

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ENVIRONMENTAL DEFENSE,)	
)	
Plaintiff,)	
)	No. 1:03CV01737 RMU
v.)	
)	
MARIANNE LAMONT HORINKO)	
Acting Administrator, United States)	
Environmental Protection Agency,)	
)	
Defendant.)	
_____)	

CONSENT DECREE

WHEREAS, Plaintiff filed the complaint in this Action on August 15, 2003, against Defendant Marianne Lamont Horinko, Acting Administrator of the United States Environmental Protection Agency (“Administrator” or “EPA”);

WHEREAS, Plaintiff's complaint alleges that EPA has not completed a nondiscretionary duty to promulgate regulations pursuant to sections 169A(a)(4), 169A(b) and 169B(e) of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7491(a)(4), 7491(b) and 7492(e), which require EPA to promulgate regulations to protect visibility in Federal Class I areas;

WHEREAS, EPA promulgated regulations pursuant to this statute in 1999, 64 Fed. Reg. 35,714 (July 1, 1999) (“Regional Haze Rule”);

WHEREAS, pursuant to 42 U.S.C. § 7491(b)(2), the Regional Haze Rule, in relevant part, required that States must include in the applicable State Implementation Plan (“SIP”) a requirement that certain major stationary sources employ the best available retrofit technology (“BART”) to control emissions;

WHEREAS, the BART regulations have been vacated by the United States Court of

Appeals for the District of Columbia as set forth in *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002);

WHEREAS, EPA has proposed at 66 Fed. Reg. 38108 (7-20-01) to promulgate regulations pursuant to CAA section 169A(a)(4) & (b), 42 U.S.C. § 7491(a)(4) & (b), to provide BART guidelines to the States but has not taken final action on that proposal;

WHEREAS, Plaintiff seeks an order from this Court establishing a deadline by which EPA must promulgate new BART regulations and BART guidelines;

WHEREAS, the Parties agree that this Court has jurisdiction under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a);

WHEREAS, the Parties seek to effect a settlement of this Action without expensive and protracted litigation;

WHEREAS, the Parties have agreed to a settlement of this Action without any admission or adjudication of fact or law;

WHEREAS, the Parties agree that this settlement represents a good faith compromise of disputed claims;

WHEREAS, it is EPA's intent to conclude a rulemaking on the BART regulations and BART guidelines by April 15, 2005;

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

DEFINITION

1. For the purposes of this Consent Decree, the following term shall have the following meaning:

“BART rule” shall mean the regulations and guidelines that are required to be promulgated and published in the Federal Register by the Administrator pursuant to 42 U.S.C. §§ 7491(a)(4), 7491(b) and 7492(e).

EPA OBLIGATIONS

2.a. i. No later than April 15, 2004, EPA shall sign for publication in the Federal Register a notice of proposed rulemaking setting forth its proposed BART Rule

ii. No later than five calendar days following signature of the notice of proposed rulemaking, EPA shall deliver the notice to the Office of the Federal Register for prompt publication. Following such delivery to the Office of the Federal Register, EPA shall not take any step (other than as necessary to correct within 10 calendar days after submittal any typographical or other errors in form) to delay or otherwise interfere with publication of such notice in the Federal Register. EPA shall make available to Plaintiff, within five business days following signature by the Administrator or her delegate, copies of the notice of proposed rulemaking referenced in paragraph 2.a.i.

b. i. No later than April 15, 2005, EPA shall sign for publication in the Federal Register a notice of final rulemaking setting forth its final BART Rule;

ii. No later than five calendar days following signature of the notice of final rulemaking referenced in paragraph 2.b.i. above, EPA shall deliver the notice to the Office of the Federal Register for prompt publication. Following such delivery to the Office of the Federal

Register, EPA shall not take any step (other than as necessary to correct within 10 calendar days after submittal any typographical or other errors in form) to delay or otherwise interfere with publication of such notice in the Federal Register. EPA shall make available to Plaintiff, within five business days following signature by the Administrator or her delegate, copies of the notice of final rulemaking referenced in paragraph 2.b.i.

MODIFICATION OF THIS DECREE

3. The Parties may extend the deadlines established in Paragraph 2 by written stipulation executed by counsel for the Parties and filed with the Court. In addition, any provision of this Consent Decree may be modified by the Court upon motion by any party to this Consent Decree demonstrating that such modification is consistent with law and in the public interest, after consideration of any response by the non-moving party.

4. Consistent with paragraph 3, EPA may request modification of the deadlines set out in this Consent Decree in accordance with the following procedures:

a. If EPA seeks to modify a deadline established by this Consent Decree, EPA shall make its best efforts to provide notice to plaintiffs at least 30 days prior to the deadline that EPA seeks to modify;

b. If EPA seeks to modify a deadline established by this Consent Decree, but has not given plaintiffs' counsel the advance notice specified in subparagraph a of this paragraph, then EPA shall notify plaintiff's counsel in writing of the reasons why such prior notice was not practicable. Such notice shall be given by such means as to be received by plaintiff's counsel no later than the date when the motion to modify is filed with the Court.

