to EPA on or about May 13, 2020. Compl. Ex. 1;

WHEREAS, on October 3, 2023, the *Federal Register* published EPA's final action disapproving that May 13, 2020, Texas SIP submission. Air Plan Disapproval; Texas; Contingency Measures for the Dallas-Fort Worth and Houston-Galveston-Brazoria Ozone Nonattainment Area, 88 Fed. Reg. 67957 (Oct. 3, 2023). Plaintiff's claim regarding *Houston 2008 O3 Serious Area Attainment Demonstration* (SPeCS Review Page ID No. 238356) in Claim 1 is therefore moot;

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *TX 30 TAC 101.222 SSM revisions (RPN 2016-040-101-CE) submitted 11/18/2016* (SPeCS Review Page ID No. 7154), a Texas SIP submission sent to EPA on or about November 21, 2016, Compl. Ex. 1;

WHEREAS, based on Texas's withdrawal of the *TX 30 TAC 101.222 SSM revisions (RPN 2016-040-101-CE) submitted 11/18/2016* (SPeCS Review Page ID No. 7154), Plaintiff no longer seeks relief as to that submission;

WHEREAS, in Claim 1, Plaintiff alleges that EPA has failed to perform a duty mandated by CAA sections 110(k)(2)-(4), 42 U.S.C. §§ 7410(k)(2)-(4), to take final action to approve or disapprove, in whole or in part, *Other - SIP 'TX_Agreed Orders and FCAA Section 110(l) SIP Revision_08202020* (SPeCS Review Page ID No. 219067), a Texas SIP submission sent to EPA on or about August 20, 2020, Compl. Ex. 1;

WHEREAS, different plaintiffs filed suit in *Environmental Integrity Project v. EPA*, Case No. 22-cv-3063 (D.D.C.) seeking a deadline by which EPA must take final action to approve,

conditionally approve, or disapprove in whole or in part that Texas August 20, 2020 SIP submission, Plaintiff no longer seeks relief as to that submission;

WHEREAS, the relief requested in the Complaint includes, among other things, an order from this Court to establish a date by which EPA must fulfill its alleged obligations and litigation costs, including attorneys' fees, Compl. at 9-10;

WHEREAS, the Parties have agreed to a settlement of this action without admission of any issue of fact or law, except as expressly provided herein;

WHEREAS, the Parties by entering into this Consent Decree (the "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 Consent Decree to be an adequate and equitable resolution of all claims in this matter, except for Plaintiff's claim for attorneys' fees and costs, and therefore wish to effectuate a settlement;

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

WHEREAS, the Parties agree that this Court has jurisdiction over the matters resolved in this Consent Decree pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2), and that venue is proper in the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. § 1391(e); 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 CAA;

NOW THEREFORE, without determination of any issue of fact or law, and upon the Parties' consent, it is ORDERED, ADJUDGED, and DECREED that:

1. The Parties to this Consent Decree are Plaintiff and EPA (each, a "Party").
2. The appropriate EPA official or officials shall:
 - a. sign a final rule for publication in the *Federal Register* to approve, conditionally approve, disapprove, in whole or in part, the Exhibit 1 SIP submissions and revisions from South Carolina listed below by June 30, 2025;

SIP submission	SPeCS Review Page ID No.	State submission date
2015 General Assembly - Minor NSR and NOx Controls	5580	July 25, 2016
2014 End of Year Revisions	7106	January 20, 2016
2011 End of Year Revisions	7092	June 17, 2013
Misc. Revisions: Definitions & Gen. Requirements, Ambient Air Quality Stds., etc. Minor Source SIP	5578	July 18, 2011
Minor Source Permit Requirements/NOx Controls	5574	October 1, 2007

- b. sign a final rule for publication in the *Federal Register* to approve, conditionally approve, disapprove, in whole or in part, the following Exhibit 1 SIP submissions and revisions from Louisiana and Texas by September 30, 2025;

