

1 JEFFREY HUGHES (NY Bar No. 5367214)  
2 U.S. Department of Justice  
3 Environmental Defense Section  
4 P.O. Box 7611  
5 Washington, D.C. 20044  
6 Tel: (202) 532-3080  
7 Email: jeffrey.hughes@usdoj.gov

8 *Attorney for Defendant Michael S. Regan,*  
9 *in his official capacity as Administrator*  
10 *of the United States Environmental Protection Agency*

11 ROBERT UKEILEY (*Pro Hac Vice*)  
12 Center for Biological Diversity  
13 1536 Wynkoop St., Ste. 421  
14 Denver, CO 80202  
15 Tel: (720) 496-8568  
16 Email: rukeiley@biologicaldiversity.org

17 [additional attorneys for Plaintiffs included in signature block]

18 *Attorneys for Plaintiffs*

19 **UNITED STATES DISTRICT COURT**  
20 **NORTHERN DISTRICT OF CALIFORNIA**  
21 **SAN FRANCISCO DIVISION**

22 CENTER FOR BIOLOGICAL DIVERSITY

23 *et al.,*

24 Plaintiffs,

25 v.

26 MICHAEL S. REGAN, in his official  
27 capacity as the Administrator of the United  
28 States Environmental Protection Agency,

Defendant.

Case No. 3:22-cv-01855-WHO

**CONSENT DECREE**

1 WHEREAS, on March 24, 2022, Plaintiffs Center for Biological Diversity, Center for  
2 Environmental Health, Environmental Integrity Project, and WildEarth Guardians  
3 (collectively, “Plaintiffs”) filed the above-captioned matter against Michael S. Regan, in his  
4 official capacity as the Administrator of the United States Environmental Protection Agency  
5 (hereinafter “EPA” or “Defendant”) (Dkt. No. 1) (“Compl.”);

6 WHEREAS, Plaintiffs allege that EPA has failed to undertake certain non-discretionary  
7 duties under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and that such alleged  
8 failure is actionable under CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2);

9  
10 WHEREAS, on May 21, 2012, EPA issued a final rule establishing initial air quality  
11 designations pursuant to 42 U.S.C. § 7407(d) for the 2008 primary and secondary national  
12 ambient air quality standards (“NAAQS”) for ozone (the “2008 Ozone NAAQS”) and  
13 determined that, among other areas, Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-  
14 Fort Worth, Texas; Greater Connecticut, Connecticut; Houston-Galveston-Brazoria, Texas;  
15 Nevada County (Western part), California; New York-North New Jersey-Long Island, New  
16 York-New Jersey-Connecticut; Ventura County, CA; and Denver-Boulder-Greeley-Ft. Collins-  
17 Loveland, Colorado were not in attainment with the 2008 Ozone NAAQS. *See* Air Quality  
18 Designations for the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30088  
19 (May 21, 2012);  
20

21  
22 WHEREAS, on May 21, 2012, EPA designated and classified Ventura County, CA as  
23 Serious nonattainment, effective July 20, 2012, *see id.* at 30109;

24  
25 WHEREAS, on March 6, 2015, EPA issued a rule establishing the attainment date for  
26 areas designated Serious nonattainment as nine years from the effective date those areas were  
27 designated nonattainment under the 2008 Ozone NAAQS, *see* Implementation of the 2008  
28 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements,

1 80 Fed. Reg. 12264, 12268 (Mar. 6, 2015), here, July 20, 2021, *see* Determinations of  
2 Attainment by Attainment Date, Extension of Attainment Date, and Reclassification of Areas  
3 Classified as Serious for the 2008 Ozone National Ambient Air Quality Standards, 87 Fed.  
4 Reg. 21825, 21828 (Apr. 13, 2022) (“The attainment date[] for Serious . . . nonattainment areas  
5 [is] 9 years . . . from the effective date of the final designation, July 20, 2012.”);  
6

7 WHEREAS, on August 13, 2019, EPA designated and classified Chicago-Naperville,  
8 Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas; Greater Connecticut, Connecticut;  
9 Houston-Galveston-Brazoria, Texas; Nevada County (Western part), California; New York-  
10 North New Jersey-Long Island, New York-New Jersey-Connecticut; and Denver-Boulder-  
11 Greeley-Ft. Collins-Loveland, Colorado as Serious nonattainment, effective September 23,  
12 2019, *see* Determinations of Attainment by the Attainment Date, Extensions of the Attainment  
13 Date, and Reclassification of Several Areas Classified as Moderate for the 2008 Ozone  
14 National Ambient Air Quality Standards, 84 Fed. Reg. 44238, 44244 (Aug. 23, 2019);  
15

