

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF CONNECTICUT,  
COMMONWEALTH OF MASSACHUSETTS, STATE  
OF NEW HAMPSHIRE, STATE OF RHODE ISLAND,  
and STATE OF VERMONT,

Plaintiffs,

-v-

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

Defendants.

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:    
DATE FILED: January 19, 2017

16 Civ. 7827 (KPF)

**CONSENT DECREE**

**CONSENT DECREE**

WHEREAS, on October 6, 2016, Plaintiffs State of New York, State of Connecticut, Commonwealth of Massachusetts, State of New Hampshire, State of Rhode Island, and State of Vermont (collectively, “Plaintiffs”) filed a complaint in the above-captioned matter against Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively “EPA”);

WHEREAS, Plaintiffs allege that EPA has failed to undertake certain non-discretionary duties under section 176A(a) of the Clean Air Act (“CAA”), 42 U.S.C § 7506a(a), and that such alleged failure is actionable under section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2);

WHEREAS, pursuant to 42 U.S.C § 7506a(a), on or about December 9, 2013, several states within the Ozone Transport Region (“OTR”), including Plaintiffs, submitted a petition requesting EPA to expand the OTR to include nine additional states (the “Petition”);

WHEREAS, 42 U.S.C. § 7506a(a) imposes a mandatory, non-discretionary duty upon the EPA Administrator by requiring the EPA Administrator to either approve or disapprove a § 7506a(a) petition within eighteen months of its receipt;

WHEREAS, Plaintiffs allege that EPA has failed to perform the duty mandated by 42 U.S.C. § 7506a(a), to take final action to either approve or disapprove the Petition within eighteen months of its receipt;

WHEREAS, EPA admits that it has not taken final action to either approve or disapprove the Petition;

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

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

WHEREAS, Plaintiffs and EPA, by entering into this Consent Decree, do not waive or limit any claim, remedy, or defense, on any grounds, related to any final EPA action;

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

WHEREAS, Plaintiffs and EPA agree that this Court has jurisdiction over this matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2), and that venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(e);

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

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. EPA shall sign a notice for public comment which proposes approval or disapproval of the Petition by no later than January 18, 2017.
2. EPA shall sign a final notice of final action which approves or disapproves the Petition by no later than October 27, 2017.
3. No later than fifteen business days following signature of the notice of any proposed or final action referenced above, EPA shall submit the notice for review and publication to the Office of the Federal Register.
4. After EPA has completed the actions set forth in Paragraphs 1 and 2 of this Consent Decree and after notice of the action required by Paragraph 3 has been published in the Federal Register and the issue of costs of litigation, including attorney fees, has been resolved, EPA may move to have this Decree terminated and the action dismissed. Plaintiffs shall have fourteen (14) days in which to respond to such motion, unless the parties stipulate to a longer time for Plaintiffs to respond.
5. The deadline established by this Consent Decree may be extended (a) by written stipulation of Plaintiffs and EPA with notice to the Court, or (b) by the Court upon motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure and upon consideration of any response by Plaintiffs and any reply by EPA.
6. If a lapse in appropriations for EPA occurs within one hundred and twenty (120) days prior to the deadlines in Paragraphs 1, 2, or 3 of this Consent Decree, that deadline shall be

extended automatically one day for each day of the lapse in appropriations. Nothing in this paragraph shall preclude EPA from seeking an additional extension pursuant to Paragraph 5.

7. Plaintiffs and EPA agree that this Consent Decree shall constitute a complete and final settlement of all claims Plaintiffs assert against the United States, including EPA, under any provision of law in connection with *State of New York, et al. v. McCarthy, et al.*, No. 16 Civ. 7827 (S.D.N.Y.). Plaintiffs therefore discharge and covenant not to sue the United States, including EPA, for any such claims.

8. 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. These parties shall meet and confer in order to attempt to resolve the dispute. If these parties are unable to resolve the dispute within ten (10) business days after receipt of the notice, either party may petition the Court to resolve the dispute.