SIP submission	SPeCS Review Page ID No.	State submission date
LA 2010 SO2 NAAQS transport prongs 1 and 2	14431	June 7, 2013
Dallas-Fort Worth 2008 Ozone Serious Area Attainment Demonstration	211953	May 13, 2020
Houston 2008 Ozone Serious Area Attainment Demonstration	211934	May 13, 2020

TX Dallas-Fort Worth 2008 O3 Serious Area RACT Analysis (in Attainment Demonstration)	214061	May 13, 2020
TX Houston 2008 O3 Serious Area RACT Analysis (in Attainment Demonstration)	514058	May 13, 2020
Dallas-Fort Worth 2008 Ozone Serious Area RACT NOx Rules	211859	May 12, 2020
Dallas-Fort Worth 2008 Ozone Serious Area RACT VOC Rules	211883	May 12, 2020
TX 30 TAC 101.118a2 and 101.118b from the Houston 1-hour ozone section 185 fee alternative program	212195	November 30, 2018
TX Transport prongs 1 and 2 portion of the 2010 SO2 Infrastructure & Transport SIP (Sub 5/6/13, Project No. 2012-022-SIP-NR)	14654	May 9, 2013
Revisions to Texas Chapter 116 - Project Emissions Accounting	241156	July 9, 2021

- c. sign a final rule for publication in the *Federal Register* to approve, conditionally approve, disapprove, in whole or in part, *TX 5-Year Regional Haze Progress Report SIP Revision, Texas Project 2013-013-SIP-NR, submitted March 20, 2014* (SPeCS Review Page ID No. 7402), a Texas SIP revision submitted on or around March 24, 2014, no later than December 15, 2026;
3. If any State withdraws a SIP submission or revision addressing any or all of the items listed above in Paragraph 2, then EPA's obligation to take the action required by Paragraph 2 with respect to those items is automatically terminated. Nothing in this Consent Decree shall be construed as an admission of any issue of fact or law nor to waive or limit any claim, remedy, or defense, on any grounds, related to EPA's obligation in the event that any State withdraws a SIP submission or revision addressing any or all of the elements listed above in Paragraph 2.

4. EPA shall, within 15 business days of signature of each action set forth in Paragraph 2, send the package for the action to the Office of the Federal Register for review and publication in the *Federal Register*.
5. After EPA has completed the actions set forth in Paragraph 2 of this Consent Decree, after the notices of each final action required by Paragraph 2 have been published in the *Federal Register*, and the issue of costs of litigation, including reasonable attorneys' fees, has been resolved, EPA may move to have this Consent Decree terminated and the above-captioned matter shall be dismissed with prejudice. Plaintiff shall have 14 days to respond to such motion unless the Parties stipulate to a longer time for Plaintiff to respond.
6. The deadlines established by this Consent Decree, including the timeframes set forth in Paragraph 2, may be extended by (A) written stipulation of the Parties with notice to the Court, or (B) the Court upon motion by EPA for good cause shown under the Federal Rules of Civil Procedure and upon consideration of any response by Plaintiff and any reply by EPA. Any other provision of this Consent Decree may be modified by the Court following motion by a Party for good cause shown under the Federal Rules of Civil Procedure and upon consideration of any response by the non-moving Party and any reply.
7. The Parties agree that for *Dallas-Fort Worth 2008 Ozone Serious Area Attainment Demonstration* (SPeCS Review Page ID No. 211953) and *Houston 2008 Ozone Serious Area Attainment Demonstration* (SPeCS Review Page ID No. 211934), Texas SIP submissions sent to EPA on May 13, 2020, any delay in Texas submitting a Severe Area

Attainment Demonstration SIP will not constitute sufficient good cause under Paragraph 6 for extending the period set forth in Paragraph 2 for these two SIP submissions.

8. The Parties recognize that the possibility exists that a lapse in the appropriations that fund EPA, such as a government shutdown, could delay compliance with the timetables in this Consent Decree. If a lapse in appropriations for EPA occurs within 120 days before any deadline in this decree, including but not limited to the periods set forth in Paragraph 2, 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 Consent Decree pursuant to Paragraph 6.
9. The Parties agree that this Consent Decree shall constitute a complete and final settlement of all claims that Plaintiff has asserted in this case, except those attorney fee and cost claims described in Paragraph 12.
10. If the Parties dispute the interpretation or implementation of any aspect of this 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 resolve the dispute within 10 business days after receipt of the notice (or a longer period as stipulated by the Parties), either Party may move the Court to resolve the dispute.
11. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of Court shall be filed unless the Party seeking to enforce this decree has followed the procedure set forth in Paragraph 10.

12. The deadline for filing a motion for Plaintiff's costs of litigation (including reasonable attorneys' fees) for activities performed before entry of this Consent Decree is hereby extended until 90 days after this Decree is entered 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, Plaintiff 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.
13. The Court shall retain jurisdiction over this matter to enforce the terms of this Consent Decree, to resolve any dispute under it, and to consider any requests for costs of litigation, including attorneys' fees.
14. Nothing in this Consent Decree shall be construed to (A) confer upon this Court jurisdiction to review any final decision made by EPA under this decree or to review any issues that are within the exclusive jurisdiction of the U.S. Court of Appeals under 42 U.S.C. § 7607(b)(1), or (B) waive any claims, remedies, or defenses the Parties may have under 42 U.S.C. § 7607(b)(1).
15. Nothing in this Consent Decree shall be construed to limit or modify any discretion given to EPA by the CAA or by general principles of administrative law in taking the actions that are the subject of this Consent Decree, including discretion to alter, amend, or revise actions contemplated by this Consent Decree. EPA's obligation to perform the actions specified in Paragraphs 2, 4, and 7 does not constitute a limitation or modification of EPA's discretion within the meaning of this Paragraph.

16. Nothing in this Consent Decree shall be construed as an admission of any issue of fact or law nor as a waiver or limitation regarding any claim or defense, on any grounds, related to any EPA action addressed in this Decree or any aspect of the complaint.
17. It is expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiff and EPA. The Parties thus agree that any and all rules of construction that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning this Decree's terms, meaning, or interpretation.
18. The Parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice of this Decree in the Federal Register and an opportunity for public comment pursuant to section 113(g) of the CAA, 42 U.S.C. § 7413(g). After this Consent Decree has undergone notice and comment, the Administrator and the Attorney General, as appropriate, shall promptly consider any written comments in determining whether to withdraw or withhold their consent to this 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 Consent Decree.
19. Any notice required or provided for by this Consent Decree shall be made in writing and sent to the following (or to any new address of counsel as filed and listed in the docket of this matter, at a future date):

For Plaintiff:

Stuart Wilcox
Environmental Advocates
5135 Anza Street
San Francisco, CA 94121

For Defendant:

Jin Hyung Lee
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section

(720) 331-0385
wilcox@enviroadvocates.com

Christopher Sproul
Environmental Advocates
5135 Anza Street
San Francisco, CA 94121
(415) 533-3376
csproul@enviroadvocates.com

P.O. Box 7611
Washington, DC 20044
(202) 514-2640
jin.hyung.lee@usdoj.gov

20. The Parties recognize and acknowledge that the obligations imposed on EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.
21. If for any reason the Court declines to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Party and the proposed Decree's terms may not be used as evidence in any litigation between the Parties.
22. This 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 the Parties 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 Consent Decree.

SO ORDERED on this ____ day of _____, 2024.

Christopher R. Cooper
United States District Judge

COUNSEL FOR PLAINTIFF:

Stuart Wilcox
Environmental Advocates
5135 Anza Street
San Francisco, CA 94121
(720) 331-0385
wilcox@enviroadvocates.com

COUNSEL FOR DEFENDANT:

Todd Kim
Assistant Attorney General

Jin Hyung Lee
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
Tel: (202) 514-2640
jin.hyung.lee@usdoj.gov