16 WHEREAS, EPA must determine no later than six months after the attainment date  
17 whether a nonattainment area has attained the relevant NAAQS by the applicable attainment  
18 date, 42 U.S.C. §§ 7509(c)(1), 7511(b)(2)(A);  
19

20 WHEREAS, EPA must publish a notice in the Federal Register no later than six months  
21 after the attainment date identifying each area that did not attain the NAAQS, 42 U.S.C. §§  
22 7509(c)(2), 7511(b)(2)(B);  
23

24 WHEREAS, EPA did not make or publish a final determination as to whether Chicago-  
25 Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas; Greater Connecticut,  
26 Connecticut; Houston-Galveston-Brazoria, Texas; Nevada County (Western part), California;  
27 New York-North New Jersey-Long Island, New York-New Jersey-Connecticut; Ventura  
28

1 County, CA; and Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado had attained the  
2 2008 Ozone NAAQS by January 20, 2022;

3 WHEREAS, EPA published on April 13, 2022 a proposed rule that proposes to  
4 determine that Chicago-Naperville, Illinois-Indiana-Wisconsin; Dallas-Fort Worth, Texas;  
5 Houston-Galveston-Brazoria, Texas; New York-North New Jersey-Long Island, New York-  
6 New Jersey-Connecticut; and Denver-Boulder-Greeley-Ft. Collins-Loveland, Colorado failed  
7 to attain the 2008 Ozone NAAQS by July 20, 2021 and that Greater Connecticut, Connecticut  
8 attained the 2008 Ozone NAAQS by July 20, 2021, 87 Fed. Reg. 21825 (Apr. 13, 2022);  
9

10 WHEREAS, this same proposed rule also noted that, for Nevada County (Western  
11 part), California and Ventura County, California, the California Air Resources Board had  
12 submitted additional information for EPA's consideration that may affect EPA's determination  
13 of whether those areas attained the 2008 Ozone NAAQS by the attainment date and that EPA  
14 would address these areas in separate actions, *see id.*;

15  
16  
17 WHEREAS, on April 11, 2022, EPA published a final rule in the *Federal Register*  
18 redesignating the Wisconsin portion of the Chicago-Naperville Area to Attainment of the 2008  
19 Ozone NAAQS, Air Plan Approval; Wisconsin; Redesignation of the Wisconsin Portion of the  
20 Chicago-Naperville, Illinois-Indiana-Wisconsin Area to Attainment of the 2008 Ozone  
21 Standard, 87 Fed. Reg. 21027 (April 11, 2022), rendering Plaintiffs' claim moot as to this area;

22  
23 WHEREAS, on May 20, 2022, EPA published final rules in the *Federal Register*  
24 redesignating the Illinois and Indiana portions of the Chicago-Naperville Area to Attainment of  
25 the 2008 Ozone NAAQS, *see* Air Plan Approval; Illinois; Redesignation of the Illinois Portion  
26 of the Chicago-Naperville, Illinois-Indiana-Wisconsin Area to Attainment of the 2008 Ozone  
27 Standard, 87 Fed. Reg. 30828 (May 20, 2022); Air Plan Approval; Indiana; Redesignation of  
28

1 the Indiana Portion of the Chicago-Naperville Area to Attainment of the 2008 Ozone Standard,  
2 NO<sub>x</sub> RACT Waiver, and Serious Plan Elements, 87 Fed. Reg. 30821 (May 20, 2022),  
3 rendering Plaintiffs' claim moot as to these areas;

4  
5 WHEREAS, the relief requested in the Complaint includes, among other things, an  
6 order from this Court to establish a date certain by which EPA must fulfill its obligations;

7 WHEREAS, Plaintiffs and EPA have agreed to a settlement of this action without  
8 admission of any issue of fact or law, except as expressly provided herein;

9 WHEREAS, Plaintiffs and EPA, by entering into this Consent Decree (the "Consent  
10 Decree"), do not waive or limit any claim, remedy, or defense, on any grounds, related to any  
11 final EPA action;

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

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

16 WHEREAS, Plaintiffs and EPA agree that this Court has jurisdiction over the matters  
17 resolved in this Consent Decree pursuant to the citizen suit provision in CAA section  
18 304(a)(2), 42 U.S.C. § 7604(a)(2), and that venue is proper in the Northern District of  
19 California pursuant to 28 U.S.C. § 1391(e) and Civil L.R. 3-2(c)-(d); and

