EN BANC ORAL ARGUMENT HELD ON SEPTEMBER 26, 2016

No. 15-1363 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WEST VIRGINIA, *et al.*,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

SUPPLEMENTAL BRIEF OF PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATION RESPONDENT-INTERVENORS

Sean H. Donahue
Susannah L. Weaver
Donahue & Goldberg, LLP
1111 14th Street, N.W., Suite 510A
Washington, D.C. 20005
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street, N.W., Suite 300
Washington, D.C. 20005
(202) 513-6256
Counsel for Natural Resources Defense Council

Tomás Carbonell
Vickie Patton
Martha Roberts
Benjamin Levitan
Environmental Defense Fund
1875 Conn. Avenue, N.W. Ste. 600
Washington, D.C. 20009
(202) 572-3610
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
The Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
Counsel for Sierra Club

Additional Counsel Listed On Signature Block.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Clean Air Act or Act	42 U.S.C. §§ 7401-7671q
Clean Power Plan	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
EPA	United States Environmental Protection Agency
JA	Joint Appendix
Rule	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
Section 111(d)	42 U.S.C. § 7411(d)

Public Health and Environmental Respondent-Intervenors hereby respond to the Court's April 28, 2017, order requesting briefs on whether these consolidated cases concerning the Environmental Protection Agency's Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"), should be "remanded to the agency rather than held in abeyance." ECF No. 1673071 ("April 28 Order").

Unlike placing the cases in abeyance, remand would allow termination of the Supreme Court's stay pending litigation, and would properly place the responsibility on EPA to follow statutory rulemaking procedures if it wishes to delay implementation or make other changes to the Rule. Remand thus would avoid the most egregious flaw in EPA's request for indefinite abeyance of a rule that is subject to a stay pending expedited judicial review.

While remand is preferable to indefinite abeyance, we respectfully submit that the only appropriate resolution of these cases remains for the Court to decide the merits. The Clean Air Act requires EPA to protect citizens from dangerous air pollutants. The effort to curb power plants' dangerous carbon dioxide pollution began *nearly 20 years ago*, and with each year of delay, the blanket of heat-trapping pollution in the atmosphere thickens. *See*, *e.g.*, National Oceanic and Atmospheric Administration, Earth System Research Laboratory, "Atmospheric CO_2 at Mona Loa Observatory" (May 2017), available at https://www.esrl.noaa.gov/gmd/ccgg/trends/full.html (last visited May 14, 2017)

(Attachment 1 hereto). Once emitted, each additional ton of carbon dioxide causes harm that is irreversible: much of that carbon dioxide persists in the atmosphere for centuries. Under the Clean Air Act, EPA must address that peril.

After a landmark decision by the Supreme Court confirmed EPA's authority and responsibility to act, the agency found that carbon dioxide and other greenhouse gas air pollutants endanger public health and welfare, a decision this Court upheld five years ago. Meanwhile, six years ago, the Supreme Court held that Section 111(d) – the authority EPA used here – empowers the agency to regulate the carbon dioxide emissions of power plants, the largest source of this pollution. After years of effort and massive public engagement, EPA adopted a rule that would begin to curtail the grave threat from that power plant pollution.

The EPA action before the Court is within this Court's mandatory and exclusive review jurisdiction. This is a ripe, jurisdictionally proper case presenting fundamental legal issues that have been exhaustively aired by hundreds of parties and amici. EPA's pending motion relies on oblique references to an ill-defined prudential ripeness doctrine. *See* EPA Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance 7, ECF No. 1668274 (citing *Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012)) ("EPA Abeyance Motion"); EPA Abeyance Reply 4, ECF No. 1670856 (same). Beyond the questionable viability of such a doctrine, *see Susan*

B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014), the exercise of any such discretion surely requires consideration of the particular posture of the case and the equities and practical consequences of withholding review. Such factors overwhelmingly favor deciding the merits here.

