

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

SIERRA CLUB,)	CV-S-02-0578-PMP-RJJ
)	
Plaintiff,)	
)	
v.)	SETTLEMENT AGREEMENT
)	
UNITED STATES DEPARTMENT OF)	
TRANSPORTATION; Secretary of)	
Transportation NORMAN MINETA;)	
FEDERAL HIGHWAY ADMINISTRATION)	
(FHWA); Administrator of the FHWA)	
MARY PETERS, Division)	
Administrator of FHWA Nevada)	
Division SUSAN KLEKAR,)	
)	
Defendants.)	
_____)	

This Settlement Agreement (Agreement) between the Sierra Club (Plaintiff), the United States Department of Transportation and the other Defendant-Appellees (Defendants), and the Nevada Department of Transportation (NDOT), collectively referred to as “the Parties,” resolves the above entitled matter to the satisfaction of the Parties.

Part I: General Terms

1. This Agreement resolves the above-entitled matter to the satisfaction of the Parties.

2. The Sierra Club agrees to dismiss its claims and appeal in exchange for commitments by the Nevada Department of Transportation (NDOT) to implement measures in the US 95 corridor designed to reduce exposure of school children to motor vehicle emissions and commitments by the Federal Highway Administration (FHWA) to undertake studies of emissions from highways of: diesel particulate matter plus diesel exhaust organic gases; benzene; 1,3 butadiene; acetaldehyde; formaldehyde; and acrolein (collectively referred to as MSATs); as well as PM_{2.5}. Other pollutants may be studied as surrogates for these pollutants, or as markers to distinguish between gasoline and diesel vehicle emissions.

3. This Agreement provides for a methodology for identifying MSAT concentrations in the area around three schools in Las Vegas, Nevada, located in the vicinity of the U.S. 95 project, and a broader protocol for measuring the production and behavior of PM_{2.5} and MSATs for five additional highway locations to be identified in accordance with this Agreement. This Agreement is not intended to characterize the potential health impacts of public exposure to MSATs or PM_{2.5}. Thus, the Parties agree that while certain measures to reduce MSAT concentrations inside the three schools and modify the site plan for two of the three schools will be implemented under this Agreement, that fact does not constitute a determination that such measures are required to ameliorate potential health impacts of any particular concentration or emission level of MSATs. Rather, the protocols, tests, and measures agreed upon herein are intended to enhance the understanding of the Parties and the public regarding the potential source and behavior of MSATs and PM_{2.5} and to test the effectiveness of some techniques that may reduce the concentration levels of MSATs in certain environments. Moreover, the Parties agree that this Agreement is not an admission by either FHWA or NDOT that MSATs or PM_{2.5} are primarily attributable to highways or that a particular level of MSAT or PM_{2.5} emissions from highways does or does not potentially impact human health. The parties will issue a joint announcement of this Agreement to the public.
4. For Part II of this Agreement, the contractor responsible for implementing the monitoring plan will issue annual reports as to the status and findings of the monitoring for, and filtration of, MSATs as specified in Part II of this Agreement. The first report is due one year after the monitoring required under Part II of this Agreement begins and the final report is due two years after the additional lanes of U.S.95 have been opened to traffic. Nothing in this paragraph is designed to limit a reasonable number of more frequent, informal contacts between the Parties or their expert consultants.
5. For Part III of this Agreement, FHWA will issue annual reports until all MSAT and PM_{2.5} analyses called for in Part III of this Agreement have been completed as to the status and findings of these analyses. The first report is due one year after the effective date of this Agreement is signed and the final report is due after the MSAT analyses called for in Part III of this Agreement are completed. Nothing in this paragraph is designed to limit a reasonable number of more frequent, informal contacts between the Parties or their expert consultants.
6. In the event of any dispute, claim, or controversy arising out of or relating to this Agreement or an alleged breach thereof, the Parties shall use their best efforts to settle the controversy. To this effect, the Party raising the dispute shall give written notice to the other Party or Parties stating the nature of the matter to be resolved and the position of the Party asserting the controversy. The Parties shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to all Parties.

This Agreement is entered into solely for the benefit of the parties to this Agreement, and it is not intended to confer any rights or remedies upon any person other than the Parties.

