

SETTLEMENT AGREEMENT

WHEREAS, Forest Guardians and Southwest Environmental Center (collectively, "Forest Guardians") filed a complaint (C.A. Number 96-0826 LH) in the District of New Mexico on June 13, 1996, against Carol M. Browner ("the Administrator") in her official capacity as Administrator of the United States Environmental Protection Agency ("EPA") pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d);

WHEREAS, Section 303(d) of the Act, 33 U.S.C. § 1313(d), and EPA's implementing regulations, 40 C.F.R. § 130.7(b)-(e), provide for: (1) identification of waters for which applicable technology-based effluent limitations and other controls are not stringent enough to implement water quality standards (the "Section 303(d) list"); (2) establishment of a priority ranking for such waters; and (3) establishment of total maximum daily loads ("TMDLs") for pollutants for which those waters are not in attainment with water quality standards;

WHEREAS, the subject of C.A. Number 96-0926 LH is EPA's alleged duty to establish TMDLs for New Mexico waters on the Section 303(d) list given the State of New Mexico's alleged failure to do so, pursuant to Section 303(d) of the Act;

WHEREAS, the State of New Mexico has lead responsibility for the establishment of TMDLs pursuant to Clean Water Act Section 303(d), 33 U.S.C. § 1313(d);

WHEREAS, EPA intends to work with the State of New Mexico in an assistance role to ensure that the State of New Mexico develops the requisite capacity and expertise to establish TMDLs;

WHEREAS, the parties have entered into a Consent Decree that sets forth EPA commitments regarding a schedule for establishment of TMDLs for certain specified water quality limited segments ("WQLSs") on the 1996 Section 303(d) list;

WHEREAS, the parties intend this Settlement Agreement to set forth terms for, among other matters, establishment of TMDLs for the WQLSs on the 1996 Section 303(d) list that are not addressed in the Consent Decree;

WHEREAS, Forest Guardians and EPA have agreed to a settlement of C.A. Number 96-0826 LH without any admission of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in the action;

WHEREAS, by entering into this Settlement Agreement, Forest Guardians and the EPA Administrator do not waive or limit any claim or defense, on any grounds, related to any final agency action taken pursuant hereto, including EPA's approval, or disapproval, of TMDLs in New Mexico, or to any agency inaction.

NOW, THEREFORE, the parties agree as follows:

GENERAL TERMS

1. The parties to this Settlement Agreement are Forest Guardians, the Southwest Environmental Center and Carol M. Browner. The parties understand that: (a) Carol Browner was sued

in her official capacity as Administrator of the United States Environmental Protection Agency; and (b) the obligations arising under this Settlement Agreement are to be performed by EPA and not by Carol Browner in her individual capacity.

2. This Settlement Agreement applies to, is binding upon, and inures to the benefit of Forest Guardians (and their successors, assigns, and designees), the Administrator and EPA.

3. For the purposes of this Settlement Agreement, the following terms shall have the meanings provided below:

A. "EPA" means the United States Environmental Protection Agency;

B. "Forest Guardians" means both Forest Guardians, and the Southwest Environmental Center;

C. "1996 Section 303(d) list" means the list of Water Quality Limited Segments identified on the Clean Water Act Section 303(d) list approved by EPA on May 1, 1996;

D. The "United States" means the United States of America, including its officers, agencies, departments and instrumentalities;

E. "Water Quality Standards" has the meaning provided at 40 C.F.R. § 130.2(d), as of the effective date of this Settlement Agreement, or as subsequently amended;

F. "Water Quality Limited Segments" has the meaning provided at 40 C.F.R. § 130.2(j), as of the effective

date of this Settlement Agreement, or as subsequently amended;

G. "Total Maximum Daily Load" has the meaning provided at 40 C.F.R. § 130.2(i), as of the effective date of this Settlement Agreement, or as subsequently amended.