BACKGROUND

The effort to enforce EPA's statutory responsibility to establish limits on climate-destabilizing carbon dioxide emissions from power plants has now consumed nearly two decades, during which time greenhouse gas concentrations and observed impacts of climate change have steadily mounted. EPA first concluded that greenhouse gases, and specifically carbon dioxide emissions from power plants, were subject to Clean Air Act regulation in *1998*. *See* Memorandum from General Counsel Jonathan Z. Cannon to Administrator Carol M. Browner, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (Apr. 10, 1998);[1] *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 510-11 (2007) (discussing Cannon Memorandum). Yet the agency did not regulate such emissions from *any* source. After a change of administrations, EPA attempted in 2003 to disavow that statutory authority, denying a 1999 rulemaking petition to set greenhouse gas standards for motor vehicles. After years of litigation the Supreme Court, in the 2007 *Massachusetts* decision, affirmed the agency's authority and

[1] The Cannon Memorandum is available at http://www.law.umaryland.edu/environment/casebook/documents/epaco2memo1.pdf (last visited May 14, 2017).

responsibility to address greenhouse gas emissions under the Clean Air Act. 549 U.S. at 510-11, 528-34.

In parallel with the *Massachusetts* case, many of the current state and non-governmental Respondent-Intervenors sought standards for power plant carbon dioxide emissions under Section 111. After a 2002 notice of intent and 2003 lawsuit seeking to force EPA to update the power plant performance standards to include carbon dioxide,[2] EPA issued a final rule, but refused to establish carbon dioxide standards. 71 Fed. Reg. 9866 (Feb. 27, 2006). That refusal necessitated a second lawsuit, *New York v. EPA*, this time challenging the final rule. Following the *Massachusetts* ruling, this Court granted EPA's request to remand the *New York* case to the agency for "further proceedings in light of *Massachusetts.*" Order, *New York v. EPA*, No. 06-1322, ECF No. 1068502 (Sept. 24, 2007) (Attachment 2 hereto).

After three more years in which EPA failed to act, state and environmental Respondent-Intervenors again demanded that EPA set carbon dioxide standards, in compliance with this Court's remand. The resulting settlement imposed a timetable for EPA to propose regulations and take final action by May 2012, 75 Fed. Reg. 82,392, 82,392 (Dec. 30, 2010) – a deadline EPA missed by three years.

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[2] *Save Our Children's Earth Found. & Sierra Club v. EPA*, No. 03-cv-00770-CW, Complaint, ¶¶ 4, 32 (N.D. Cal. Feb. 21, 2003), *proposed consent decree published*, 68 Fed. Reg. 65,699 (Nov. 21, 2003), *consent decree approved*, Doc. No. 47 (Feb. 9, 2004).

See In re Murray Energy Corp., 788 F.3d 330, 336 (D.C. Cir. 2015). Meanwhile, the Supreme Court affirmed EPA's authority and responsibility to act on carbon dioxide emissions from power plants – under the very provision at issue in this case – in *American Electric Power v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). Finally promulgated in October 2015, the Clean Power Plan is scheduled to take effect in 2022.

The Rule is the product of an unequalled analytical process and the most extensive public engagement EPA has ever conducted, involving an unprecedented outreach to stakeholders and over four million commenters. It imposes the first-ever nationwide limits on carbon dioxide pollution from existing power plants, at a pace that is meaningful, but also measured and economically reasonable. Challenges to the Rule brought by over 150 parties have resulted in the most thoroughly briefed and argued climate case this Court has heard. After the Supreme Court stayed the implementation of the Clean Power Plan pending this Court's decision on the merits of the challenges, the Court held an extraordinary *en banc* oral argument for an entire day in September 2016. Six months later, EPA filed a motion seeking to forestall a merits decision while it conducts a review and possibly a new rulemaking to alter or rescind the Rule, under continuing cover of the February 2016 stay. ECF No. 1668274.