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

22 NOW THEREFORE, before the taking of testimony, without trial or determination of  
23 any issues of fact or law, and upon the consent of Plaintiffs and Defendant EPA, it is hereby  
24 ordered, adjudged and decreed that:

25 1. The appropriate EPA official shall:

- 26 a. By September 15, 2022, sign a notice of final rulemaking determining  
27 whether Dallas-Fort Worth, Texas; Greater Connecticut, Connecticut; Houston-  
28 Galveston-Brazoria, Texas; New York-North New Jersey-Long Island, New

1 York-New Jersey-Connecticut; and Denver-Boulder-Greeley-Ft. Collins-  
2 Loveland, Colorado attained the 2008 Ozone NAAQS by July 20, 2021; and

3 b. By December 16, 2022, sign a notice of final rulemaking determining  
4 whether Nevada County (Western part), California and Ventura County,  
5 California attained the 2008 Ozone NAAQS by July 20, 2021.

6 2. If EPA has published in the Federal Register a redesignation for an area from  
7 nonattainment to attainment for any 2008 Ozone NAAQS nonattainment area listed above in  
8 Paragraph 1, then EPA's obligation to take the actions listed above in Paragraph 1 is  
9 automatically terminated and Plaintiffs' claim as to that designated area is moot.

10 3. EPA shall, within 15 business days of signature, send the rulemaking package for  
11 each action taken pursuant to Paragraph 1 of this Consent Decree to the Office of the Federal  
12 Register for review and publication in the *Federal Register*.

13 4. After EPA has completed the actions set forth in Paragraph 1 of this Consent Decree,  
14 after notice of each final action required by Paragraph 3 have been published in the *Federal*  
15 *Register*, and the issue of costs of litigation (including reasonable attorney fees) has been  
16 resolved, the above-captioned matter shall be dismissed with prejudice and this Consent  
17 Decree shall terminate.

18 5. The deadlines established by this Consent Decree may be extended (a) by written  
19 stipulation of Plaintiffs and EPA with notice to the Court, or (b) by the Court upon motion of  
20 EPA for good cause shown pursuant to the Federal Rules of Civil Procedure and upon  
21 consideration of any response by Plaintiffs and any reply by EPA. Any other provision of this  
22 Consent Decree also may be modified by the Court following motion of an undersigned party  
23 for good cause shown pursuant to the Federal Rules of Civil Procedure and upon consideration  
24 of any response by a non-moving party and any reply.

25 6. If a lapse in EPA appropriations occurs within one hundred twenty (120) days prior  
26 to a deadline in Paragraphs 1 or 3 in this Consent Decree, that deadline shall be extended  
27 automatically one day for each day of the lapse in appropriations. Nothing in this Paragraph  
28

1 shall preclude EPA from seeking an additional extension of time through modification of this  
2 Consent Decree pursuant to Paragraph 5.

3 7. Plaintiffs and EPA agree that this Consent Decree constitutes a complete settlement  
4 of all claims as described in Paragraph 1.

5 8. In the event of a dispute between Plaintiffs and EPA concerning the interpretation or  
6 implementation of any aspect of this Consent Decree, the disputing party shall provide the  
7 other party with a written notice, via electronic mail or other means, outlining the nature of the  
8 dispute and requesting informal negotiations. These parties shall meet and confer in order to  
9 attempt to resolve the dispute. If these parties are unable to resolve the dispute within ten (10)  
10 business days after receipt of the notice, either party may petition the Court to resolve the  
11 dispute.

12 9. No motion or other proceeding seeking to enforce this Consent Decree or for  
13 contempt of Court shall be properly filed unless the procedure set forth in Paragraph 8 has been  
14 followed, and the moving party has provided the other party with written notice received at  
15 least ten (10) business days before the filing of such motion or proceeding.

16 10. The deadline for filing a motion for costs of litigation (including attorney fees) for  
17 activities performed prior to entry of the Consent Decree is hereby extended until ninety (90)  
18 days after this Consent Decree is entered by the Court. During this period, the Parties shall  
19 seek to resolve any claim for costs of litigation (including attorney fees), and if they cannot,  
20 Plaintiffs will file a motion for costs of litigation (including attorney fees) or a stipulation or  
21 motion to extend the deadline to file such a motion. EPA reserves the right to oppose any such  
22 request. The Court shall retain jurisdiction to resolve any requests for costs of litigation,  
23 including attorney fees.

24 11. This Court shall retain jurisdiction over this matter to enforce the terms of this  
25 Consent Decree and to consider any requests for costs of litigation (including attorney fees).