7. If the Parties do not resolve the controversy to their mutual satisfaction within ninety (90) working days from the date on which the notice of controversy is received, judicial enforcement will be available as follows:
 - a. Any enforcement action shall be based solely on the failure to perform an element of this Agreement.
 - b. For obligations of the Defendants or the Plaintiff, the aggrieved Party may file a motion for relief to be adjudicated by the United States District Court for the District of Nevada.
 - c. For obligations of the NDOT, the aggrieved Party may enforce this Agreement in a Nevada state court of competent jurisdiction.
 - d. No action shall be brought against the United States for the failure of NDOT to undertake activities specific to NDOT.
 - e. No enforcement action shall be brought against NDOT for the failure of the United States to undertake activities specific to the United States. No enforcement action shall be brought against NDOT for activities related to FHWA's national transportation program, except for NDOT's financial obligations defined in Part III of this Agreement.
8. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the FHWA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or other applicable provision of law. The Parties expressly agree that NDOT's financial commitments as set forth in this Agreement shall be terminated immediately if, for any reason, federal and/or state appropriations for transportation purposes are not sufficient to satisfy the financial commitments of this Agreement.
9. Each Party to this Agreement shall bear its own costs and fees.
10. This settlement Agreement is effective as of the date the District Court enters an order in accord with this Agreement as specified in paragraph 1 of Part IV.

Part II: Activities specific to NDOT.

1. Monitoring for MSATs at three schools near U.S. 95 (Fyfe Elementary School, Adcock Elementary School, and Western High School) and filtration of MSATs inside those schools:

- a. NDOT, in consultation with the Plaintiff, will select an independent expert who will establish an air quality monitoring plan to measure the concentration of MSATs. The monitoring plan will provide for the measurement of MSAT concentrations outside and inside each of the three schools in areas where school children are most likely to congregate, and at a location some distance from known sources of these pollutants, to determine ambient background levels of MSATs. The plan for monitoring inside the schools shall include, but not be limited to, measurements of the listed pollutants in the intake air before and after the filters are installed to determine the effectiveness of the filters with respect to removal efficiency for each pollutant, and in representative areas such as classrooms.
- b. The monitoring plan will be developed for the Parties by an expert acceptable to NDOT, the Defendants, the Plaintiff, and the Clark County School District (CCSD). If NDOT and the Sierra Club are unable to agree regarding the selection of an independent expert, the experts nominated by each party shall confer with each other to select a third independent expert which shall have the primary responsibility for the design of the monitoring plan. The expert who designs the monitoring plan will also review implementation to assure compliance with the plan. Review procedures will be defined in the monitoring plan.
- c. At a minimum, the monitoring plan will provide that monitoring of MSAT concentrations will occur before the additional lanes of U.S. 95 are open to traffic, before the filtration systems specified in this Part are installed, and again after the additional lanes of U.S. 95 are open to traffic, and after the filtration systems specified in this Part are installed and operating.
- d. To determine how effective filtration systems are at reducing the level of MSATs inside of schools, NDOT will fund the installation of a filtration system in each of the above three schools.
 - i. The filtration systems will be installed by August 1, 2006, and will be designed to attain the maximum achievable reduction from the MSAT concentrations present in the intake air. The filtration systems are to include any monitoring devices that are integral to a typical installation. The total cost of the three filtration systems shall not exceed \$1,250,000. Any funds from this \$1,250,000 not required for the installation of the filtration systems will be set aside and used to replace the filtration media as needed.
 - ii. NDOT will also fund a follow-on test based upon monitoring data five years after the filtration systems are installed to determine how effective the filtration systems are at reducing the level of MSATs inside of the three schools over time as compared to the initial

performance of the systems when first installed.