ARGUMENT

I. INDEFINITE ABEYANCE HERE WOULD VIOLATE BASIC ADMINISTRATIVE LAW PRINCIPLES.

EPA's motion asks this Court to place the case in abeyance "while the agency conducts its review of the Clean Power Plan . . . [and] until 30 days after the conclusion of review and any resulting forthcoming rulemaking." EPA Abeyance Motion at 8-9. Placing the cases in indefinite abeyance while the Clean Power Plan is subject to a stay would disregard basic principles of administrative law. *See* Corrected Respondent-Intervenor Public Health and Environmental Organizations' Opposition to Motion to Hold Cases in Abeyance 4-10, ECF No. 1669770 (Apr. 5, 2017) ("NGO Abeyance Opp."). Such abeyance would contravene the terms of the Supreme Court's orders temporarily staying enforcement of the Rule, which provide that the stay remains in place only so long as a "disposition" of the petitions is pending. *Id*. at 6-8. It would also contradict the Administrative Procedure Act provision that Petitioners argued gave the Supreme Court power to enter the stay, which authorizes courts to stay a rule only "pending judicial review." 5 U.S.C. 705; *see* NGO Abeyance Opp. 7 & n.3.

Granting EPA's motion would convert temporary enforcement relief pending judicial review into a long-term suspension of the Clean Power Plan, without any court having issued a decision on its legal merits and without following the administrative steps necessary to amend, suspend, or withdraw a regulation. It

would violate central requirements of the Clean Air Act forbidding agency suspensions of rules without notice and comment rulemaking procedures and a reasoned explanation. *See, e.g.*, 42 U.S.C. 7607(d); NGO Abeyance Opp. 9-10 (citing cases). And because EPA, by means of a letter, has asserted that an extra day must be added to the Clean Power Plan's compliance deadlines for every day of the stay, Letter from Admin'r Scott Pruitt to Gov. Matt Bevin, Mar. 30, 2017 (App. to NGO Abeyance Opp.), abeyance threatens to delay achievement of the Clean Power Plan's environmental objectives far into the future – even if the current administration's efforts to change or rescind the Rule are rejected on judicial review. This outcome would cause serious harm to the public and to Respondent-Intervenors, who have sought for two decades to protect their citizens and members from the urgent threat of climate change. *See* NGO Abeyance Opp. 17; *see also* Regulatory Impact Analysis at 4-29 to 4-34, Doc. No. EPA-HQ-OAR-2013-0602-37105 (Oct. 23, 2015) (estimated health benefits of Clean Power Plan, including avoiding thousands of premature deaths and hundreds of thousands of illnesses) (reproduced in part at JA 3684).

Accordingly, the Court should deny EPA's motion and not extend the abeyance beyond its current expiration date of June 27, 2017.[3]

[3] If the Court does grant any further abeyance, it should be for a time certain, lest abeyance morph into unlawful suspension of the Rule without notice and comment rulemaking. Any further abeyance period should extend no more than the three

II. REMANDING THE CASES WOULD AVOID IMPROPER EXTENSION OF THE SUPREME COURT STAY.

The April 28 Order directs parties to address the possibility of remanding these consolidated cases. Remand of the cases would terminate this Court's jurisdiction. D.C. Cir. Rule 41(b) ("If the case is remanded, this court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand."); *see also* D.C. Circuit Handbook of Practice and Internal Procedures 35 (rev. Jan. 26, 2017); *Nat'l Labor Relations Bd. v. Wilder Mfg. Co.*, 454 F.2d 995, 998 (D.C. Cir. 1971). It would constitute "disposition" of the petitions for review within the terms of the Supreme Court's stay orders. *See* Order, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016).[4]

Accordingly, if the Court remanded the Rule, the stay would terminate unless a party sought certiorari of the remand order, and if so, when the Supreme Court took final action. *See id.* If EPA wished to alter, rescind, or delay the Rule, the agency would be required to follow Clean Air Act rulemaking processes. *See*

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months permitted, in different but related circumstances, under 42 U.S.C. 7607(d)(7)(B).

