

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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MIDDLE DIST. OF LA.

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LOUISIANA ENVIRONMENTAL
ACTION NETWORK

CIVIL ACTION

VERSUS

NO. 00-879-A

CHRISTINE TODD WHITMAN, in her
official capacity as Administrator,
United States Environmental
Protection Agency

**RULING ON MOTION
FOR SUMMARY JUDGMENT**

This matter is before the court on a motion by plaintiff, Louisiana Environmental Action Network (LEAN) for summary judgment (doc. 10). Defendant, the United States Environmental Protection Agency (EPA), and intervenors, the Louisiana Department of Environmental Quality (LDEQ), the City of Baton Rouge / Parish of East Baton Rouge (City-Parish), Entergy Gulf States, Inc. and Entergy Gulf South, Inc. (jointly as "Entergy"), Louisiana Chemical Association (LCA), and Louisiana Mid-Continent Oil & Gas Association (LMOGA), oppose the motion. On August 29, 2001, United States Magistrate Judge Docia L. Dalby issued a report and recommendation that the motion be granted in part and denied in part (doc. 88). All parties except the EPA have filed objections.¹ The EPA agrees with the report and

¹Doc. 89, "Plaintiff's Partial Objection and Limited Request for Modification of the Recommendation of the Magistrate Judge," filed by Louisiana Environmental Action Network; doc. 91, "City of Baton

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recommendation and has filed a response to the objection filed by LEAN.² There is no need for oral argument. Jurisdiction is based upon §304(a)(2) of the Clean Air Act, 42 U.S.C. §7604(a)(2).

On February 19, 2002, oral argument was presented by all parties.

The procedural and factual background of this matter is fully outlined by the magistrate in her report. LEAN claims that the EPA has failed to discharge its duty to publish a determination that the Baton Rouge Ozone Nonattainment Area, as defined in 56 Fed. Reg. 56,694, 56,768, failed to attain the National Ambient Air Quality Standard for ozone by November 15, 1999. LEAN seeks an order requiring the EPA to publish, within 20 days of the order of the court, a determination in the Federal Register that the Baton Rouge Ozone Nonattainment Area failed to attain the ozone standard by the November 15, 1999 deadline. LEAN further seeks an order requiring the EPA to publish, within 30 days of the order of the court, notice of reclassification pursuant to 42 U.S.C. §7511(b)(2)(B).

The magistrate judge recommended that the court enter a final judgment ordering the EPA to: (1) make, no later than 45 days after the date of the court's

Rouge / Parish of East Baton Rouge Objection to Magistrate Judge's Report," filed by the City of Baton Rouge / Parish of East Baton Rouge; doc. 93, "Objection to Report and Recommendations by the Magistrate on the Motion for Summary Judgment filed by the Petitioners," filed by the Louisiana Department of Environmental Quality; doc. 96, "LCA and LMOGA's Joint Objection to Magistrate Judge's Report," filed by the Louisiana Chemical Association and the Louisiana Mid-Continent Oil & Gas Association; doc. 97, "Entergy Louisiana, Inc. and Entergy Gulf South, Inc.'s Objection to Magistrate Judge's Report," filed by Entergy Louisiana, Inc. and Entergy Gulf States, Inc.

²Doc. 103.

order, a determination pursuant to 42 U.S.C. §7511(b)(2) as to whether the Baton Rouge Ozone Nonattainment Area attained the applicable ozone standard by November 15, 1999; and (2) publish in the Federal Register no later than six working days after said determination notice of a final action reflecting both the determination and any reclassification of the area required as a result of the determination.

Objection by LEAN

LEAN objects to the following portion of the magistrate judge's report:

The Court further should deny plaintiff's request for an order restricting the effective date that the EPA might select for its action. First, the Court cannot issue what in essence would be an advisory ruling regarding an effective date decision that the EPA has not yet made. Second, the Court in any event does not have jurisdiction under Section 7604 to dictate the particulars of the EPA's action.³

LEAN argues that a determination without timely effect would subvert the intent of Congress under the Clean Air Act by disregarding timetables established for the express purpose of avoiding "gaming by the States, industry, and others." LEAN argues that the EPA should be required to issue a determination with a restricted effective date.

The EPA responds that the selection by the EPA of an effective date for its determination is part of its substance.

³Magistrate Judge's Report, doc. 88.

The statute in question, 42 U.S.C. §7604, grants the court jurisdiction to compel agency action unreasonably delayed.⁴ Given this limited authority, the court agrees with the recommendation by the magistrate judge. The court lacks the authority to issue an order restricting the effective date that the EPA selects for its action.

Objection by intervenors LDEQ, City-Parish, Entergy, LCA, and LMOGA

Intervenors object to the deadlines recommended by the magistrate judge in her report, and maintain that the court should use its equitable discretion to allow the EPA additional time to issue its determination. Intervenors argue that immediate compliance will divert resources and possibly delay the actions necessary to achieve significant improvements in air quality. Intervenors argue that, by limiting the time for EPA action to 45 days, the court is dictating that the EPA reclassify Baton Rouge to a "severe" classification, which will require Baton Rouge residents to use a more expensive reformulated gasoline and regulate small businesses which are not currently regulated.

LEAN responds that the harm inflicted by continued delay of EPA determination is prolonged exposure to unhealthy levels of ozone.

The proposal by the LDEQ to delay such an order to EPA until EPA completes action upon the State's recently filed program has practical and surface appeal. It is certainly possible that the State could achieve attainment soon, particularly if the

⁴42 U.S.C. §7604(a).

Baton Rouge area is the victim of "ozone transport" from Texas. The court is convinced, however, that the narrow range of discretion bestowed upon it does not authorize such an approach. The time for making a determination by EPA is long past.

As the magistrate judge observed, "...continued delay frustrates clear congressional directives that a determination as to attainment be made now and, if that determination is one of nonattainment, that specific mandatory measures be initiated now to reduce ozone causing emissions."⁵ The magistrate judge recommended that the court order the EPA to comply with the statutory directive within the same 45 day period ordered in the matter of **Sierra Club v. Browner**.⁶

The court agrees that continued delay frustrates the clear direction of the Congress. However, the court finds that a 90-day deadline for EPA compliance with the statutory directive is more appropriate in this matter. The **Sierra Club** case, although informative, is neither binding precedent upon this court nor did it involve the same set of circumstances as this case. The court hereby adopts the report of the magistrate judge as its ruling, with the exception that the compliance deadline is hereby set at 90 days and only prompt publication will be required.


For the foregoing reasons, the motion by plaintiff, Louisiana Environmental Action Network (LEAN) for summary judgment (doc. 10), is hereby **GRANTED IN**

⁵Magistrate Judge's Report, page 21, doc. 88.

⁶130 F.Supp.2d 78 (D.D.C. 2001).

PART and DENIED IN PART. There will be declaratory judgment in favor of plaintiff which shall order EPA to: 1) issue, no later than ninety (90) days after the date of the judgment, a determination pursuant to 42 U.S.C. §7511(b)(2) as to whether the Baton Rouge Ozone Nonattainment Area attained the applicable ozone standard by November 15, 1999; and 2) promptly after the determination publish in the Federal Register notice of a final action reflecting both the determination and any reclassification of the area required as a result of the determination.

Baton Rouge, Louisiana, February 27, 2002.


JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA