UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, Plaintiff, v. STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency, Defendant.	Case No. 1:03CV02411 (GK)
LOUISIANA ENVIRONMENTAL ACTION NETWORK, Plaintiff, v. STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency, Defendant.	Case No. 1:04CV00484 (GK)

EPA'S REPLY MEMORANDUM IN SUPPORT OF
EPA'S MOTION TO TERMINATE CONSENT DECREE

In opposing EPA's Motion to Terminate Consent Decree, Plaintiffs Sierra Club and Louisiana Environmental Action Network claim that the Court should merely hold this case in abeyance so that – if it is necessary at some future date – Plaintiffs can return to this Court to enforce the provisions of the Consent Decree. This argument rests on the erroneous assumption that, if the D.C. Circuit takes certain actions in separate cases, Plaintiffs would be entitled to return to this Court for further relief under the Consent Decree. However, even if the D.C. Circuit acts as Plaintiffs predict, Plaintiffs could secure no further relief in this case because each

of the obligations of the Consent Decree has been met.

Plantiffs do not dispute that EPA has promulgated each of the rules it was required to promulgate under the Consent Decree, but they speculate that the D.C. Circuit may vacate two of those rules. In their view, this would constitute a "restoration of the non-discretionary duties at issue in the present case." Plaintiffs' Opp. and Cross-Mot. at 3-4 (Aug. 7, 2007). However, the issue of whether EPA has a non-discretionary duty to take certain actions has already been settled in this case by entry of the Consent Decree. Plaintiffs have also already won the relief required under the Consent Decree, because EPA has done what the Consent Decree requires.

Plaintiffs attempt to distinguish *EDF v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983), on the grounds that they do not ask this Court to pass judgment on the validity of the rules that EPA has promulgated. This is not a meaningful distinction. In *EDF*, the D.C. Circuit distinguished between the following questions: first, whether EPA had promulgated regulations in accordance with the Court's order, and second, whether EPA's action to suspend those regulations was valid. Plaintiffs here point to the D.C. Circuit's holding that the validity of EPA's action in suspending the regulation was a question for the court of appeals. *EDF*, 713 F.2d at 813. However, before reaching that question, the D.C. Circuit also held that EPA's promulgation of the regulation fulfilled the statutory duty (and EPA's obligation under the District Court order), regardless of the fact that EPA then suspended the regulation. *See id.* at 812 ("the court properly determined that the act it commanded had been performed"). The D.C. Circuit also found, quoting the District Court, that "the Court directed the Agency to promulgate regulations, and the agency has done so." *Id.* *EDF* names only one circumstance in which promulgation of the regulations could be considered not to fulfill the statutory duty, and that is the agency's bad faith, an issue that is

not present here. *See id.*

The interpretation that promulgation fulfills a non-discretionary duty, regardless of what happens after promulgation, is borne out in subsequent cases. In *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002), the District Court imposed a deadline on EPA to make a determination required by the Clean Air Act. EPA met the deadline, but at the same time that it made the determination, it proposed a rule to stay the effective date of its determination. The plaintiffs in *Whitman* challenged the stay in the Court of Appeals, and also sought to enforce the original deadline in the District Court. The District Court held, and the D.C. Circuit agreed, that promulgation of the rule satisfied EPA's obligation regardless of the stay of effectiveness. *Id.* at 68. The Court noted: "The objection is that once having complied, EPA undid what the order required and thereby violated it. To accept this contention would require us to read the court's order as restricting more than the court itself intended." *Id. See also Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1164 (D.C. Cir. 1984) (holding that agency met the requirements of a court order by publishing a rule, even though the agency rescinded that rule by subsequent administrative action before it took effect).

In a recent unpublished decision involving the parties to this case, the District Court had granted a preliminary injunction requiring EPA to act on several state submissions under the Clean Air Act, and publish Federal Register notices of that action, by a particular deadline. *See Sierra Club v. Whitman*, No. 02-2235, slip op. (D.D.C. August 24, 2004) (attached hereto as Exhibit 2). EPA approved the state submissions, but that one of those approval actions was subsequently invalidated by the D.C. Circuit. Sierra Club then moved to enforce the preliminary injunction that the District Court's had originally issued. Judge Robertson rejected that request,

and ruled that the publication of the Federal Register notices satisfied the terms of the injunction.

In each of these cases, EPA fulfilled a non-discretionary duty to act, even though that action did not take legal effect because of some intervening factor. These situations are not materially different from the possible vacatur of EPA's regulations that Plaintiffs posit may occur here. Even if the D.C. Circuit were to restore the *legal* status quo by vacating certain rules, that would not affect the *factual* question of whether, by the dates specified in the Consent Decree, EPA had taken the required actions and forwarded notice of those actions to the Federal Register. Vacatur would remove the legal effect of EPA's regulations, but it would not mean that, as a factual matter, they had never been promulgated at all. *See Sierra Club v. Whitman*, slip op. (noting that the D.C. Circuit invalidated the substance of EPA's decision, but not the act of making the decision). If Plaintiffs sought to return to this Court and seek enforcement of the Consent Decree, therefore, the Court would have no choice but to conclude that EPA had complied with each of its terms. Because there is no possibility for further relief for Plaintiffs in this case under the Consent Decree, Plaintiffs' argument in favor of abeyance must be rejected.

For the foregoing reasons, EPA moves that the Consent Decree in this litigation be terminated and that the Court bring its jurisdiction over this matter to a close.

Respectfully submitted,

DAVID GUNTER
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, DC 20026
(202) 514-3785
Counsel for Defendant Stephen L. Johnson

Dated: August 10, 2007

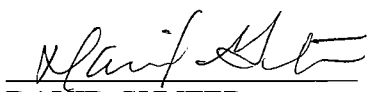
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, Plaintiff, v. STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency, Defendant.	Case No. 1:03CV02411 (GK)
LOUISIANA ENVIRONMENTAL ACTION NETWORK, Plaintiff, v. STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency, Defendant.	Case No. 1:04CV00484 (GK)

CERTIFICATE OF SERVICE

On August 10, 2007, I am filing EPA's Reply In Support of EPA's Motion to Terminate Consent Decree in the above-captioned case using the Court's electronic filing system. I certify that the following counsel are registered to receive electronic service in this case and that EPA's Motion to Terminate Consent Decree will be served on them in that manner upon filing.

Adam Babich	ababich@law.tulane.edu
James S. Pew	jpew@earthjustice.org



DAVID GUNTER