[4] Because a remand of the cases is unmistakably a "disposition" of the petitions for review, the stay would be terminated regardless of whether a remand is "final" for purposes of appeal. *Cf. Lakes Pilots Ass'n, Inc. v. U.S. Coast Guard*, 359 F.3d 624 (D.C. Cir. 2004).

42 U.S.C. 7607(d) (rulemaking requirements); NGO Abeyance Opp. 9-10 (citing cases).[5]

Petitioners may object to a remand because it could mean that subsequent efforts to challenge the Clean Power Plan would be time-barred.[6] But Petitioners themselves have made the decision to join EPA in asking this Court not to issue a merits decision on their own petitions for review. Respondent-Intervenors request that Petitioners' challenges be resolved on their merits. But if Petitioners seek to avoid a merits decision at this late stage, it is only fair that they – as litigants regularly must – forfeit the claims they choose not to litigate.[7]

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[5] No party has requested vacatur of the Rule without a merits ruling, and this Court's April 28 Order does not request briefing on vacatur. Basic administrative law principles prohibit such relief, which would enable EPA to bypass the statutory process to rescind regulations. *See* 42 U.S.C. 7607(d); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 558 (D.C. Cir. 2015); *Consumer Energy Council v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

[6] Because the Clean Air Act bars petitions for review filed more than 60 days after Federal Register publication of the agency action, 42 U.S.C. 7607(b)(1), new petitions challenging the October 2015 Clean Power Plan would be barred as untimely. *See, e.g., Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1113 (D.C. Cir. 2009).

[7] If, nevertheless, a party wished to argue that this Court's remand, combined with EPA's actions on remand and the Clean Air Act's limitations period, worked fundamental unfairness, it could move to recall the mandate in these cases. *See Greater Boston Television Corp. v. Fed. Commc'ns Comm'n*, 463 F.2d 268, 277 (D.C. Cir. 1971). Petitioners' tactical effort now to avoid judicial resolution of a controversy they have previously pressed with maximum vigor is a poor candidate for such exceptional relief, and we believe that any such claims would properly be rejected.

In sum, while Respondent-Intervenors oppose both abeyance and remand, we believe a remand of the cases produces fewer inappropriate consequences. Remand would at least prevent the patent evasion of basic principles of administrative law caused by an abeyance coupled with an ongoing stay, and would properly require EPA to make any changes to the Rule in conformity with statutory procedures.[8]

III. THE COURT SHOULD DECIDE THE MERITS.

While remand is preferable to abeyance, the only appropriate path is to issue a merits decision. Withholding a merits decision now would waste massive resources that the agency, the public, the parties and the Court have invested, and would very likely introduce sprawling new chapters to the long history of delay in curtailing the grave health and environmental consequences of power plant carbon pollution. It would leave still unresolved the core legal issues that many of the current Petitioners (and the current EPA Administrator) considered so clear and discrete that they sought to litigate them even *before* the Clean Power Plan was finalized. *See*, *e.g.*, Final Brief for Petitioners 29-51, *West Virginia v. EPA*, No.

[8] The April 28 Order seeks briefing on the possibility of remanding "these consolidated *cases*." Neither the Order nor any party has suggested remanding the record. If the Court were to remand the record only, it would retain jurisdiction over the cases while EPA conducts any further administrative processes. *See* D.C. Cir. Rule 41(b). This would allow the Petitioners to retain their claims while avoiding the possibility of forfeiture. Here, however, remanding the record would leave the petitions for review pending and would thereby leave the stay in effect; it would be indistinguishable from abeyance and inappropriate for the same reasons.

14-1146, ECF No. 1540535. These issues include threshold questions such as whether regulation of air toxics under Section 112 precludes regulation of carbon emissions from the same sources under Section 111(d). *See also* NGO Abeyance Opp. 12-13. To decline to decide these issues at this point, even though they are now ripe and fully aired, would frustrate the rational and timely administration of the Act and its objective of timely abatement of pollution.

