

## **SETTLEMENT AGREEMENT**

This Settlement Agreement (hereinafter referred to as the "Agreement") is made by and between Plaintiffs Blue Skies Alliance, et al., a coalition of public health and environmental organizations (hereinafter referred to as "Plaintiffs"), and the Texas Commission on Environmental Quality (hereinafter referred to as "TCEQ"). All of the parties to this litigation will be collectively referred to as the "Parties." This settlement agreement is made with respect to the following facts and recitals:

WHEREAS, disputes and differences have arisen between the Parties concerning the Dallas-Fort Worth ("DFW") state implementation plan ("SIP") and various obligations arising under the United States Clean Air Act which have led to litigation entitled Blue Skies Alliance, et al., v. Environmental Protection Agency, et al., Texas Commission on Environmental Quality, Intervenor, filed in the Northern District of the United States District Court of Texas, as action number 3:04CIV-2169-N (hereinafter referred to as "the Litigation"); and

WHEREAS, the complaint in the Litigation was filed on October 6, 2004, and an answer to that complaint was filed by Respondent EPA on or about December 4, 2004; and

WHEREAS, on December 16, 2004 the Texas Commission on Environmental Quality filed an unopposed motion to intervene in this litigation, and the court signed an agreed order approving the intervention on December 17, 2004; and

WHEREAS, a number of other parties sought and were permitted to intervene in this litigation, including the Texas counties of Collin, Tarrant, and Ellis, the City of Garland, the

BCCA Appeal Group, the Association of Electric Companies of Texas, and the Portland Cement Association; and

WHEREAS, the allegations in the complaint concern duties pertaining to the 1-hour national ambient air quality standard for ozone (“1-hour ozone standard”) and Plaintiffs allege that EPA failed to act to: 1) formally find that the DFW nonattainment 1-hour area failed to attain the 1-hour ozone standard by the November 15, 1999 deadline and thus was required to be reclassified to a “severe” area under § 182 of the federal Clean Air Act (“FCAA”) by operation of law, extending the deadline for attainment to November 15, 2005 while also imposing a series of additional SIP requirements and obligations upon TCEQ and the State of Texas; and 2) formally determine, no later than 18 months after submittal and 12 months after determining completeness, the adequacy of three SIPs submitted by TCEQ and the State of Texas in 1999 and 2000 addressing Rate of Progress (“ROP”) and a demonstration of attainment; and

WHEREAS, EPA adopted a revised national ambient air quality standard for ozone based on an 8-hour exposure period (“8-hour ozone standard”) which may require additional emissions reductions and other efforts and actions to reduce air pollution both within and outside of the DFW 8-hour nonattainment area, EPA has determined that the 1-hour ozone standard will be revoked, with no further force and effect after June 15, 2005 except as described in the 8-hour ozone standard implementation rule, and petitions for review of EPA’s action, including the revocation of the 1-hour ozone standard, have been filed in the D.C. Circuit Court of Appeals; and

WHEREAS, EPA’s schedule for the State to submit a SIP demonstrating attainment of the 8-hour ozone standard does not require the submittal of a revised SIP for the 8-hour ozone standard until June 2007; and

WHEREAS, Plaintiffs' complaint arises under and could be responded to by actions addressing the 1-hour ozone standard; however TCEQ has begun work on addressing 8-hour ozone standard issues and SIP preparation, and the Plaintiffs and TCEQ recognize the advantages of maintaining focus, effort and direction towards promptly developing, adopting and implementing a SIP revision that addresses the 8-hour ozone standard; and

WHEREAS the Plaintiffs and the EPA have negotiated a proposed consent decree ("Consent Decree"), which will finally dispose of the Plaintiffs' claims in the Litigation. A conformed copy of the Consent Decree is attached hereto as Exhibit A; and

WHEREAS, Plaintiffs and TCEQ have reached agreement on the terms of a Settlement Agreement between them that represents TCEQ's commitments to addressing air quality issues related to this action.

NOW, THEREFORE, based on the recitals described above and the mutual promises contained herein, the TCEQ and Plaintiffs agree as follows:

A. Defendant TCEQ's Actions:

1. Early Measures: The Executive Director will consider implementing control measures for the DFW 8-hour nonattainment area prior to the statutory, or any other agreed-upon earlier deadline for the submittal of an 8-hour attainment demonstration SIP, if those measures are clearly identified as being reasonably available, practically enforceable, and needed to contribute to the emissions reductions necessary to achieve timely attainment of the 8-hour ozone standard in the DFW 8-hour nonattainment area.

2. 8-hour Attainment Demonstration SIP.

a. Process for Addressing and Resolving Model Adequacy Issues.

