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19 GREENPEACE, INC. and
20 PORT TOWNSEND AIRWATCHERS

21 [Counsel for Defendants listed on page 2]

22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA
24 OAKLAND DIVISION

25 CENTER FOR BIOLOGICAL DIVERSITY,) Case No.: C-11-06059 YGR
26 GREENPEACE, INC., and PORT)
27 TOWNSEND AIRWATCHERS,)

28 Plaintiffs,)

v.)

29 UNITED STATES ENVIRONMENTAL)
30 PROTECTION AGENCY and LISA P.)
31 JACKSON, Administrator, United States)
32 Environmental Protection Agency,)

33 Defendants.)

[PROPOSED] CONSENT DECREE

1 IGNACIA S. MORENO
Assistant Attorney General
2 Environment & Natural Resources Division
3 NORMAN L. RAVE, JR. (D.C. 431602)
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9 Attorneys for Defendants

10
11 **CONSENT DECREE**

12 WHEREAS, Plaintiffs Center for Biological Diversity, Greenpeace, Inc., and Port
13 Townsend Airwatchers (collectively, "Plaintiffs") filed their Complaint on December 6,
14 2011, against Defendants the United States Environmental Protection Agency and EPA
15 Administrator Lisa Jackson (collectively "EPA"), pursuant to section 304(a)(2) of the Clean Air
16 Act ("CAA"), 42 U.S.C. § 7604(a)(2), to compel EPA to review the existing New Source
17 Performance Standards governing kraft pulp mills ("kraft pulp NSPS") under Clean Air Act
18 ("the Act") Section 111, 42 U.S.C. § 7411;

19
20 WHEREAS, EPA last issued kraft pulp NSPS, set forth in 40 C.F.R. Part 60, Subpart
21 BB ("NSPS"), in 1978;

22
23 WHEREAS, plaintiffs allege that EPA has failed to perform a non-discretionary
24 duty to review, and if appropriate revise, the NSPS for kraft pulp mills at least every 8
25 years pursuant to 42 U.S.C. § 7411 (b)(1)(B);

26
27 WHEREAS, EPA will be providing Plaintiffs with status reports every 90 days to inform
28 Plaintiffs whether the Agency continues to make reasonable progress towards meeting the

1 deadlines provided in this consent decree, or if it anticipates any difficulties in meeting those
2 dates, in which case the EPA will provide an explanation of the difficulty or difficulties;

3 WHEREAS, Plaintiffs and EPA (collectively "the Parties") wish to effectuate a
4 settlement of the above-captioned matter without expensive and protracted litigation;
5

6 WHEREAS, the Parties consider this Decree to be an adequate and equitable resolution
7 of the claims in the above-captioned matter; and

8 WHEREAS, the Court, by entering this Decree, finds that the Decree represents a fair,
9 equitable, and adequate resolution of the claims resolved herein; NOW THEREFORE, it is
10 hereby ORDERED, ADJUDGED AND DECREED as follows:
11

12 1. This Court has jurisdiction over the claims set forth in the Complaint, and to order
13 the relief contained in this Decree, pursuant to section 304 of the Act, 42 U.S.C. § 7604. Venue
14 is proper in the United States District Court for the Northern District of California pursuant to
15 section 304 of the Act, 42 § U.S.C. 7604, and 28 U.S.C. § 1391(e).

16 2. For the kraft pulp mills source category:

17 a. No later than May 15, 2013, EPA shall: (i) review the kraft pulp NSPS and sign
18 for publication one or a combination of the following: (A) a proposed rule
19 containing revisions to the kraft pulp NSPS, 40 C.F.R. Part 60, Subpart BB
20 ("NSPS Subpart BB"), under section 111(b)(1)(B) of the Act, 42 U.S.C. §
21 7411(b)(1)(B); or (B) a proposed determination under section 111(b)(1)(B) not to
22 revise NSPS Subpart BB; or (ii) sign for publication a determination that "review
23 is not appropriate in light of readily available information on the efficacy of [the]
24 standard," i.e., NSPS Subpart BB.
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1 b. If EPA signs a proposed rule or a proposed determination pursuant to paragraph
2 2.a(i) above, then no later than March 14, 2014, EPA shall sign one or a
3 combination of the following: (i) a final rule containing revisions to NSPS
4 Subpart BB under section 111(b)(1)(B) of the Act, 42 U.S.C. § 7411(b)(1)(B); or
5 (ii) a final determination under section 111(b)(1)(B) not to revise Subpart BB.
6

7 c. The Parties do not agree on the legal question of whether notice and comment is
8 required in the event that EPA takes action only pursuant to paragraph 2.a(ii). In
9 view of this, the Parties agree that nothing in this Consent Decree precludes
10 Plaintiffs from challenging any such action on the basis that notice and comment
11 was not provided, or on any other grounds, or as stated generally in Paragraph 9;
12 and nothing prevents EPA from raising any defenses in response to such a
13 challenge.
14

15 3. Within 10 business days of signing any of the documents described in Paragraph
16 2, the appropriate EPA official shall forward it or them to the Office of the Federal Register for
17 publication. EPA shall request in writing that the Office of Federal Register take all necessary
18 steps to publish the notice expeditiously.
19

20 4. Within five (5) business days after forwarding the materials described in
21 Paragraph 2 to the Federal Register, EPA shall send copies of such materials to Plaintiffs.
22

23 5. The deadlines set forth in Paragraphs 2 and 3 hereof may be modified only by:
24 (a) written stipulation of the Parties with notice to the Court; or (b) the Court following motion
25 of any party to this Decree, pursuant to the Federal Rules of Civil Procedure, and upon
26 consideration of any response by the non-moving party.
27

28 6. Pursuant to section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), Plaintiffs

1 are eligible and entitled to recover their costs of litigation in this action, including reasonable
2 attorney's fees. The deadline for filing a bill of costs pursuant to Local Rule 54-1 and a motion
3 for costs of litigation, including reasonable attorney's fees pursuant to Local Rule 54-5, is
4 extended until 90 days after the date on which the Court enters this Consent Decree. EPA
5 reserves the right to object to the reasonableness of any such fees and costs.
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7 7. The Parties shall not challenge the terms of this Decree or this Court's jurisdiction
8 to enter and enforce this Decree. Upon entry, no party shall challenge the terms of this Decree.
9

10 8. Except as provided herein, nothing in this Decree shall be construed to limit or
11 modify any discretion accorded to EPA by the CAA or by general principles of administrative
12 law in taking the actions that are the subject of this Decree.

13 9. Nothing in this Decree shall be construed to confer upon this Court jurisdiction to
14 review any issues that are within the exclusive jurisdiction of the United States Courts of
15 Appeals pursuant to CAA Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of
16 this Decree shall be construed to waive, limit or modify any remedies, rights to seek judicial
17 review, or defenses the Parties may have under CAA Section 307(b)(1), 42 U.S.C. § 7607(b)(1).
18

19 10. The obligations imposed on EPA under this Decree can only be undertaken using
20 appropriated funds. No provision of this Decree shall be interpreted as or constitute a
21 commitment or requirement that EPA obligate or pay funds in contravention of the Anti-
22 Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.
23

24 11. Any notices required or provided for by this Decree shall be made in writing, via
25 email or other means, and sent to the following:
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28

1 For Plaintiff Center for Biological Diversity:

2 Vera P. Pardee
3 Center for Biological Diversity
4 351 California Street, Suite 600
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9 For Plaintiffs Greenpeace, Inc, and Port Townsend Airwatchers:

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19 GREENPEACE, INC. and
20 PORT TOWNSEND AIRWATCHERS

21 For EPA :

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31 Office of General Counsel
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1 12. In the event of a dispute between the Parties concerning the interpretation or
2 implementation of any aspect of this Decree, the disputing party shall provide the other party
3 with a written notice outlining the nature of the dispute and requesting informal negotiations.
4 The parties shall meet and confer to attempt to resolve the dispute. If the Parties cannot reach an
5 agreed-upon resolution within ten (10) business days after receipt of the notice, any party may
6 move the Court to resolve the dispute.
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8 13. No motion or other proceeding seeking to enforce this Consent Decree or for
9 contempt of court shall be filed unless the procedure set forth in Paragraph 12 has been followed.
10

11 14. The Parties agree and acknowledge that, before this Decree can be finalized and
12 entered by the Court, EPA must provide notice of this Decree in the Federal Register and an
13 opportunity for public comment pursuant to the Clean Air Act, 42 U.S.C. § 7413(g). EPA will
14 prepare such notice and forward it to the Office of Federal Register no later than ten (10)
15 business days after the parties have signed this Consent Decree and request in writing that the
16 Office of Federal Register take all necessary steps to publish the notice expeditiously. After this
17 Decree has undergone notice and comment, EPA and/or the Attorney General, as appropriate,
18 shall promptly consider any such written comments in determining whether to withdraw or
19 withhold their consent to the Decree. In accordance with 42 U.S.C. § 7413(g), EPA may
20 withdraw or withhold its consent to the decree if the comments disclose facts or considerations
21 which indicate such consent is inappropriate, improper, inadequate, or inconsistent with the
22 requirements of the Clean Air Act. Once EPA and/or the Attorney General elect whether or not
23 to withdraw or withhold their consent to this Decree, EPA shall provide written notice of that
24 election to Plaintiffs as expeditiously as possible. If EPA and/or the Attorney General do not
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1 elect to withdraw or withhold their consent, EPA shall promptly file a motion that requests that
2 the Court enter this Decree.

3 15. The Court shall retain jurisdiction to determine and effectuate compliance with
4 this Decree. When EPA's obligations under Paragraph 2 and 3 have been completed, and the
5 Plaintiffs' claims for costs of litigation have been resolved pursuant to the process described in
6 Paragraph 6, the above-captioned matter shall be dismissed with prejudice. EPA shall file the
7 appropriate notice with the Court so that the Clerk may close the file.
8

9 16. The Parties treat this Consent Decree as jointly drafted, and any rules of
10 construction that construe any ambiguities in this document against the drafting party shall be
11 inapplicable in any dispute concerning the interpretation of this Consent Decree.
12

13 17. The undersigned representatives of each party certify that they are fully
14 authorized by the party or parties they represent to bind that Party to the terms of this Decree.
15

16 The Parties' Joint Motion to Enter Consent Decree is **GRANTED**.

17 This Order Terminates Docket Number 42.

18 **IT IS SO ORDERED.**

19 Dated: January 2, 2013


YVONNE GONZALEZ ROGERS

20 **UNITED STATES DISTRICT COURT JUDGE**
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1 FOR PLAINTIFFS:

2 Dated: August 27, 2012

CENTER FOR BIOLOGICAL DIVERSITY

3 /s/Vera Pardee

4 Vera Pardee
5 Attorneys for Plaintiffs
6 Center for Biological Diversity

7 Dated: August 27, 2012

ENVIRONMENTAL LAW AND JUSTICE
8 CLINIC

9
10 /s/ Helen H. Kang

11 Helen H. Kang
12 Attorneys for Plaintiffs
13 Greenpeace, Inc. and Port Townsend
14 Airwatchers

15 FOR DEFENDANTS:

16 Dated: August 27, 2012

IGNACIA S. MORENO

18 Assistant Attorney General
19 Environmental & Natural Resources Division

20 /s/Norman L. Rave, Jr.

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