

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon nonprofit
corporation,

Plaintiff,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY** and **MICHAEL
S. REGAN**, in his official capacity as
Administrator of the United States
Environmental Protection Agency,

Defendants.

Case No. 3:15-cv-01151-HZ

SECOND UNOPPOSED MOTION TO
MODIFY CONSENT DECREE

Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the United States Environmental Protection Agency,¹ (collectively, “EPA”) hereby move the Court, pursuant to Federal Rule of Civil Procedure 60(b), for an order modifying the Consent Decree, ECF No. 20, entered by this Court on June 7, 2016, and modified by this Court on June 15, 2018, ECF No. 23, to extend the deadlines regarding the human health arsenic criteria set forth in Paragraphs 5 and 6 of the Consent Decree. In support of its Motion, EPA avers as follows:

1. Prior to filing this Motion, EPA conferred with Plaintiff Northwest Environmental Advocates (“NWEA”). Based on those communications and the representations EPA proffers

¹ Administrator Regan is substituted for Scott Pruitt pursuant to Fed R. Civ. P. 25(d).

herein, and without waiving any of its rights under the Consent Decree, NWEA does not oppose the relief requested in this Motion.

2. In June 2018, EPA moved this Court to modify the Consent Decree and the Court granted that request.

3. Paragraph 5 of the Consent Decree as amended in 2018 provides:

If EPA's action is to disapprove Idaho's 2010 [human health arsenic criteria] submission, and Idaho does not adopt replacement criteria that EPA approves by November 15, 2022, EPA shall sign for publication in the Federal Register a proposed regulation setting forth new human health arsenic criteria for Idaho by November 15, 2022.

4. Paragraph 6 of the Consent Decree as amended in 2018 provides:

If EPA signs proposed new arsenic criteria for Idaho by November 15, 2022, and Idaho does not adopt replacement criteria that EPA approves by November 15, 2023, EPA will sign a notice of final rulemaking action on EPA's proposed arsenic criteria for Idaho by November 15, 2023.

5. On March 2, 2022, the Idaho Department of Environmental Quality ("IDEQ") published its proposed arsenic human health criteria ("Criteria") for public review; the comment period ended on April 1, 2022.²

6. Under the Idaho Administrative Procedure Act, a pending rule package must be presented to Idaho's Board of Environmental Quality ("IBEQ") prior to adoption by the Idaho Legislature before it can go into effect. Idaho Code § 67-5224(5). On May 26, 2022, IDEQ presented its Criteria to the IBEQ and the IBEQ subsequently adopted it. If the legislature approves the Criteria, IDEQ can then submit the Criteria to EPA for Clean Water Act review.

² Information regarding the IDEQ's rulemaking is available on IDEQ's website at <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/rulemaking/water-quality-docket-no-58-0102-1801/>.

7. The 2021-22 Idaho legislative session adjourned on March 31, 2022, prior to the public comment period's closure and the presentation of the Criteria to IBEQ. Because the Idaho legislature will not act on the Criteria until the new legislative session commences in early 2023, IDEQ will not be able to submit the adopted rule to EPA until spring 2023.

8. The Consent Decree provides for modification by the Court upon a showing of good cause. *See* Consent Decree ¶ 12. Similarly, Federal Rule of Civil Procedure 60(b) authorizes courts to modify any final judgment or order in cases where “applying it prospectively is no longer equitable” or for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(5), (6).

9. As long recognized by the Supreme Court, “sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.” *System Federation No. 91, Railway Employees’ Department, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961). Where the moving party demonstrates a change of law or fact warranting modification of the consent decree, the court “should consider whether the proposed modification is suitably tailored to the changed circumstance.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

10. IDEQ’s submittal of the Criteria to the EPA for action has been delayed solely because the Idaho legislature adjourned the 2021-22 legislative session before IDEQ could submit the Criteria to the IBEQ and subsequently the legislature for approval. In light of this and IDEQ’s extensive efforts to establish Criteria based upon its own scientific analysis and the state’s needs, it would be in the public interest to modify and extend the deadlines established by Paragraphs 5 and 6 of the Consent Decree.

11. Specifically, EPA requests that this Court modify and extend the deadline for signing for publication in the Federal Register a proposed regulation setting forth new human health arsenic criteria for Idaho from November 15, 2022, to November 15, 2023. *See* Consent Decree ¶ 5; ECF No. 23. In addition, EPA requests that this Court modify and extend the deadline for signing a notice of final rulemaking action on EPA's proposed human health arsenic criteria for Idaho from November 15, 2023, to November 15, 2024. *See* Consent Decree ¶ 6; ECF No. 23.

12. Counsel for NWEA has authorized the United States to represent that NWEA does not oppose the relief sought in this Motion.

CONCLUSION

Accordingly, EPA respectfully requests that the Court enter an order modifying the Consent Decree by extending the Paragraph 5 deadlines to November 15, 2023, and the Paragraph 6 deadlines to November 15, 2024.

Respectfully submitted,

TODD KIM
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U.S. Department of Justice
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/s/ Brian S. Uholik
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Dated: June 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2022, I served the foregoing Second Unopposed Motion to Modify Consent Decree on the following counsel for Plaintiffs via ECF:

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/s/ Brian S. Uholik