ESTABLISHMENT OF TMDLS

4. The parties agree that, upon completion of the TMDLs for WQLSs identified in Attachment A to the Consent Decree, TMDLs will be developed for the remaining WQLSs on the 1996 Section 303(d) list, subject to Paragraph 5 below.

5. In carrying out the requirements of this Settlement Agreement, EPA is under no obligation to develop TMDLs for any Water Quality Limited Segments that are determined not to need TMDLs, consistent with Section 303(d) of the Clean Water Act of its implementing regulations, including 40 C.F.R. § 130.7(b)(1), as amended, or that are removed from New Mexico's 303(d) list, consistent with Section 303(d) of the Clean Water Act and its implementing regulations.

6. The parties understand that the State of New Mexico has primary responsibility for the development of TMDLs pursuant to Clean Water Act Section 303(d), 33 U.S.C. § 1313(d). However, EPA commits that by December 31, 2016, EPA will take steps necessary to ensure completion of the TMDLs for the remaining WQLSs on the 1996 Section 303(d) list consistent with Paragraph 5

above, through establishment of TMDLs or approval of New Mexico's submitted TMDLs.

7. Notwithstanding the statutory and regulatory authority referenced in Paragraph 5 above, EPA anticipates deferring until July 1, 1998, approval of the removal of any WQLSs from the 1996 Section 303(d) list that are expected to meet water quality standards through implementation of other pollution controls. After July 1, 1998, and in reviewing the 1998 Section 303(d) list, EPA Region 6 may approve the removal of any WQLSs that was on the 1996 Section 303(d) list that are expected to meet water quality standards through implementation of other pollution controls. If Forest Guardians disagrees with any such decision, then Forest Guardians may request an independent evaluation and decision from EPA Headquarters. If Forest Guardians disagrees with the decision of EPA Headquarters in response to that request, then EPA will provide Forest Guardians with status reports every 6 months, until the 2000 Section 303(d) list is approved. The status reports will describe the progress of the waters at issue with respect to attainment of water quality standards.

TERMINATION OF SETTLEMENT AGREEMENT

8. This Settlement Agreement shall terminate on the date when all of EPA's obligations under this Agreement have been fulfilled.

EFFECTIVE DATE

9. This Settlement Agreement shall become effective upon the entry of the Consent Decree by the Court. If for any reason the District Court does not enter the Consent Decree, the obligations set forth in this Agreement are null and void.

RELEASE BY FOREST GUARDIANS

10. This Settlement Agreement and the Consent Decree entered in C.A. Number 96-0826 LH shall constitute a complete and final settlement between Forest Guardians and the Administrator of all claims under the Clean Water Act and the Administrative Procedure Act which were asserted, or could have been asserted, by Forest Guardians against the United States in the complaint filed in C.A. Number 96-0826 LH.

11. Forest Guardians hereby releases, discharges, and covenants not to assert (by way of the commencement of an action, the joinder of the Administrator and/or EPA in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which it may have had, or may now or hereafter have, against the United States based upon matters which were asserted, or could have been asserted, by Forest Guardians in the complaint filed in C.A. Number 96-0826 LH, including, but not limited to, any challenge to the merits of EPA's approval of New Mexico's 1996 Section 303(d) list.

12. Plaintiffs reserve their rights to challenge the merits of EPA's actual approval, disapproval or establishment of New

Mexico's 1998 Section 303(d) list and any subsequent Section 303(d) list, or any TMDLs, under the Clean Water Act and/or the Administrative Procedure Act. EPA reserves all its defenses to such suits.

DISPUTE RESOLUTION AND REMEDY FOR NON-COMPLIANCE

13. In the event of a disagreement between the parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice, or such time thereafter as is mutually agreed. If the parties are unable to resolve the dispute within 60 days of such meeting, then Forest Guardians' sole remedy is to reactivate the litigation in C.A. Number 96-0826 LH to seek an order pursuant to the Clean Water Act to obtain the same action identified in this Settlement Agreement. EPA does not waive or limit any defense relating to such litigation. The parties agree that contempt of court is not an available remedy under this Settlement Agreement.