The choice not to decide these cases is itself highly consequential. We have found no published precedent or even unpublished order in which this Court has granted abeyance in similar circumstances – when consideration of a case is so far along, and when the rule in question would not continue in effect during abeyance. So far as we can tell, this Court has never stopped work on a case that had already been argued – let alone one argued *en banc* many months prior – based upon an agency's stated desire to reconsider its policy.[9] There is no precedent, principle, or custom that *requires* such a step. This case presents a live controversy squarely within this Court's jurisdiction – indeed, its exclusive jurisdiction. Given the high stakes and the massive investments of parties and amici, if the Court believes there may be cause to terminate merits review at this point, it should allow oral argument

[9] The situation here contrasts sharply with one where the Court considers whether to initiate discretionary review (*e.g.*, rehearing *en banc*) of a case a panel has already decided but where the relevant agency policy may change. *Cf. U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, No. 15-1063, 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017) (opinion of Srinivasan, J., concurring in denial of rehearing *en banc*).

on EPA's abeyance motion and the remedial alternatives and consider issuing an opinion explaining its decision.

EPA has argued (in nearly identical language, in a host of abeyance motions submitted in recent weeks) that abeyance would conserve judicial resources and avoid the need for government lawyers to defend an existing rule despite uncertainty about the EPA Administrator's current position. These arguments have little force here. This case was argued many months ago, and massive investments of judicial and party resources have already been made. The 20-year history of efforts to enforce EPA's obligation under the Clean Air Act to regulate power plant carbon dioxide emissions highlights the danger that further agency action is likely to delay effective abatement of this pollution for many additional years. Briefing and arguing another case challenging whatever future action EPA takes – action that inevitably will raise many of the same legal issues – will take even longer. If not decided now, the legal questions presented here will need to be litigated again, from scratch, with the likelihood of another long and complex course of briefing and judicial consideration. And there is no reason why review of any subsequent rule on this topic would be any less *en banc*-worthy.

Deferring decision is extremely prejudicial to states and local governments and nongovernmental organizations that seek to protect the public from carbon pollution. The Supreme Court relied upon the existence of EPA's mandate under

Section 111(d) to determine that states and private parties had no federal common law remedy against power plants' carbon pollution. *AEP*, 564 U.S. at 424. Petitioners' attacks on that very Clean Air Act authority should not be allowed to linger unresolved, simultaneously delaying emissions reductions under the statute and precluding other remedies against this existential environmental threat.

Any exercise of prudential judicial authority to avoid decision should take into account the practical consequences – including, here, a severe and time-sensitive public health threat that becomes more dangerous the longer it is unaddressed, and a well-documented history of implementation delay. *See* NGO Abeyance Opp. 18-20 (citing recent assessments from leading scientific agencies and organizations that key indicators of climate change have become more severe over the last decade and that many harmful impacts are now manifest).

A decision not to decide this case now would compound the already lamentable history of delay *regardless* of what EPA chooses to do in its recently announced "review." If EPA rescinds the Rule, or amends it significantly, the core legal issues presented here will again be presented on review of that action. And if EPA ends up retaining the Rule, then – unless Petitioners forfeit their challenges – the Court will need to adjudicate these issues. All that would be accomplished is delay. And, in this context, delay means great practical harm and defiance of the Clean Air Act's mandate to move quickly against identified threats to public health

and welfare. *See* 42 U.S.C. 7411(b)(1) (requiring that EPA, within one year of statute's 1970 enactment, list categories of stationary sources whose emissions endanger health or welfare, and that EPA promulgate emissions standards within one year of listing source category); *id*. § 7411(d)(1) (providing EPA "shall" issue guidelines for existing sources in source categories subject to standards under Section 7411(b)).

