

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

ENVIRONMENTAL INTEGRITY PROJECT,
NATURAL RESOURCES DEFENSE COUNCIL,
EARTHWORKS,
CENTER FOR HEALTH, ENVIRONMENT
AND JUSTICE,
WEST VIRGINIA CITIZEN ACTION GROUP
D/B/A WEST VIRGINIA SURFACE OWNERS'
RIGHTS ORGANIZATION,
RESPONSIBLE DRILLING ALLIANCE, and
SAN JUAN CITIZENS ALLIANCE,

Plaintiffs,

V.

GINA McCARTHY, in her official capacity as
Administrator, United States Environmental
Protection Agency,

Defendant.

Civil Action No. 1:16-cv-00842-JDB

JOINT MOTION TO ENTER CONSENT DECREE

Plaintiffs Environmental Integrity Project, Natural Resources Defense Council, Earthworks, Center for Health, Environment and Justice, West Virginia Citizen Action Group d/b/a West Virginia Surface Owners' Rights Organization, Responsible Drilling Alliance, and San Juan Citizens Alliance (Plaintiffs) and Defendant Gina McCarthy, in her official capacity as Administrator, United States Environmental Protection Agency (EPA) (together the Parties), respectfully submit this Motion for the Court to enter the attached proposed Consent Decree. In support of this Motion, the Parties state the following:

1. On May 4, 2016, Plaintiffs filed the Complaint for declaratory and injunctive relief alleging that EPA had failed to comply with alleged mandatory duties under the Resource

Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6912(b), 6942(b), to review its Subtitle D criteria regulations, 40 C.F.R. Part 257, and its state plan guidelines, 40 C.F.R. Part 256, and, where necessary or appropriate, revise those regulations and state plan guidelines. *See* Compl. ¶¶ 2–6 [ECF No. 1].

2. On November 18, 2016, the Court denied three motions to intervene in this suit filed by oil and gas industry associations and by the State of North Dakota. In an accompanying Memorandum Opinion, the Court accepted Plaintiffs’ representations that the scope of their Complaint was limited to seeking “an order requiring the EPA to initiate a rulemaking and to issue whatever regulations that it, in its discretion, deems necessary.” Mem. Opinion at 8–9 [ECF No. 30] (Nov. 18, 2016) (citing *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324–25 (D.C. Cir. 2013), *In re Idaho Conservation League*, 811 F.3d 502, 514 (D.C. Cir. 2016)). The Court also ordered the parties to submit a proposed briefing schedule for the filing of dispositive motions by not later than January 4, 2017. *See* Order [ECF No. 29] (Nov. 18, 2016).

3. The Parties have negotiated a proposed Consent Decree resolving the substantive claims in this suit. A copy of this proposed Consent Decree is attached to this Motion as Exhibit A.

4. The proposed Consent Decree establishes an agreed upon schedule for EPA to comply with RCRA Sections 6912(b) and 6942(b), 42 U.S.C. §§ 6912(b), 6942(b), with respect to EPA’s Subtitle D criteria regulations and the state plan guidelines. *See* Proposed Consent Decree, Ex. A. Specifically, the Consent Decree requires EPA, by a date certain, to either determine that revision of the Subtitle D criteria regulations is not necessary or to issue a notice of proposed rulemaking to revise those regulations. *Id.* ¶ 5. Likewise, the Consent Decree requires EPA, by a date certain, to either determine that revision of the state plan guidelines is

not appropriate or to issue a notice of proposed rulemaking to revise the state plan guidelines. *Id.* ¶ 7. If EPA issues a notice of proposed rulemaking for revised Subtitle D criteria regulations, then the Consent Decree requires EPA to take final action on the notice of proposed rulemaking by a date certain. *Id.* ¶ 6. Likewise, if EPA issues a notice of proposed rulemaking for revised state plan guidelines, then the Consent Decree requires EPA to take final action on the notice of proposed rulemaking by a date certain. *Id.* ¶ 8. In sum, the Consent Decree prescribes a schedule for EPA to act while preserving the discretion accorded EPA by RCRA and by general principles of administrative law in taking the actions that are the subject of the Consent Decree.

