

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ENVIRONMENTAL JUSTICE
HEALTH ALLIANCE FOR
CHEMICAL POLICY REFORM;
PEOPLE CONCERNED ABOUT
CHEMICAL SAFETY; and NATURAL
RESOURCES DEFENSE COUNCIL,
INC.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; and GINA
MCCARTHY, in her official capacity as
Administrator of the United States
Environmental Protection Agency,

Defendants.

15 Civ. 5705 (SAS)

CONSENT DECREE

WHEREAS, on July 21, 2015, Plaintiffs Environmental Justice Health Alliance for Chemical Policy Reform, People Concerned About Chemical Safety, and Natural Resources Defense Council, Inc. (collectively "Plaintiffs") filed the above-captioned matter against the United States Environmental Protection Agency ("EPA") and Gina McCarthy, in her official capacity as Administrator of the EPA (collectively "Defendants");

WHEREAS, on October 19, 2015, Plaintiffs filed an Amended Complaint in the above-captioned matter (ECF No. 20 ("Am. Compl."));

WHEREAS, Plaintiffs allege that EPA has a duty under Clean Water Act ("CWA") section 311(j)(1), 33 U.S.C. § 1321(j)(1), to issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of . . . hazardous

substances . . . from onshore facilities . . . , and to contain such discharges” (the “Hazardous Substance Regulations”) (Am. Compl. ¶¶ 2, 25);

WHEREAS, Plaintiffs allege that EPA failed to comply with this alleged mandatory duty (Am. Compl. ¶ 27);

WHEREAS, the relief requested in the Amended Complaint includes an order from this Court to establish a deadline by which EPA must promulgate the Hazardous Substance Regulations (Am. Compl. at 10);

WHEREAS, Plaintiffs assert (1) a claim under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(2), for failure to perform a non-discretionary act or duty in violation of the CWA (Am. Compl. ¶¶ 37-39), and (2) a claim pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(a), for unreasonable delay (Am. Compl. ¶¶ 40-42);

WHEREAS, on November 5, 2015, Defendants moved to dismiss the CWA citizen suit claim for lack of subject matter jurisdiction;

WHEREAS, on November 23, 2015, Plaintiffs filed an opposition to Defendants’ motion to dismiss;

WHEREAS, on December 11, 2015, Plaintiffs filed a motion for summary judgment as to both counts in their Amended Complaint;

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

WHEREAS, Plaintiffs and Defendants 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, Plaintiffs and Defendants 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 Defendants agree that this Court has subject matter jurisdiction over Plaintiffs' APA claim pursuant to 28 U.S.C. § 1331 and the waiver of sovereign immunity contained in 5 U.S.C. § 702;

WHEREAS, Plaintiffs assert that this Court has subject matter jurisdiction over their CWA claim pursuant to 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a)(2), but Defendants dispute that the Court has jurisdiction over that claim;

WHEREAS, Plaintiffs and Defendants agree that this Court has subject matter jurisdiction sufficient to enter this Consent Decree containing the relief described herein;

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, before the taking of testimony, without trial or determination of any issues of fact or law, and upon the consent of Plaintiffs and Defendants, 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. This Consent Decree applies to, is binding upon, and inures to the benefit of the parties (and their successors, assigns, and designees).
3. Except as provided below, no later than 18 months after the Court's entry of this Consent Decree, EPA shall sign (and within 15 days thereafter transmit to the Office of the Federal Register) a notice of proposed rulemaking pertaining to the issuance of the Hazardous Substance Regulations. If no later than 60 days after the Court's entry of this Consent Decree,

however, EPA notifies Plaintiffs in writing that it intends to publish a Federal Register notice regarding the collection of information, pursuant to 44 U.S.C. § 3506(c)(2)(A), the deadline by which EPA must sign the notice of proposed rulemaking described in the preceding sentence shall be extended to 28 months after the Court's entry of this Consent Decree. In addition, EPA shall provide a copy of the notice of proposed rulemaking to Plaintiffs within 7 days of publication by the Office of the Federal Register.

4. No later than 14 months after publication of the proposed Hazardous Substance Regulations described in paragraph 3, EPA shall sign (and within 15 days thereafter transmit to the Office of the Federal Register) a notice taking final action following notice and comment rulemaking pertaining to the issuance of Hazardous Substance Regulations. In addition, EPA shall provide a copy of such notice to Plaintiffs within 7 days of publication by the Office of the Federal Register.