- iii. The installation of the filtration system and follow-on test shall be implemented in a manner acceptable to the CCSD.
 - iv. In designing and installing the filtration systems, and in conducting the follow-on test, NDOT will use the services of experts acceptable to NDOT, the Defendants, the Plaintiff, and the CCSD. The final design of the systems shall be submitted by the independent expert to these parties for their review and approval.
2. The NDOT agrees to enter into an agreement with the CCSD in which the NDOT will contribute funds not to exceed \$200,000 to relocate Fyfe Elementary School modular classroom buildings and play structures, which are between the main school building and the U.S. 95 freeway reconstruction. These facilities will be relocated at the greatest feasible distance from the highway right-of-way.
3. The NDOT agrees to provide \$50,000 for an expert consultant to be employed by the Sierra Club for the purpose of providing expert advice to the CCSD in conjunction with the current redesign of Western High School, to help ensure that the school will be redesigned in a manner that will minimize student exposure to MSATs. The consultant will be selected by the Plaintiff with the concurrence of the CCSD.
4. The NDOT agrees to support the CCSD in implementing a program to reduce diesel emissions from the CCSD's existing bus fleet to which NDOT will contribute \$1 million over three years. NDOT will enter an agreement with CCSD that will require that the funding be used to develop and implement a strategy, such as retrofitting existing buses with diesel oxidation catalysts or diesel particulate filters, and the use of alternative fuels, including compressed natural gas, biodiesel and ultra low sulfur diesel. The chosen strategy for reducing diesel emissions shall be acceptable to NDOT, CCSD, and the Plaintiff. The objective is to utilize the NDOT funding to achieve the maximum reduction in diesel particulate emissions from the CCSD's bus fleet that is feasible with the application of available and demonstrated technology and/or fuels. "Demonstrated" means in use on any commercial or public fleet of diesel vehicles. The NDOT also agrees to seek additional funding for this effort, jointly with the Plaintiff and CCSD, from the EPA Clean School Bus USA program.
5. The NDOT, working through the RTC of Southern Nevada, will assist in the development of an outreach program to encourage the reduction of idling time of diesel powered vehicles. The program will target large diesel fleet owners, and include partnerships with various organizations, media relations, and paid publications in trade and construction publications.

Part III: Activities related to FHWA's national transportation program.

1. The Parties agree that FHWA will study the production and behavior of PM_{2.5} and MSAT emissions at five major highway locations in the United States as described in this Agreement and in accordance with the protocol set forth in Appendix A. PM_{2.5} will be studied only for highway locations in PM_{2.5} nonattainment or maintenance areas. It is the understanding of the Parties that, except to the extent outlined in subparagraph 2.g. of this Part, these studies will be carried out with Federal aid highway grant funds to the States and not with Federal funds directly used by FHWA for its own research activities.
2. Highway locations will be selected as follows:
 - a. It is the understanding of the Parties that the highway locations under this Agreement will be selected with the purpose of providing useful data within a relatively short period of time. Thus, they will consist of open to traffic sections or sections that will be opened to traffic within the time period required by this Part for the commencement of a study at such location.
 - b. Immediately after this Agreement becomes effective, FHWA will seek to identify candidate study locations that meet the criteria set forth in Appendix A. Within 30 days of the effective date of this Agreement, the Plaintiff may provide FHWA with a list of candidate locations that it wishes to have considered for inclusion in this scan. FHWA will complete this scan of potential locations within 90 days of the effective date of this Agreement.
 - c. After this initial scan is complete, FHWA will prepare a list of the candidate locations and consult with the Plaintiff to ensure that both FHWA and the Plaintiff agree that the locations on the list meet the criteria set forth in Appendix A. Moreover, FHWA will seek the concurrence of the Plaintiff as to the order in which locations on the list shall be considered for inclusion in the final list of locations for study. At least two of the five highway locations shall be in PM_{2.5} nonattainment or maintenance areas.
 - d. FHWA will work with the State Departments of Transportation (DOT) for the States in which the candidate locations are located to program a Federal aid project to conduct the study called for in this Agreement. If a State DOT does not wish to participate in such a study, FHWA will select the next candidate project on the list and seek the participation of the State DOT where that project is located, until five highway locations that have the concurrence of the Plaintiff have been identified for study.
 - e. It is the intent of NDOT and the other Parties that U.S. 95 be one of the five study locations. For the U.S. 95 study, the baseline monitoring called for in Appendix A may be conducted by NDOT after completion of heavy

construction activities and before the additional lanes of U.S. 95 have been opened to traffic. If U.S. 95 is selected as a study location, NDOT agrees to provide funding not to exceed \$700,000 to complete the study. If U.S. 95 is not selected, NDOT agrees to make sufficient funds available, not to exceed \$700,000, to complete a study in another location in accordance with Appendix A. FHWA agrees to allow eligible federal aid funds to be used for the study. U.S. 95 is not located in a PM_{2.5} nonattainment or maintenance area.