5. In this Consent Decree, Plaintiffs and EPA state their agreement that the Consent Decree is fair, reasonable, and in the public interest. *See In re Idaho Conservation League*, 811 F.3d at 515–16 (discussing court’s limited role in evaluating the reasonableness of a proposed consent order). The Consent Decree draws a reasonable balance between requiring EPA to complete the process established in RCRA, 42 U.S.C. §§ 6912(b), 6942(b) on a specific timetable, while taking into account the specific and unique facts of this case and affording EPA sufficient time to act. The Court should therefore enter the attached Consent Decree.

WHEREFORE, the Parties respectfully jointly move the Court to enter the attached Consent Decree.

Dated: December 23, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2016, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Justin D. Heminger

EXHIBIT A

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

ENVIRONMENTAL INTEGRITY PROJECT,
NATURAL RESOURCES DEFENSE COUNCIL,
EARTHWORKS,
CENTER FOR HEALTH, ENVIRONMENT
AND JUSTICE,
WEST VIRGINIA CITIZEN ACTION GROUP
D/B/A WEST VIRGINIA SURFACE OWNERS'
RIGHTS ORGANIZATION,
RESPONSIBLE DRILLING ALLIANCE, and
SAN JUAN CITIZENS ALLIANCE,

Plaintiffs,

v.

GINA McCARTHY, in her official capacity as
Administrator, United States Environmental
Protection Agency,

Defendant.

Civil Action No. 1:16-cv-00842-JDB

CONSENT DECREE

WHEREAS, on May 4, 2016, Plaintiffs Environmental Integrity Project, Natural Resources Defense Council, Earthworks, Center for Health, Environment & Justice, West Virginia Citizen Action Group d/b/a West Virginia Surface Owners' Rights Organization, Responsible Drilling Alliance, and San Juan Citizens Alliance (collectively Plaintiffs) filed the above-captioned matter against Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (hereafter EPA);

WHEREAS, Plaintiffs allege that the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6912(b), places a duty on EPA that "[e]ach regulation promulgated under this

chapter shall be reviewed and, where necessary, revised not less frequently than every three years,” Pls.’ Compl., ECF No. 1, ¶¶ 5, 37, 96;

WHEREAS, Plaintiffs allege that EPA failed to comply with this alleged mandatory duty, *id.* at ¶¶ 5, 97-98;

WHEREAS, the relief that Plaintiffs seek for this alleged violation includes a Court order requiring EPA to review the Subtitle D criteria regulations, 40 C.F.R. Part 257, for wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy (oil and gas wastes) and, if EPA determines revision to be “necessary,” to conduct a rulemaking for revisions of the regulations on a “date certain” schedule, Pls.’ Compl., ECF No. 1, at 24;

WHEREAS, Plaintiffs allege that RCRA, 42 U.S.C. § 6942(b), places a duty on EPA to “promulgate regulations containing guidelines to assist in the development and implementation of State solid waste management plans” and allege that RCRA, 42 U.S.C. § 6942(b), places a duty on EPA that these state plan guidelines “shall be reviewed from time to time, but not less frequently than every three years, and revised as may be appropriate,” Pls.’ Compl., ECF No. 1, ¶¶ 6, 39, 40, 100;

WHEREAS, Plaintiffs allege that EPA failed to comply with this alleged mandatory duty, *id.* at ¶¶ 6, 101-103;

WHEREAS, the relief that Plaintiffs seek for this alleged violation includes a Court order requiring EPA to review the state plan guidelines for oil and gas waste and, if EPA determines revision to be “appropriate,” to conduct a rulemaking for revisions of the state plan guidelines on a “date certain” schedule, *id.* at 24;

WHEREAS, Plaintiffs and EPA have agreed to a settlement of this action without admission of any issue of fact or law;

WHEREAS, Plaintiffs and EPA agree that resolution of this matter without further litigation is in the best interest of the parties, the public, and judicial economy;

WHEREAS, Plaintiffs and EPA consider this Consent Decree to be an adequate and equitable resolution of all the claims in this matter and therefore wish to effectuate a settlement;

WHEREAS, the Court finds and determines that it has jurisdiction to enter this Consent Decree;

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

NOW THEREFORE, before the taking of testimony, without trial or determination of any issues of fact or law, and upon the consent of Plaintiffs and EPA, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. This Court has jurisdiction to enter this Consent Decree and, pursuant to the Consent Decree, order the relief stated herein.
2. The Parties to this Consent Decree are Plaintiffs and EPA (hereafter together and severally the Parties).
3. This Consent Decree applies to, is binding upon, and inures to the benefit of the Parties (and their successors, assigns, and designees).
4. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.
5. Except as provided below, no later than March 15, 2019, EPA shall either (a) sign (and thereafter expeditiously transmit to the Office of the Federal Register) a notice of proposed

rulemaking for the revision of the Subtitle D criteria regulations pertaining to oil and gas wastes, 40 C.F.R. Part 257, or (b) sign a determination that revision of the regulations is not necessary.

If EPA signs a notice of proposed rulemaking, then EPA shall provide to Plaintiffs a copy of the notice of proposed rulemaking within seven (7) days of publication by the Office of the Federal Register, and if EPA signs a determination that revision of the regulations is not necessary, then EPA shall provide to Plaintiffs a copy of the determination within seven (7) days of signature.

6. In the event that EPA publishes a notice of proposed rulemaking for revised Subtitle D criteria regulations for oil and gas wastes, as provided in Paragraph 5, EPA shall sign (and thereafter expeditiously transmit to the Office of the Federal Register) a notice taking final action following notice and comment rulemaking no later than July 15, 2021. In addition, EPA shall provide a copy of such notice of final action to Plaintiffs within seven (7) days of publication by the Office of the Federal Register.

7. Except as provided below, no later than March 15, 2019, EPA shall either (a) sign (and thereafter expeditiously transmit to the Office of the Federal Register) a notice of proposed rulemaking for the revision of the state plan guidelines pertaining to oil and gas wastes, 40 C.F.R. Part 256, or (b) sign a determination that revision of the state plan guidelines is not appropriate. If EPA signs a notice of proposed rulemaking, then EPA shall provide to Plaintiffs a copy of the notice of proposed rulemaking within seven (7) days of publication by the Office of the Federal Register, and if EPA signs a determination that revision of the state plan guidelines is not appropriate, then EPA shall provide to Plaintiffs a copy of the determination within seven (7) days of signature.

8. In the event that EPA publishes a notice of proposed rulemaking for revision of the state plan guidelines for oil and gas wastes, as provided in Paragraph 7, EPA shall sign (and

thereafter expeditiously transmit to the Office of the Federal Register) a notice taking final action following notice and comment rulemaking no later than July 15, 2021. EPA shall provide a copy of such notice of final action to Plaintiffs within seven (7) days of publication by the Office of the Federal Register.

9. The Parties agree that this Consent Decree shall constitute a complete and final settlement of all claims that Plaintiffs have asserted against the United States, including EPA, in *Environmental Integrity Project, et al. v. McCarthy*, Civil Action No. 1:16-cv-00842-JDB (D.D.C.), except as provided in Paragraphs 19 and 20 of this Consent Decree. Plaintiffs therefore discharge and covenant not to sue the United States, including EPA, for all claims asserted in this suit. Nothing in this Paragraph, however, shall be construed to limit Plaintiffs' rights to file future suits against the United States, including EPA, asserting claims that allege future violations of mandatory duties under RCRA, 42 U.S.C. §§ 6912(b), 6942(b), after this Consent Decree has terminated under Paragraph 10. EPA reserves all defenses it may have to any such future suit.

10. This Court shall retain jurisdiction over this matter to enforce the terms of this Consent Decree and to consider any requests for costs of litigation, including attorneys' fees. After EPA has satisfied its obligations under Paragraphs 5 through 8, and Plaintiffs' claim for costs of litigation has been resolved pursuant to Paragraphs 19 and 20, this Consent Decree shall terminate and the action shall be dismissed with prejudice. EPA may move the Court for an order reflecting that such termination has occurred. Plaintiffs shall have 20 days in which to respond to such motion.

11. Nothing in this Consent Decree shall be construed as precluding EPA from issuing proposed or final Subtitle D criteria regulations for oil and gas wastes, proposed or final

state plan guidelines for oil and gas wastes, or determinations for the regulations or state plan guidelines by dates earlier than the deadlines established by this Consent Decree.

12. The deadlines established by this Consent Decree may be extended (a) by written stipulation of Plaintiffs and EPA, or (b) by the Court on a motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure and upon consideration of any response by the Plaintiffs. A modification of deadlines pursuant to subsection (a) of this paragraph shall be noted by the Parties on the docket of this case.

13. Any provision of this Consent Decree other than a deadline may be modified by the Court following motion of either Plaintiffs or EPA for good cause shown pursuant to the Federal Rules of Civil Procedure and upon consideration of any response by the non-moving party.