5. After publication of notice of the final action required by paragraph 4 in the Federal Register, this Consent Decree shall terminate and the action shall be dismissed with prejudice. Defendants may move the Court for an order reflecting that such termination has occurred. Plaintiffs shall have 14 days in which to respond to such motion.

6. Nothing in this Consent Decree shall be construed as precluding EPA from issuing proposed or final Hazardous Substance Regulations by a date earlier than the deadlines established by this Consent Decree.

7. The deadlines established by this Consent Decree may be extended (a) by written stipulation of Plaintiffs and Defendants, or (b) by the Court on a motion of Defendants 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.

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

9. In the event of a dispute between Plaintiffs and Defendants 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 14 days after receipt of the notice, either party may petition the Court to resolve the dispute.

10. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of Court shall be properly filed unless Plaintiffs have followed the procedure set forth in paragraph 9 and provided Defendants with written notice received at least 14 days before filing of such motion or proceeding.

11. 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.

12. Nothing in the terms of this Consent Decree shall be construed (a) to confer upon this Court jurisdiction to review any final rule 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 CWA section 509(b)(1), 33

U.S.C. § 1369(b)(1); or (c) to waive any claims, remedies, or defenses that the parties may have under CWA section 509(b)(1), 33 U.S.C. § 1369(b)(1).

13. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the CWA 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 promulgated 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.

14. 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, Defendants and Plaintiffs do not waive or limit any claim, remedy, or defense, on any grounds, related to any final action EPA takes with respect to the actions addressed in this Consent Decree.

15. 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 90 days after this Consent Decree is entered by the Court. During this 90-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 Defendants that Plaintiffs are entitled to or eligible for recovery of any costs or attorneys' fees.

16. 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. Defendants reserve 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 9 of this Consent Decree to allow Plaintiffs to assess the potential to resolve such a claim informally before acting.

17. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiffs and Defendants. 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.

18. 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):

a. For Plaintiffs:

Jared E. Knicley
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
E-mail: jknicley@nrdc.org

Mitchell S. Bernard
Natural Resources Defense Council
40 West 20th Street
New York, NY 10011
E-mail: mbernard@nrdc.org

b. For Defendants:

Dominika Tarczynska
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
E-mail: dominika.tarczynska@usdoj.gov

James Bove
EPA Office of General Counsel
Mail Code 2366A
1200 Pennsylvania Ave NW
Washington, DC 20460
E-mail: bove.james@epa.gov

19. Defendants and Plaintiffs recognize and acknowledge that 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 be interpreted as or constitute 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.

20. Defendants and Plaintiffs recognize that the possibility exists that a lapse in appropriations by Congress resulting in an EPA shutdown could delay EPA's compliance with the obligations contained in this Consent Decree. Should a delay occur due to such an EPA shutdown that occurs within 90 days prior to a deadline set forth in this Consent Decree, such deadline shall be extended automatically one day for each day of the EPA shutdown. EPA will provide Plaintiffs with notice no later than 10 days after the shutdown ends 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 9 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 7 above, nor limit Plaintiffs' right to oppose any such request for an additional extension.

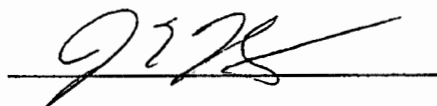
21. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either party and the terms of the proposed Consent Decree may not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

22. The undersigned representatives of Plaintiffs and Defendants 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.

COUNSEL FOR PLAINTIFFS:

Dated: Washington, D.C.
February 11, 2016

By:



JARED E. KNICLEY
MITCHELL S. BERNARD
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
Telephone: (202) 513-6242
E-mail: jknicley@nrdc.org
mbernard@nrdc.org

Attorneys for Plaintiffs

COUNSEL FOR DEFENDANTS:

Dated: New York, New York
February 11, 2016

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: 

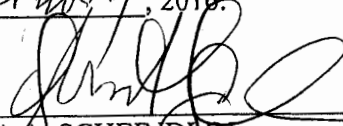
DOMINIKA TARCZYNSKA
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2748
Facsimile: (212) 637-2686
E-mail: dominika.tarczynska@usdoj.gov

SO ORDERED on this

16

day of

February, 2016.


SHIRA A. SCHEINDLIN
United States District Judge