

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____))
In re ENVIRONMENTAL DEFENSE,) Case No. 03-1220
)
Petitioner.)
)
_____))

SETTLEMENT AGREEMENT

WHEREAS, Environmental Defense ("Petitioner") filed a petition for writ of mandamus directing the U.S. Environmental Protection Agency ("EPA") to complete remand proceedings ordered by the United States Court of Appeals for the D.C. Circuit ("the Court") in Environmental Defense Fund v. EPA, 898 F.2d 183 (D.C. Cir. 1990) (hereinafter "EDF v. EPA"), and to promulgate regulations, consistent with the Clean Air Act, 42 U.S.C. §7476, for the prevention of significant deterioration ("PSD") of air quality by oxides of nitrogen ("NOx");

WHEREAS, the Parties agree that the Court has jurisdiction to enforce its mandate and to preserve its future jurisdiction; and

WHEREAS, the Parties wish to implement this Settlement Agreement ("Agreement") to avoid protracted and costly litigation and to preserve judicial resources;

NOW THEREFORE, Environmental Defense and EPA hereby agree as follows:

1. For the purposes of this Agreement, the phrase "NOx PSD regulations" shall mean the regulations to prevent the significant deterioration of air quality which would result from the emissions of nitrogen oxides that are required to be promulgated and published in the Federal Register by the Administrator pursuant to 42 U.S.C. § 7476.

2. The Parties shall have the following obligations, pursuant to this Agreement:

- a. No later than September 30, 2004, EPA shall sign for publication in the Federal Register a notice of proposed rulemaking setting forth its proposed action to fully comply with the Court's remand order in EDF v. EPA, including any proposed regulations necessary to comply with that remand order. Within five calendar days following such signature, 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 Petitioner, within five business days following signature by the Administrator, copies of the notice of proposed rulemaking.
- b. No later than September 30, 2005, EPA shall sign for publication in the Federal Register a notice of final rulemaking setting forth its final action to fully comply with the Court's remand order in EDF v. EPA, including any final regulations necessary to comply with that remand order. Within five calendar days following such signature, 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 Petitioner, within five business days following signature by the Administrator, copies of the notice of final rulemaking.

- c. No later than 120 days from the date this Agreement is executed by the Parties, and at 90-day intervals thereafter, EPA shall file status reports on the Agency's progress and the status of implementation of this Agreement to the Court and hold teleconference briefings with Petitioner to describe the Agency's progress and the status of implementation of this Agreement.
- d. No later than 90 days from the date this Agreement is executed by the Parties, EPA shall notify Petitioner whether the Agreement is final in accordance with paragraph 9, below.
- e. No later than 10 days from the date this Agreement is executed by the Parties, the Parties will jointly notify the Court that they have reached a Settlement Agreement requiring notice-and-comment proceedings under section 113(g) of the Clean Air Act as described in paragraph 9, below. Said notice shall state that within 15 days after this Agreement becomes final pursuant to paragraph 9, the Parties will move the Court to effectuate the Agreement by ordering the rulemaking schedule agreed to by the Parties. Such notice will further request that the Court defer review or action on this case pending completion of the process under section 113(g) of the Clean Air Act.
- f. No later than 15 days from the date that this Agreement is final in accordance with paragraph 9, below, the Parties to this Agreement will jointly move the Court to issue an order establishing each of the elements of the schedules set out in subparagraphs 2(a)-(c). That order will also contain a provision

providing that the parties may extend the dates set in the order pursuant to paragraph 10 of this Agreement.

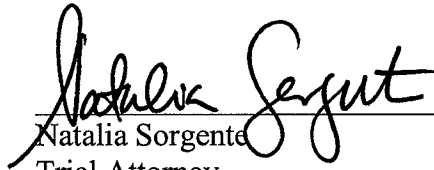
3. Petitioner shall have the right to withdraw from this Agreement and renew its request that the Court order further proceedings and/or specific relief if the events enumerated in paragraph 2(d), (e), or (f) do not occur in accordance with the schedule provided therein, or if the Court declines to issue an order in accordance with subparagraph 2(f), above.
4. EPA shall not oppose a request by Petitioner pursuant to paragraph 3, except to the extent that EPA contends that all of the events referenced in subparagraphs 2(d)-(f) have occurred and the Court has issued an order in accordance with subparagraph 2(f).
5. Before Petitioner may move the Court to take further action in this case pursuant to paragraph 3 above, Petitioner shall notify EPA in writing of its intent 7 business days before filing such a motion. If the ground upon which Petitioner seeks to withdraw from this Agreement is cured within the 7-day period, Petitioner may not withdraw on that basis. The terms of this paragraph and paragraphs 2 through 4 shall apply during (but not limited to) the time EPA considers whether to finalize this Agreement in accordance with paragraph 9, below.
6. The obligations imposed by EPA under paragraph 2 of this Settlement Agreement can only be undertaken using appropriated funds. No provision of this Agreement 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 the terms of this Agreement 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 Agreement, by the dates specified in said paragraph, does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.
8. Except as expressly provided in this Agreement, none of the Parties hereto waive or relinquishes any legal rights, claims, or defenses it may have.
9. The Parties agree and acknowledge that this Agreement is not final until EPA provides 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 shall submit said notice of this Agreement to the Federal Register for publication within seven days of execution of this Agreement by the Parties. After this Agreement 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 the Agreement, in accordance with section 113(g) of the Clean Air Act. This Agreement shall become final on the date that EPA notifies Petitioner in writing of such finality.
10. The Parties to this Agreement may extend the dates set forth in paragraph 2(a) through (f), or otherwise modify this Agreement, by written stipulation executed by counsel for both of the Parties and filed with the Court.

The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Agreement.

This Agreement will be deemed to be executed when it has been signed by the representatives of the parties set forth below, subject to final approvals pursuant to paragraph 9. Petitioner reserves the right to apply to the Court at an appropriate time for an award of costs of litigation (including attorneys' fees).

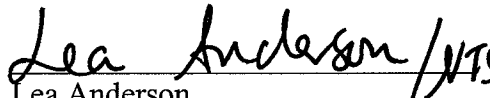
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11/12/2003

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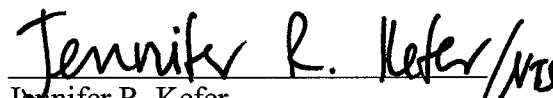


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