FORCE MAJEURE

14. The parties recognize that the performance of this Settlement Agreement is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, *et seq.* The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the timetables

contained in this Settlement Agreement. Such situations include, but are not limited to, sufficient funds not being appropriated as requested, appropriated funds not being available for expenditure, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to such circumstances, any resulting failure to meet the timetables set forth herein shall not constitute a failure to comply with the terms of this Settlement Agreement. The Parties shall meet to agree upon an appropriate extension of the deadline. EPA will provide Forest Guardians with reasonable notice in the event that EPA invokes this term of the Settlement Agreement. Any dispute regarding invocation of this provision shall be resolved in accordance with the dispute resolution provision of Paragraph 13.

MODIFICATIONS

15. If a subsequent change in law alters or relieves EPA of its obligations concerning matters addressed in this Settlement Agreement, then the Settlement Agreement shall be amended to conform to such changes. Any dispute regarding invocation of this provision shall be resolved in accordance with the dispute resolution provision of Paragraph 13.

AGENCY DISCRETION

16. Except as expressly provided herein, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Water Act or by general principles of administrative law.

17. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend, or revise from time to time any actions taken by EPA pursuant to this Agreement, or to promulgate superseding regulations.

NOTICE

18. Any notice required or made with respect to this Settlement Agreement shall be in writing and shall be effective upon receipt. For any matter relating to this Settlement Agreement, the contact persons are:

For Forest Guardians:

Steven Sugarman
1413 Second Street, Suite 1
Sante Fe, NM 87505

John Horning
Forest Guardians
1413 Second Street, Suite 1
Sante Fe, NM 87505

Kevin Bixby
Southwest Environmental Center
1494A S. Solano Drive
Las Cruces, NM 88001

For EPA:

Associate General Counsel for Water (2355)
Office of General Counsel (2355)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

and

Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, TX 75202

and

Russell M. Young
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Settlement Agreement.

REPRESENTATIVE AUTHORITY

19. Each undersigned representative of the parties to this Settlement Agreement certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Agreement, and to bind such party to this Agreement.

MUTUAL DRAFTING

20. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by Forest Guardians and EPA. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

COUNTERPARTS

21. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party had signed all other counterparts.

USE OF SETTLEMENT AGREEMENT

22. This Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of EPA, its officers, or any person affiliated with it. This Settlement Agreement shall not be admitted for any purpose in any proceeding without prior notice to EPA.

COMPLIANCE WITH OTHER LAWS

23. 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 take actions in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the Clean Water Act, or any other law or regulation, either substantive or procedural.

APPLICABLE LAW

24. This Settlement Agreement shall be governed and construed under the laws of the United States.

THIRD-PARTY BENEFICIARIES

25. Nothing in this Settlement Agreement shall be construed to make any other person or entity not executing this Agreement a third-party beneficiary to this Agreement.

The parties consent to the form and substance of the foregoing Agreement.

CAROL M. BROWNER
ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION
AGENCY

By: LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural
Resources Division

Date: 4/29/97

Wendy L. Blake
RUSSELL M. YOUNG, Attorney
WENDY L. BLAKE, Attorney
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2640
(202) 305-0851

Of Counsel:

Susmita Dubey
U.S. Environmental Protection
Agency
401 M St., S.W.
Washington, D.C. 20460
(202) 260-7699

George Malone
U.S. Environmental Protection
Agency
1445 Ross Avenue
Dallas, TX 75202
(214) 665-8030

FOREST GUARDIANS AND SOUTHWEST ENVIRONMENTAL CENTER

Date: 4/25/97


By: STEVEN C. SUGARMAN
1413 Second Street, Suite One
Santa Fe, New Mexico 87505