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

10. Upon entry of the Consent Decree, EPA agrees that Plaintiffs are entitled to recover costs of litigation (including reasonable attorney fees) (“litigation costs”) incurred in this matter pursuant to 42 U.S.C. § 7604(d). The deadline for filing a motion for litigation costs is hereby extended until 120 days after entry of this Consent Decree by the Court. During this time, Plaintiffs and EPA shall seek to resolve informally any claim for litigation costs, and if

they cannot reach a resolution, Plaintiffs may seek such litigation costs from the Court. The Court shall retain jurisdiction to resolve any request for litigation costs.

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 attorney fees.

12. Nothing in the terms of this Consent Decree shall be construed (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 CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), including final action taken pursuant to section 176A(a) of the CAA, 42 U.S.C. § 7506a(a), approving or disapproving a petition; or (b) to waive any claims, remedies, or defenses that the parties may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

13. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions that 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 nor to 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. Plaintiffs reserve the right to seek additional costs of litigation, including reasonable attorney fees, incurred subsequent to entry of this Consent Decree. EPA reserves the

right to oppose any such request for additional costs of litigation, including reasonable attorney fees.

16. 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.

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

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

For Plaintiffs:

Morgan A. Costello  
Assistant Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
Tel.: (518) 776-2392  
E-mail: morgan.costello@ag.ny.gov

For EPA:

Samuel Dolinger  
Assistant United States Attorney  
86 Chambers Street, 3rd Floor  
New York, New York 10007  
Tel.: (212) 637-2677  
E-mail: samuel.dolinger@usdoj.gov

19. EPA 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. 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.

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

SO ORDERED: on this 19<sup>th</sup> day of January, 2017.



---

HON. KATHERINE POLK FAILLA  
UNITED STATES DISTRICT JUDGE

COUNSEL FOR THE STATE OF  
NEW YORK:

ERIC T. SCHNEIDERMAN  
Attorney General of New York

By:

*Morgan Costello*

MORGAN A. COSTELLO  
Assistant Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224  
Tel.: (518) 776-2392  
morgan.costello@ag.ny.gov

COUNSEL FOR THE STATE OF  
CONNECTICUT:

GEORGE JEPSEN  
Attorney General of Connecticut

By:

*MATTHEW I. LEVINE*

MATTHEW I. LEVINE  
JILL LACEDONIA  
Assistant Attorneys General  
Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120  
Tel.: (860) 808-5250  
Matthew.Levine@ct.gov

COUNSEL FOR THE  
COMMONWEALTH OF  
MASSACHUSETTS:

MAURA HEALEY  
Attorney General of Massachusetts

By:

*CAROLIANA*

CAROL IANCU  
Assistant Attorney General  
Environmental Protection Division  
One Ashburton Place, 18th Floor  
Boston, Massachusetts 02108  
Tel.: (617) 963-2428  
Carol.iancu@state.ma.us

COUNSEL FOR THE STATE OF  
NEW YORK:

ERIC T. SCHNEIDERMAN  
Attorney General of New York

By:

MORGAN A. COSTELLO  
Assistant Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224  
Tel.: (518) 776-2392  
morgan.costello@ag.ny.gov

COUNSEL FOR THE STATE OF  
CONNECTICUT:

GEORGE JEPSEN  
Attorney General of Connecticut

By:

MATTHEW I. LEVINE  
JILL LACEDONIA  
Assistant Attorneys General  
Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120  
Tel.: (860) 808-5250  
Matthew.Levine@ct.gov

COUNSEL FOR THE  
COMMONWEALTH OF  
MASSACHUSETTS:

MAURA HEALEY  
Attorney General of Massachusetts

By:

CAROLIANCU  
CAROL IANCU  
Assistant Attorney General  
Environmental Protection Division  
One Ashburton Place, 18th Floor  
Boston, Massachusetts 02108  
Tel.: (617) 963-2428  
Carol.iancu@state.ma.us

COUNSEL FOR THE STATE OF  
NEW HAMPSHIRE:

JOSEPH A. FOSTER  
Attorney General of New Hampshire

By:

K. Allen Brooks  
K. ALLEN BROOKS  
Senior Assistant Attorney General  
Chief, Environmental Bureau  
33 Capitol Street  
Concord, New Hampshire 03301  
Tel.: (603) 271-3679  
Allen.brooks@doj.nh.gov

COUNSEL FOR THE STATE OF  
RHODE ISLAND:

PETER F. KILMARTIN  
Attorney General of Rhode Island

By:

Gregory S. Schultz  
GREGORY S. SCHULTZ  
Special Assistant Attorney General  
Rhode Island Department of Attorney General  
150 South Main Street  
Providence, Rhode Island 02903  
Tel.: (401) 274-4400  
gSchultz@riag.ri.gov

COUNSEL FOR THE STATE OF  
VERMONT:

WILLIAM H. SORRELL  
Attorney General of Vermont

By:

Jill Abrams  
JILL ABRAMS  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, Vermont 05609  
Tel.: (802) 828-1106  
Jill.abrams@vermont.gov

COUNSEL FOR THE STATE OF  
NEW HAMPSHIRE:

JOSEPH A. FOSTER  
Attorney General of New Hampshire

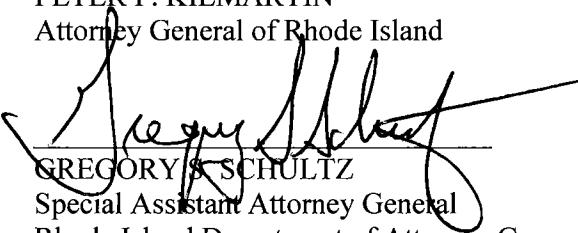
By:

K. ALLEN BROOKS  
Senior Assistant Attorney General  
Chief, Environmental Bureau  
33 Capitol Street  
Concord, New Hampshire 03301  
Tel.: (603) 271-3679  
Allen.brooks@doj.nh.gov

COUNSEL FOR THE STATE OF  
RHODE ISLAND:

PETER F. KILMARTIN  
Attorney General of Rhode Island

By:

  
GREGORY S. SCHULTZ  
Special Assistant Attorney General  
Rhode Island Department of Attorney General  
150 South Main Street  
Providence, Rhode Island 02903  
Tel.: (401) 274-4400  
gSchultz@riag.ri.gov

COUNSEL FOR THE STATE OF  
VERMONT:

WILLIAM H. SORRELL  
Attorney General of Vermont

By:

JILL ABRAMS  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, Vermont 05609  
Tel.: (802) 828-1106  
Jill.abrams@vermont.gov

COUNSEL FOR THE STATE OF  
NEW HAMPSHIRE:

JOSEPH A. FOSTER  
Attorney General of New Hampshire

By:

K. ALLEN BROOKS  
Senior Assistant Attorney General  
Chief, Environmental Bureau  
33 Capitol Street  
Concord, New Hampshire 03301  
Tel.: (603) 271-3679  
Allen.brooks@doj.nh.gov

COUNSEL FOR THE STATE OF  
RHODE ISLAND:

PETER F. KILMARTIN  
Attorney General of Rhode Island

By:

GREGORY S. SCHULTZ  
Special Assistant Attorney General  
Rhode Island Department of Attorney General  
150 South Main Street  
Providence, Rhode Island 02903  
Tel.: (401) 274-4400  
gSchultz@riag.ri.gov

COUNSEL FOR THE STATE OF  
VERMONT:

WILLIAM H. SORRELL  
Attorney General of Vermont

By:

Jill Abrams  
JILL ABRAMS  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, Vermont 05609  
Tel.: (802) 828-1106  
Jill.abrams@vermont.gov

COUNSEL FOR DEFENDANTS:

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

By:

  
SAMUEL DOLINGER  
Assistant United States Attorney  
86 Chambers Street, 3rd Floor  
New York, New York 10007  
Tel.: (212) 637-2677  
samuel.dolinger@usdoj.gov