- f. It is the intention of the Parties that the selection of highway locations for study will be completed within 180 days of the effective date of this Agreement. The actual studies will begin as soon as practicable after the highway location has been selected and agreed upon by the relevant State DOT, and an expert consultant has been employed to design and develop the study in accordance with Appendix A.
 - g. If within 180 days after the effective date of this Agreement, FHWA has not been able to obtain the cooperation of the State DOTs for studies at five highway locations, the FHWA will prioritize five highway locations on the list (if a list has been agreed upon) that meet the criteria set forth in Appendix A and are located in a PM_{2.5} nonattainment or maintenance area for the purpose of conducting one federally funded study using FHWA funds if necessary. The Plaintiff's concurrence will be obtained as to which one of the five highway locations identified in the previous sentence will be selected. If Plaintiff fails to concur in one of the five locations within 60 days of receiving the list from FHWA, the obligation to do the study ceases.
3. Studies at each highway location undertaken pursuant to Part III of this Agreement will be initiated within 24 months after the effective date of this Agreement.
 4. The general protocol to be implemented by the expert consultant selected for each of the five studies is set forth in Appendix A to this Agreement.
 5. Monitoring activities performed near the U.S. 95 project in Las Vegas, Nevada, in conjunction with the study of pollutants at schools provided for in Part II will be in addition to the five locations called for in this Part III.
 6. A study consistent with Appendix A will be undertaken at each of the selected highway locations. The procurement of the consultant services needed to do the studies will proceed in accordance with applicable Federal or State procurement law, whichever is appropriate. Prior to making a selection of the consultant, and if permissible under applicable Federal or State procurement law, FHWA will provide the Sierra Club the opportunity to comment, within 14 days of receipt, on the qualifications of the consultant(s) under consideration for the studies at selected highway locations. FHWA or the State DOT, whichever is appropriate,

will make the final decision as to which consultant to select. If a consultant contract is terminated for any reason, a substitute consultant will be selected in accordance with the procedures set forth in this paragraph.

7. The Sierra Club will have 60 days to review and comment on the final report for each study location before it is made public.
8. This Agreement does not provide for the performance of studies to compare modeling results with results obtained from monitoring studies as described in section B of Appendix A. The Parties agree that one or more studies of this nature would be desirable in light of the information that will be developed pursuant to this Part. The parties agree in good faith to seek reasonable opportunities to encourage the conduct of such studies, consistent with available staff time, by themselves or other State or Federal agencies or independent researchers who will perform such studies with resources made available outside of the scope of this Agreement.

Part IV: Final Adjudication.

1. Upon the signing of this Agreement, the Sierra Club and FHWA will jointly seek an order from the Court of Appeals that conditionally remands the case to the District Court for consideration of a joint motion requesting that the Court enter an order approving this Settlement Agreement, retaining jurisdiction over this matter for the purpose of enforcing this Agreement, as set forth in subparagraph 7.b. of Part I, and dismissing this action with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2). Upon entry by the District Court of an order in accord with this Agreement, the Sierra Club shall forthwith file a notice of voluntary dismissal in the Court of Appeals pursuant to Federal Rule of Appellate Procedure 42. All injunctions and/or stays pending appeal currently preventing work on U.S. 95 in Las Vegas, Nevada, will be lifted upon dismissal by the Court of Appeals. By being a signatory to this Agreement, NDOT does not waive its Eleventh Amendment sovereign immunity.
2. Upon approval of this Agreement by the District Court, this Agreement shall represent the final adjudication of all claims presented by Plaintiff in its challenge to the final environmental impact statement dated November 18, 1999, and Record of Decision issued January 28, 2000, for the US 95 Widening Project.
3. This Agreement is based on, and limited solely to, the facts involved in this case. This Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the FHWA, the United States, its officers, or any person affiliated with it. The United States agrees not to plead or interpose a claim or issue preclusion defense, including res judicata and collateral estoppel, based on the District Court's decision in this case, in any action by the Sierra Club seeking to enforce the terms of the National

Environmental Policy Act and/or the Federal Aid Highway Act with respect to another highway project. FHWA does not waive any other defenses it may have concerning the claims settled under this Agreement. This Agreement is executed solely for the purpose of compromising and settling this litigation and nothing herein shall be construed as precedent in any other context.

For the PLAINTIFF:

Carl Pope
Executive Director
Sierra Club

Date

Joanne Spalding
Staff Attorney
Sierra Club

Date

For the DEFENDANTS, acting by and
through the Federal Highway Administration:

Susan Klekar
Division Administrator
FHWA Nevada Division

Date

Edward V.A. Kussy
Deputy Chief Counsel
Federal Highway Administration

Date

Andrew Mergen
Attorney, Appellate Section
Environment and Natural Resources Division
U.S. Department of Justice

Date

APPROVED FOR LEGALITY AND FORM:

Liesl Freedman, Deputy Attorney General
State of Nevada

Date

STATE OF NEVADA, acting by and
through its DEPARTMENT OF
TRANSPORTATION

Jeffery Fontaine, P.E., Director

Date