26 12. Nothing in the terms of this Consent Decree shall be construed (a) to confer upon  
27 this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the  
28 United States Courts of Appeals under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), or (b)

1 to waive any claims, remedies, or defenses that the parties may have under CAA section  
2 307(b)(1), 42 U.S.C. § 7607(b)(1).

3 13. Nothing in this Consent Decree shall be construed to limit or modify any discretion  
4 accorded EPA by the Clean Air Act or by general principles of administrative law in taking the  
5 actions which are the subject of this Consent Decree, including the discretion to alter, amend,  
6 or revise any final actions promulgated pursuant to this Consent Decree. EPA's obligation to  
7 perform each action specified in this Consent Decree does not constitute a limitation or  
8 modification of EPA's discretion within the meaning of this paragraph.

9 14. Except as expressly provided herein, nothing in this Consent Decree shall be  
10 construed as an admission of any issue of fact or law nor to waive or limit any claim, remedy,  
11 or defense, on any grounds, related to any final action EPA takes with respect to the actions  
12 addressed in this Consent Decree.

13 15. Plaintiffs reserve the right to seek additional costs of litigation (including  
14 reasonable attorney fees) incurred subsequent to entry of this Consent Decree. EPA reserves  
15 the right to oppose any such request for additional costs of litigation (including attorney fees).

16 16. It is hereby expressly understood and agreed that this Consent Decree was jointly  
17 drafted by Plaintiffs and EPA. Accordingly, the parties hereby agree that any and all rules of  
18 construction to the effect that ambiguity is construed against the drafting party shall be  
19 inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent  
20 Decree.

21 17. The parties agree and acknowledge that before this Consent Decree can be finalized  
22 and entered by the Court, EPA must provide notice of this Consent Decree in the *Federal*  
23 *Register* and an opportunity for public comment pursuant to CAA section 113(g), 42 U.S.C.  
24 § 7413(g). After this Consent Decree has undergone notice and comment, the Administrator  
25 and/or the Attorney General, as appropriate, shall promptly consider any written comments in  
26 determining whether to withdraw or withhold their consent to the Consent Decree, in  
27 accordance with CAA section 113(g). If the Administrator and/or the Attorney General do not  
28



1 elect to withdraw or withhold consent, EPA shall promptly file a motion that requests that the  
2 Court enter this Consent Decree.

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

6 For Plaintiffs: Robert Ukeiley  
7 Center for Biological Diversity  
8 1536 Wynkoop St., Ste. 421  
9 Denver, CO 80202  
10 Tel: (720) 496-8568  
11 Email: rukeiley@biologicaldiversity.org

12 For Defendant EPA: Jeffrey Hughes  
13 U.S. Department of Justice  
14 Environmental Defense Section  
15 P.O. Box 7611  
16 Washington, D.C. 20044  
17 Tel: (202) 532-3080  
18 Email: jeffrey.hughes@usdoj.gov

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

25 21. If for any reason the Court should decline to approve this Consent Decree in the  
26 form presented, this agreement is voidable at the sole discretion of either party and the terms of  
27 the proposed Consent Decree may not be used as evidence in any litigation between the parties.

28 22. The undersigned representatives of Plaintiffs and Defendant EPA 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 Decree.

1 IT IS SO ORDERED on this 14<sup>th</sup> day of September, 2022.

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

  
\_\_\_\_\_  
WILLIAM H. ORRICK  
UNITED STATES DISTRICT JUDGE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

COUNSEL FOR PLAINTIFFS:

*/s/ Ryan Maher*

---

Robert Ukeiley (*Pro Hac Vice*)  
Center for Biological Diversity  
1536 Wynkoop St., Ste. 421  
Denver, CO 80202  
Tel: (720) 496-8568  
Email: rukeiley@biologicaldiversity.org

Ryan Maher (*Pro Hac Vice*)  
Center for Biological Diversity  
1411 K Street NW, Suite 1300  
Washington, D.C. 20005  
Tel: (781) 325-6303  
Email: rmaher@biologicaldiversity.org

Hollin N. Kretzmann  
Center for Biological Diversity  
1212 Broadway  
Suite 800  
Oakland, CA 94612  
Tel: (510) 844-7118  
Email: hkretzmann@gmail.com

*Attorneys for Plaintiffs*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

COUNSEL FOR DEFENDANT:

/s/ Jeffrey Hughes

---

Jeffrey Hughes (N.Y. Bar No. 5367214)  
United States Department of Justice  
Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044  
Tel: (202) 532-3080  
Email: jeffrey.hughes@usdoj.gov

*Attorney for Defendant*