

Exhibit 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-0001-CJA-MEH
(Consolidated with 11-cv-00743-CMA-MEH)

WILDEARTH GUARDIANS,

Plaintiffs,

v.

LISA JACKSON, in her official capacity as
Administrator, United States Environmental
Protection Agency,

Defendant.

DEFENDANT'S UNOPPOSED MOTION
TO MODIFY TWO DEADLINES IN CONSENT DECREE

INTRODUCTION

Defendant Lisa Jackson, in her official capacity as EPA Administrator, moves to modify two deadlines in the Consent Decree entered by this Court on September 27, 2011 (Dkt. No. 67). These deadlines govern proposed and final action for compliance with regional haze implementation plan requirements under the Clean Air Act for the State of Wyoming. EPA seeks to modify the Consent Decree to allow it to re-propose, on or before March 29, 2012, a rule to govern compliance with regional haze implementation plan requirements under the Clean Air Act for the State of Wyoming. EPA further seeks to extend the deadline, from December 14, 2012 to September 27, 2013, for taking final action on this rule.

EPA conferred with Ashley Wilmes, counsel for Plaintiff WildEarth Guardians, and Reed Zars, counsel for National Parks Conservation Association (“NPCA”), regarding this modification of the Consent Decree on several occasions between November 21 and December 6, 2012. These Plaintiffs do not oppose the modification of the consent decree described in this motion.¹

BACKGROUND

In their complaints, Plaintiffs WildEarth Guardians and NPCA allege that EPA failed to undertake nondiscretionary duties under the Clean Air Act, 42 U.S.C. § 7410(c) and (k), to either approve or disapprove state implementation plans (SIPs) or to promulgate federal implementation plans (FIPs) by deadlines set forth in the Act. The alleged duties primarily concern compliance with regional haze implementation plan requirements under the Clean Air Act for the states of Colorado, Montana, North Dakota and Wyoming that were due by December 17, 2007, under EPA’s regional haze regulations. See Dkt. No. 21, ¶¶ 48-93.

The Consent Decree established dates during 2011 and 2012 by which EPA shall sign notices of proposed rulemaking and final rulemaking that address SIPs, FIPs, or partial SIPs and partial FIPs to meet regional haze implementation plan requirements in these States. EPA completed its rulemaking obligations with respect to North Dakota, Colorado and Montana. It proposed rulemaking to address regional haze implementation plan requirements for the Wyoming on May 15, 2012. It provided notice in the Federal Register and solicited public comment on the proposed rule.

¹ Plaintiff Environmental Defense Fund did not assert a claim regarding Wyoming regional haze requirements and, therefore, the Consent Decree did not require that EPA consult with the Environmental Defense Fund regarding the extensions sought in this motion. See Decree ¶ 12.

Paragraph 7 of the Consent Decree, as originally entered by the Court, required EPA to sign, by October 15, 2012, a notice of final action to address regional haze implementation plan requirements for Wyoming.

EPA, WildEarth Guardians and NPCA stipulated to extend the deadline in Paragraph 7 of the Consent Decree for final action on rulemaking to meet the regional haze implementation plan for Wyoming. See Dkt No. 69. The stipulated extension bifurcated the final action. These parties agreed to extend the deadline, from October 15, 2012, to November 14, 2012, for final action under the regional haze requirements of 40 C.F.R. § 51.309, other than action required under 40 C.F.R. § 51.309(g). The parties further agreed to extend the deadline in Paragraph 7, from October 15, 2012, to December 14, 2012, for final action under the requirements of 40 C.F.R. § 51.309(g).

EPA took final action on November 14, 2012, under the regional haze requirements of 40 C.F.R. 51.309, other than action required under 40 C.F.R. § 51.309(g). For the reasons explained below, EPA seeks to extend the deadlines associated with issuance of a final regional haze plan for Wyoming under the requirements of 40 C.F.R. § 51.309(g). It seeks this extension in order to re-propose a rulemaking to address and allow public comment on new information developed since the prior comment period on the proposed rule.

ARGUMENT

The Court should modify the deadlines in the consent decree associated with rulemaking to address Wyoming regional haze requirements under 40 C.F.R. § 51.309(g) because of the public comments EPA received and new information gathered by EPA necessitates the re-proposal of the rule.

In response to EPA's solicitation of public comments on its proposed rule, a number of commenters challenged some of the cost and visibility information provided by owners of power plants on which EPA based its proposed action. These comments prompted EPA to undertake additional research in order to evaluate the commenters' contentions. EPA developed substantial new cost and visibility analyses for several of the units subject to emission controls under the regional haze requirements. EPA is still considering this new information.

EPA believes that this new information is significant and the public, including the State of Wyoming and the owners of power plants subject to regional haze requirements, should have the opportunity to comment on the new information. The current deadline of December 14, 2012, for final action does not allow time for EPA to fully consider the new information or allow for public review and comment on the new analyses before final action. Given these circumstances, EPA desires to re-notice the Wyoming regional haze plan addressing the 40 C.F.R. § 51.309(g) requirements. It plans to do so in accordance with new deadlines of March 29, 2013, for signature on proposed action and September 27, 2013, for signature on final action.

WildEarth Guardians and the NPCA do not oppose the deadline modifications sought by EPA. However, because the extensions will postpone final action by almost one year, and thereby potentially delay installation of controls by one year, these Plaintiffs and EPA agreed, that in preparing the re-proposal EPA will consider appropriate compliance dates for the installation of any selected emission controls. Therefore, these parties agreed that the consent decree modification would include language that EPA, in developing its proposal, will propose to "determine, for each

source subject to BART, the period of time for BART compliance that is as expeditious as practicable, as required by 42 U.S.C. § 7491."

In order to enable EPA to re-propose the rule, solicit and review public comments and promulgate a final rule, EPA seeks to modify two paragraphs in the consent decree. EPA seeks to modify Paragraph 6 of the Consent Decree as follows:

By March 29, 2013, EPA shall sign a notice of re-proposed rulemaking in which it proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP, or approval of a SIP or promulgation of a FIP in the alternative, for the State of Wyoming, to meet the regional haze implementation plan requirements that were due by December 17, 2007, under 40 C.F.R. § 51.309(g). In its re-proposal, EPA will propose to determine, for each source subject to BART, the period of time for BART compliance that is as expeditious as practicable, as required by 42 U.S.C. § 7491.

EPA seeks to modify Paragraph 7 of the Consent Decree as follows:

EPA shall by September 27, 2013, sign a notice of final rulemaking promulgating a FIP for the State of Wyoming, to meet the regional haze implementation plan requirements that were due by December 17, 2007, under the requirements of 40 C.F.R. § 51.309(g), unless, by September 27, 2013, EPA has signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and partial unconditional approval of a SIP, for the State of Wyoming that meets the regional haze implementation plan requirements that were due by December 17, 2007, under the requirements of 40 C.F.R. § 51.309(g).

CONCLUSION

For the reasons set forth above, the Court should order that Paragraphs 6 and 7 of the Consent Decree be modified as described in this motion.

Dated: December 10, 2012

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

s/ Alan D. Greenberg

ALAN D. GREENBERG
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
(303) 844-1366
alan.greenberg@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2012, I electronically filed the foregoing Defendant's Motion to Modify Two Deadlines in Consent Decree with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

Ashley Wilmes
awilmes@wildearthguardians.org

Jay Tutchton
jtutchton@wildearthguardinas.org

Pam Campos
pcampos@edf.org

Reed Zars
rzars@lariat.org

Paul M. Seby
paul.seby@moyewhite.com

s/ Alan D. Greenberg
