

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMUNITIES FOR A BETTER ENVIRONMENT and)
OUR CHILDREN’S EARTH FOUNDATION,)
Petitioners,)
v.) No. 02-70191
U.S. ENVIRONMENTAL PROTECTION AGENCY,)
Respondent.)

SETTLEMENT AGREEMENT

WHEREAS, Communities For a Better Environment and Our Children’s Earth Foundation (hereinafter “Petitioners”) seek judicial review under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), of the final rule entitled “Clean Air Act Full Approval of 34 Operating Permits Programs in California,” 66 Fed. Reg. 63,503 (Dec. 7, 2001) (“Title V Approval Rule”), promulgated by the United States Environmental Protection Agency (“EPA”), respondent in the above mentioned case (the “Litigation”);

WHEREAS, the parties wish to effect a settlement of the Litigation without expensive and protracted litigation; and

WHEREAS, the parties agree that judicial consideration of the Litigation should be stayed pending completion of the agreements herein;

NOW THEREFORE, Petitioners and EPA hereby agree as follows:

1. If the Bay Area Air Quality Management District (“BAAQMD”) fails to accomplish any of the rulemaking activities in the following table by the dates specified, then the Regional Administrator

of EPA Region 9 shall sign a notice of proposed rulemaking that will propose the issuance of a Notice of Deficiency to BAAQMD pursuant to the terms in subparagraphs (a) - (c) of this paragraph.

	Rulemaking Activity	Deadline for BAAQMD Action
1	Publish notice of hearing regarding amendment of Major Facility Review rules pertaining to administrative permit amendments (BAAQMD Rule 2-6-201) and the portable engine exemption (BAAQMD Rule 2-6-113)	January 15, 2003
2	Staff presentation to BAAQMD Board of Directors, with opportunity for public comment, regarding amendment of Major Facility Review rules pertaining to administrative permit amendments and the portable engine exemption	March 5, 2003
3	Adopt rule revising Major Facility Rules as they pertain to administrative permit amendments and the portable engine exemption	April 5, 2003

(a) If applicable, the notice of proposed rulemaking shall inform the BAAQMD that the portable engine exemption in BAAQMD Rule 2-6-113 must be revised to be consistent with the term “stationary source” as it is defined in the Clean Air Act, 42 U.S.C. § 7602(z), and EPA’s implementing regulations, 40 C.F.R. Pt. 70.2, including the definition of “nonroad engine” at 40 C.F.R. § 89.2 . In addition, if applicable, the notice of proposed rulemaking shall inform the BAAQMD that the definition

of “administrative permit amendment” in BAAQMD Rule 2-6-201 must be revised to be consistent with the definition of “administrative permit amendment” set forth in 40 C.F.R. Pt. 70.7(d)(i) - (iv).

(b) The proposed rulemaking for the Notice of Deficiency shall be forwarded to the Office of the Federal Register no later than 30 days after the deadline specified in the table above. After considering any public comments received, the Administrator of EPA shall forward to the Office of the Federal Register a notice of final rulemaking on the Notice of Deficiency no later than 90 days after publication of the notice of proposed rulemaking.

(c) (i) If the BAAQMD misses a deadline but subsequently completes the required action before EPA forwards to the Office of the Federal Register the proposed rulemaking for the Notice of Deficiency, then EPA’s obligations under subparagraphs (a) and (b) shall be terminated with respect to that action.

(ii) If the BAAQMD misses a deadline but subsequently completes the required action after EPA forwards to the Office of the Federal Register the proposed rulemaking for the Notice of Deficiency but before EPA forwards the notice of final rulemaking on the Notice of Deficiency, then EPA’s obligation to forward the final rule to the Office of the Federal Register shall be tolled.

2. The commitments in Paragraph 1 are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law. In the event that sufficient appropriated funding is not available, the parties shall adjust the commitments in Paragraph 1 accordingly.

3. Nothing in the terms of this Settlement Agreement shall be construed to limit or modify

the discretion accorded EPA under the Clean Air Act or by general principles of administrative law.

4. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend, or revise the regulations in 40 C.F.R. Pt. 70 from time to time, or to promulgate superseding regulations.

5. Petitioners shall dismiss the Litigation without prejudice to reactivating the Litigation subject to the terms and conditions of Paragraph 6.

6. In the event that EPA does not accomplish any of the items specified in Paragraph 1, or BAAQMD does not undertake new rulemaking that pertains to statements of basis and "potential to emit" at the same time the BAAQMD revises its regulations on portable engines and administrative permit amendments, Petitioners shall have the right to reactivate the Litigation concerning the BAAQMD's rules governing administrative permit amendments, the portable engine exemption, statements of basis, or "potential to emit," as applicable, and that right shall constitute Petitioners' exclusive remedy. Petitioners shall reactivate the Litigation by giving notice to the Court within sixty (60) days of the event that triggers the reactivation.

7. The settlement embodied herein constitutes a fair, reasonable and full and complete settlement of all claims for attorney's fees and costs under any provision of law that the Petitioners have asserted or could have asserted in connection with the Litigation to date. As soon as reasonably practicable after the execution of this Agreement by the parties, the United States shall pay \$36,491 to the Environmental Law and Justice Clinic in full and complete settlement of Petitioners' claims for attorney's fees and costs in the Litigation to date. The payments shall be made by electronic wire transfer in accordance with instructions provided by Petitioners.

8. Except as expressly provided in this Settlement Agreement, none of the parties hereto waives or relinquishes any legal rights, claims, or defenses it may have.

9. Petitioners and EPA agree and acknowledge that final approval of this Settlement Agreement is subject to the requirements of section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g). That section requires that the Administrator provide notice of any proposed settlement agreement in the Federal Register and provide a period of at least thirty (30) days following publication to allow persons who are not parties or intervenors in the litigation to comment in writing. The Administrator or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to the Settlement Agreement and may withdraw or withhold her or his consent to the Settlement Agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate or inconsistent with the requirements of the Act.

10. Within fifteen (15) days of the Signature Date of this Settlement Agreement, the Regional Administrator shall forward a notice to the Federal Register requesting public comments on this Settlement Agreement pursuant to section 113(g) of the Act. Within fifteen (15) days after the close of such public comment period, and after review of any public comments, the Administrator or the Attorney General shall determine whether to consent to this Settlement Agreement.

11. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to bind the respective parties to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the parties set forth below, subject to final approvals pursuant to Paragraphs 9 and 10.

DATED: Dec. 31, 2002

//signed//

HELEN H. KANG

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ATTORNEYS FOR PETITIONERS COMMUNITIES FOR
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