For purposes of Section 2 of this document the terms "adequacy" and/or "adequate" when

referring to the DFW 1999 episode shall mean that the photochemical model based on the episode predicts within acceptable limits the ozone conditions at the time of the episode.

i. Episode Adequacy Decision. The TCEQ will make a good faith effort to reach a decision promptly on the adequacy of the DFW 1999 episode and to obtain EPA concurrence with its decision on the adequacy of the episode. The TCEQ met with EPA on or around February 1, 2005, and intends to continue discussions with EPA thereafter as needed to make a determination on the adequacy of the episode.

ii. Go/No Go Episode Adequacy Decision. TCEQ will report to the Parties its determination on the adequacy of the DFW 1999 episode in writing no later than 25 business days after (1) the Plaintiffs have signed the Consent Decree and (2) this agreement is signed by both the Plaintiffs and the TCEQ. In the event that the EPA fails to respond in a timely manner to reasonable requests for input from the TCEQ or to TCEQ requests for an EPA determination on the adequacy of the DFW 1999 episode and TCEQ has notified Plaintiffs of any such delays in communication, the episode adequacy determination deadline shall be extended by the number of days that it takes for EPA to respond to TCEQ's requests plus such additional days as necessary for the TCEQ to respond to any comments or issues raised by EPA.

iii. Model Performance Decision. If the TCEQ determines the DFW 1999 episode is adequate and the EPA concurs, the TCEQ will promptly pursue a determination and EPA concurrence on the performance of the photochemical model based on the DFW 1999 episode for 8-hour SIP planning purposes. TCEQ shall promptly provide a schedule to the Parties and, through the DFW Photochemical Modeling Technical Committee, for the remaining steps, milestones and actions to achieve satisfactory model performance.

b. SIP submittal time line.

i. If Concurrence is Achieved. If TCEQ determines that the

DFW 1999 episode is adequate and the EPA concurs, the TCEQ shall make a good faith effort to achieve SIP submittal in advance of the existing deadline of June 15, 2007 and to attain the 8-hour ozone standard as expeditiously as practicable. The TCEQ shall provide to the Parties no later than 45 business days after (1) the Plaintiffs have signed the Consent Decree and (2) this agreement is signed by both the Plaintiffs and the TCEQ a specific schedule for the milestones associated with the development, adoption and submittal of an 8-hour ozone attainment demonstration SIP that attempts to achieve SIP submittal in advance of the existing deadline of June 15, 2007, and reflects a good faith effort to attain the 8-hour ozone standard as expeditiously as practicable. After the TCEQ issues the schedule, the TCEQ shall meet with the Plaintiffs to provide an opportunity for comment and/or questions concerning the schedule.

ii. If Concurrence is Not Achieved. If TCEQ is unable to

achieve concurrence from EPA on the adequacy of the DFW 1999 episode, TCEQ remains committed to early submittal and attainment of the 8-hour ozone standard, to the extent feasible, and shall report to the Parties, through the DFW Photochemical Modeling Technical Committee and/or the North Texas Clean Air Steering Committee as appropriate, the status of photochemical modeling and SIP development relating to the DFW 8-hour nonattainment area. Reports may include the issues that need to be addressed and/or informational needs that remain to be satisfied and a schedule describing the issue and providing the expected date of resolution of such issues. TCEQ shall report to the Parties, through the DFW Photochemical Modeling Technical Committee and/or the North Texas Clean Air Steering Committee as appropriate, no

less frequently than every two months thereafter on the status of the DFW 8-hour nonattainment area photochemical model.

3. Evaluation of potentially reasonable control measures.

a. As part of its 8-hour SIP planning process, the TCEQ will perform a review of potentially reasonable control measures for the DFW 8-hour nonattainment area. This review will include an analysis of NO<sub>x</sub> and VOC rules from other serious 1-hour ozone nonattainment areas in existence on June 15, 2004 and the South Coast Air Quality Management District and recommend reasonably available and practically enforceable measures for inclusion into the SIP and report the rationale for any potentially reasonable control measures that are not recommended for inclusion in the 8-hour nonattainment demonstration SIP.

b. Cement Kiln Control Technology Study. The TCEQ is currently developing a proposed scope of work to contract with a consultant to perform a cement kiln study to evaluate the potential availability of new air pollution control technologies for cement kilns in the DFW 8-Hour nonattainment area, including consideration of selective catalytic reduction (SCR), with a report contract deliverable to evaluate and establish what type of controls may be technically and economically applied to the three nonattainment area cement plants with their 10 kilns. TCEQ shall meet with Plaintiffs, EPA, and Intervenor the Portland Cement Association ("PCA") to review and comment upon the proposed scope of work for this study no later than 10 business days after (1) the Plaintiffs have signed the Consent Decree and (2) this agreement is signed by both the Plaintiffs and the TCEQ.