CONTINUING JURISDICTION AND TERMINATION

5.a. The Court shall retain jurisdiction to effectuate compliance with this Consent Decree and to consider any requests for costs of litigation (including attorney's fees). When EPA has discharged its obligations under paragraph 2 above and all relevant notices have been published in the Federal Register, then this case shall be dismissed with prejudice.

b. Notwithstanding such dismissal, if (1) Plaintiff seeks judicial review in the court of appeals of any action taken by EPA pursuant to this Consent Decree, and (2) the court of appeals rules that such challenge is not within the jurisdiction of the court of appeals, any dismissal of the instant action shall not preclude Plaintiff from bringing a district court action challenging any such action taken by EPA pursuant to this Consent Decree. Should any final action taken by EPA under paragraph 2 be vacated in whole or part by a United States Court of Appeals under section 307(b)(1) of the Clean Air Act, any dismissal of the instant case shall not preclude any party's right, which is expressly reserved, to argue in a new lawsuit whether a claim exists for EPA to promulgate all or part of the BART Rule, the court in which such a lawsuit and claim might be heard, and the jurisdictional basis for any such lawsuit and claim.

c. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Decree, the disputing party shall contact the other party to confer and attempt to reach an agreement on the disputed issue. If the parties cannot reach an agreed-upon resolution, then either party may move the Court to resolve the dispute.

SAVINGS PROVISIONS

6. The obligations imposed by EPA under Paragraph 2 of this Consent Decree can only be undertaken using appropriated funds. 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 federal statute.

7. Nothing in this Consent Decree shall be considered to limit or modify any discretion EPA may have to alter, amend, or revise the actions taken pursuant to Paragraph 2 of this Consent Decree.

8. Nothing in the terms of this Decree shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions referred to in Paragraph 2. EPA's obligation to perform the actions specified in paragraph 2 of this Decree, by the dates specified in said paragraph, does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

9. Nothing in the terms of this Consent Decree shall be construed either (a) to confer upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), or (b) to waive any remedies plaintiffs may have under section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Decree shall be construed to confer upon the district court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree.

ATTORNEY FEES AND COSTS

10. The deadline for filing a motion for costs of litigation (including attorney's fees) for activities performed prior to entry of this Consent Decree in this case is hereby extended until 120 days after entry of this Consent Decree by the Court. During this time the parties shall seek to resolve informally any claim for costs of litigation (including attorney's fees), and if they

cannot, will submit that issue to the Court for resolution. The Court shall retain jurisdiction to resolve any request for costs of litigation (including attorney's fees), notwithstanding any dismissal pursuant to paragraph 5 above.

SECTION 113(g)

11. The Parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). EPA will expeditiously prepare such notice and forward it to the Office of Federal Register within 15 days of lodging the draft Consent Decree with the Court. After this Consent Decree has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree, in accordance with section 113(g) of the Clean Air Act. If the federal government elects not to withdraw or withhold consent to this Consent Decree, the parties shall promptly file a motion that requests the Court to enter this Consent Decree. If a motion to enter the Consent Decree is not filed within 75 days after the notice is published in the Federal Register, any party may file dispositive motions in this matter.

RECIPIENTS OF NOTIFICATION

12. Any notices required or provided for by this Decree shall be in writing, effective upon receipt, and sent to the following:

For Plaintiff:

David Baron
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington D.C. 20036-2212

For Defendant:

M. Lea Anderson, Attorney,
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Chief
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Attn: DJ # 90-5-2-4-16726

or such other person as either party may subsequently identify in writing to the other party.

SIGNATURE OF PARTIES

13. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to consent to the Court's entry of the terms and conditions of this Consent Decree.

IT IS SO ORDERED this _____ day of _____ 2003.

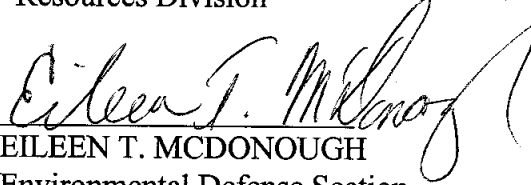
UNITED STATES DISTRICT COURT JUDGE

Approved by Counsel for the Parties:

MARIANNE LAMONT HORINKO, Acting
Administrator, U.S. Environmental Protection
Agency

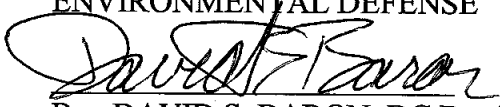
Date: August 18, 2003

By: THOMAS L. SANSONETTI
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M. LEA ANDERSON
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1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(202) 564-5571

Date: August 15, 2003

ENVIRONMENTAL DEFENSE

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