14. In the event of a dispute between Plaintiffs and EPA concerning 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 in order to attempt to resolve the dispute. If the Parties are unable to resolve the dispute within twenty (20) days after receipt of the written notice, either party may petition the Court to resolve the dispute.

15. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of Court shall be properly filed unless the party seeking to enforce this Consent Decree has followed the procedure set forth in Paragraph 14.

16. Nothing in the terms of this Consent Decree shall be construed (a) to confer upon this Court jurisdiction to review any final rule, final action, or determination issued by EPA pursuant to this Consent Decree; (b) to confer upon this Court jurisdiction to review any issues

that are within the exclusive jurisdiction of the United States Courts of Appeals under RCRA section 7006(a)(1), 42 U.S.C. § 6976(a)(1); or (c) to waive any claims, remedies, or defenses that the Parties may have under RCRA section 7006(a)(1), 42 U.S.C. § 6976(a)(1).

17. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by RCRA or by general principles of administrative law in taking the actions which are the subject of this Consent Decree, including the discretion to alter, amend, or revise any final actions taken pursuant to this Consent Decree. EPA's obligation to perform each action specified in this Consent Decree does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

18. Except as expressly provided herein, nothing in this Consent Decree shall be construed as an admission of any issue of fact or law. By entering into this Consent Decree, Plaintiffs and EPA do not waive or limit any claim, remedy, or defense, on any grounds, related to any final action that EPA takes with respect to the actions addressed in this Consent Decree.

19. The deadline for filing a motion for costs of litigation (including attorneys' fees) for activities performed prior to entry of the Consent Decree is hereby extended until sixty (60) days after this Consent Decree is entered by the Court. During this sixty-day period, the Parties shall seek to resolve informally any claim for costs of litigation (including attorneys' fees), and if they cannot, Plaintiffs may file a motion for costs of litigation (including attorneys' fees). Nothing in this paragraph shall be construed as an admission or concession by EPA that Plaintiffs are entitled to or eligible for recovery of any costs or attorneys' fees.

20. Plaintiffs reserve the right to seek additional costs of litigation, including attorneys' fees, incurred subsequent to entry of this Consent Decree and arising from Plaintiffs' need to enforce or defend against efforts to modify its terms or the underlying schedule outlined

herein, or for any other unforeseen continuation of this action. EPA reserves the right to oppose any such request. In the event that Plaintiffs intend to file a claim for any such additional costs of litigation, including attorneys' fees, the Parties agree to confer pursuant to Paragraph 14 of this Consent Decree to attempt to resolve any such claim informally before Plaintiffs file a motion for additional costs of litigation (including attorneys' fees).

21. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiffs and EPA. Accordingly, the Parties hereby agree 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.

22. Any notices required or provided for by this Consent Decree shall be in writing, via electronic mail or certified mail, and sent to each of the following counsel (or to any new address of the Parties' counsel as filed and listed in the docket of the above-captioned matter, at a future date):

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23. The obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall constitute or be interpreted as a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

24. Plaintiffs and EPA recognize that the possibility exists that a lapse in appropriations by Congress resulting in a government shutdown could delay EPA's performance of obligations contained in this Consent Decree. In the event of a government shutdown affecting EPA that occurs within one-hundred and twenty (120) days prior to a deadline set forth in this Consent Decree, such deadline shall be extended automatically one day for each day of the shutdown. EPA will provide Plaintiffs and the Court with notice as soon as is reasonably possible in the event that EPA invokes this paragraph of the Consent Decree. Any dispute regarding such invocation shall be resolved in accordance with the dispute resolution provision in Paragraph 14 of this Consent Decree. Nothing in this paragraph shall preclude EPA from

seeking an additional extension, either by stipulation or court order, pursuant to the procedures of Paragraph 12 above, nor limit Plaintiffs' right to oppose any such request for an additional extension.

25. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Plaintiffs or EPA, and the terms of the proposed Consent Decree may not be used as evidence in any litigation between the Parties.

26. The undersigned representatives of Plaintiffs and EPA certify that they are fully authorized by the Parties they represent to consent to the Court's entry of the terms and conditions of this Consent Decree.

SO ORDERED on this ____ day of _____, 2016.

JOHN D. BATES
United States District Judge

SO AGREED:

FOR PLAINTIFFS

Dated: December 23, 2016

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FOR EPA

Dated: December 23, 2016

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