The TCEQ, through consultation with the Plaintiffs, EPA, and PCA, will make a determination whether an existing state contractor, or a subcontractor to an existing state contractor, is competent to perform the study no later than 15 business days after (1) the

Plaintiffs have signed the Consent Decree and (2) this agreement is signed by both the Plaintiffs and the TCEQ. The TCEQ through consultation with the Plaintiffs, EPA, and PCA, will make a final consultant selection no later than 15 business days after (1) the Consent Decree is signed by the Plaintiffs and (2) this agreement is signed by both the Plaintiffs and the TCEQ, if an existing state contractor is selected; and if a subcontractor to an existing state contractor or a new contractor is selected, as soon as reasonably possible, but no later than 135 business days after (1) the Plaintiffs have signed the Consent Decree and (2) this agreement is signed by both the Plaintiffs and the TCEQ, with contract approval to follow as quickly as possible. If TCEQ determines a new contractor or subcontractor will undertake this study, it shall provide Plaintiffs, EPA, and PCA with a list of potential contractors who responded to the request for proposal from the TCEQ under consideration and consider comments thereon. Approximately midway through the study process, the contractor shall identify to TCEQ, Plaintiffs, EPA, and PCA the list of cement kilns with advanced NOx emission reduction technologies that are under analysis as part of said study. If the TCEQ experiences difficulties with this process and timely notifies the Plaintiffs, EPA, and the PCA of such difficulties, the Plaintiffs agree to adjust these deadlines. The study is to be completed and report issued no later than 6 months after the date that the contract is approved by the TCEQ.

4. Specific control measure consideration.

a. Potentially reasonable control measures. After the TCEQ completes its review of potentially reasonable control measures for the DFW 8-hour nonattainment area, described in ¶¶ 3.a. above, the Executive Director will consider rulemaking or other action for reasonably available and practically enforceable control measures in the 8-

hour SIP planning process if such measures are needed to achieve expeditious attainment of the 8-hour ozone standard in accordance with FCAA §§ 172(c)(1), 181(a)(1).

b. Cement Kilns. Within 30 days following completion of the Cement Kiln Control Technology Study, above, the Executive Director shall commence consideration of the availability of additional controls on Cement Kilns. The Executive Director shall run such potentially available kiln control options in interim attainment demonstration model runs used for SIP planning purposes. Not later than 60 days following the completion of the Executive Director's interim attainment demonstration model runs examining various kiln control strategies, the Executive Director shall report to the DFW Photochemical Modeling Technical Committee and/or the North Texas Clean Air Steering Committee concerning the availability of kiln controls as control measures in the 8-hour attainment demonstration SIP. The TCEQ will consider the results of the Cement Kiln Control Technology Study, above, when determining whether further control strategies are warranted for cement kilns in the 8-hour SIP.

5. Communication with Parties. TCEQ will confer with counsel for the Parties to review existing communication vehicles for technical air quality issues and make a good faith effort to address problems identified by the Parties. TCEQ will meet and confer with the Parties, through counsel, concerning other issues of interest and concern in this matter.

B. Plaintiff Blue Skies Alliance, et al's Actions:

1. To meet and confer with TCEQ as needed to achieve milestones under this Agreement and advance the SIP planning and emissions reductions processes anticipated under this Agreement.

2. To timely sign the Consent Decree.

**C. General provisions of this Agreement:**

- 1. This Agreement contains the entire Settlement Agreement. The Agreement cannot be altered or amended except by a writing duly executed by all parties hereto.**
- 2. The Plaintiffs and the TCEQ will cooperate with each other, communicate as reasonably necessary, and exercise their best effort to carry out all of their responsibilities, express or implied.**
- 3. This Agreement is subject to Federal Rules of Evidence Rule 408.**
- 4. The TCEQ's agreement herein is contingent and expressly conditioned on each of the conditions listed in Paragraph 5.a through 5.d below. In the event that any one or more of the following events does not occur as set forth below, the TCEQ shall have no further obligation to perform under this Agreement:**
  - a. No later than April 22, 2005, the Plaintiffs sign the Consent Decree;**
  - b. No later than June 15, 2005, the Parties jointly submit to the Court and request entry of the Consent Decree; and no later than December 1, 2005, the Court signs the Consent Decree;**
  - c. The EPA satisfactorily performs the actions required by the Consent Decree by no later than December 1, 2005, unless such date is modified in accordance with the Consent Decree; and**
  - d. The Court dismisses the Litigation with prejudice no later than 60 days after publication of all Federal Register Notices contemplated in Paragraph 2 of the Consent Decree.**

IN WITNESS WHEREOF, each party hereby executes this Agreement on the dates below indicated. The last signature date will represent the governing date of this Agreement.

Dated: April 22, 2005



Marc Chytilo, Attorney for  
Plaintiff Blue Skies Alliance, et al.

Dated: April 15, 2005



Glenn Shankle, Executive Director  
of the Texas Commission on  
Environmental Quality