An EPA decision not to regulate power plant carbon emissions would face, to put it mildly, serious hurdles on judicial review. *See, e.g.*, *AEP*, 564 U.S. at 424 (declaring that Section 111(d) "speaks directly" to carbon dioxide emissions from power plants); *Massachusetts*, 549 U.S. 497. And if an agency action rescinding or changing the Rule were vacated, the unlawfully repealed Clean Power Plan would become operative once more. *See Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (vacatur of agency rule rescinding another rule has effect of "reinstating the rules previously in force"); *Alaska v. U.S. Dep't of Agric.*, 772 F.3d 899, 899-900 (D.C. Cir. 2014). Unless challenges to the Clean Power Plan were deemed forfeited, *supra* p. 10, the parties would need to re-brief and relitigate this case. In all these ways, not deciding this ripe, fully briefed and argued case would likely leave the legal framework for limiting carbon dioxide from power plants under the cloud of Petitioners' objections for years to come.

Such delays are irreparably harmful: Atmospheric carbon dioxide levels are increasing inexorably and irreversibly the longer emissions abatement is delayed, with extraordinary dangers to Respondent-Intervenors' citizens and members, as well as all Americans. *See* NGO Abeyance Opp. 19-20 (citing recent scientific assessments and noting that greenhouse gas concentrations have increased from 384 to 406 parts per million in the 10 years since *Massachusetts* was decided).

Adjudicating the case on the merits would allow any party unhappy with the Court's merits decision to seek Supreme Court review, giving that Court the opportunity to decide whether to engage further with the case. This Court's decision to take the case initially *en banc* was likely based in part upon a desire to expedite consideration of a case likely to be subject to Supreme Court review. Indeed, not deciding the merits of this ripe case now would likely foreclose the opportunity for either side to obtain Supreme Court merits review of the Clean Power Plan – an opportunity that was a key premise of the stay.

Measured against these harms, the reasons for deferring a merits decision either by abeyance or remand are insubstantial. If the Court decides these cases now, EPA will still have the prerogative to revisit the Rule in conformity with the applicable administrative law requirements. To be sure, EPA would need to take into account the Court's rulings on Petitioners' challenges; however, it is a normal and salutary consequence of judicial review that court decisions guide future

conduct as well as decide current controversies. That administrative agencies must operate within the bounds of judicial precedent is a feature of our system, not a bug to be avoided. Any detriment to EPA or Petitioners from having to contend with this Court's merits decision must be weighed against the massive effort that parties, amici, and the Court have invested in this case, the risks of lengthening the long history of exceptionally harmful delay, and the certainty that most of the same issues would still need to decided later. No precedent or practice supports a decision to avoid completing merits review in these circumstances, while the enormous damage of leaving the issues unresolved could be irreversible.

CONCLUSION

The Court should deny EPA's abeyance motion and decide these consolidated cases. If the Court does not do so, it should remand the cases.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue
Susannah L. Weaver
Donahue & Goldberg, LLP
1111 14th Street, N.W., Suite 510A
Washington, D.C. 20005
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street, N.W., Suite 300
Washington, D.C. 20005
(202) 513-6256
Counsel for Natural Resources Defense Council

Tomás Carbonell
Vickie Patton
Martha Roberts
Benjamin Levitan
Environmental Defense Fund
1875 Conn. Avenue, N.W. Ste. 600
Washington, D.C. 20009
(202) 572-3610
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
The Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
Counsel for American Lung Association, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, and The Ohio Environmental Council

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Massachusetts Avenue, N.W., Suite 702
Washington, D.C. 20036
(202) 667-4500
Counsel for Sierra Club

Vera P. Pardee
Kevin P. Bundy
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
Counsel for Center for Biological Diversity

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
(304) 342-5588
Counsel for West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Coal River Mountain Watch, Kanawha Forest Coalition, Mon Valley Clean Air Coalition, and Keepers of the Mountains Foundation

CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 3887 words.

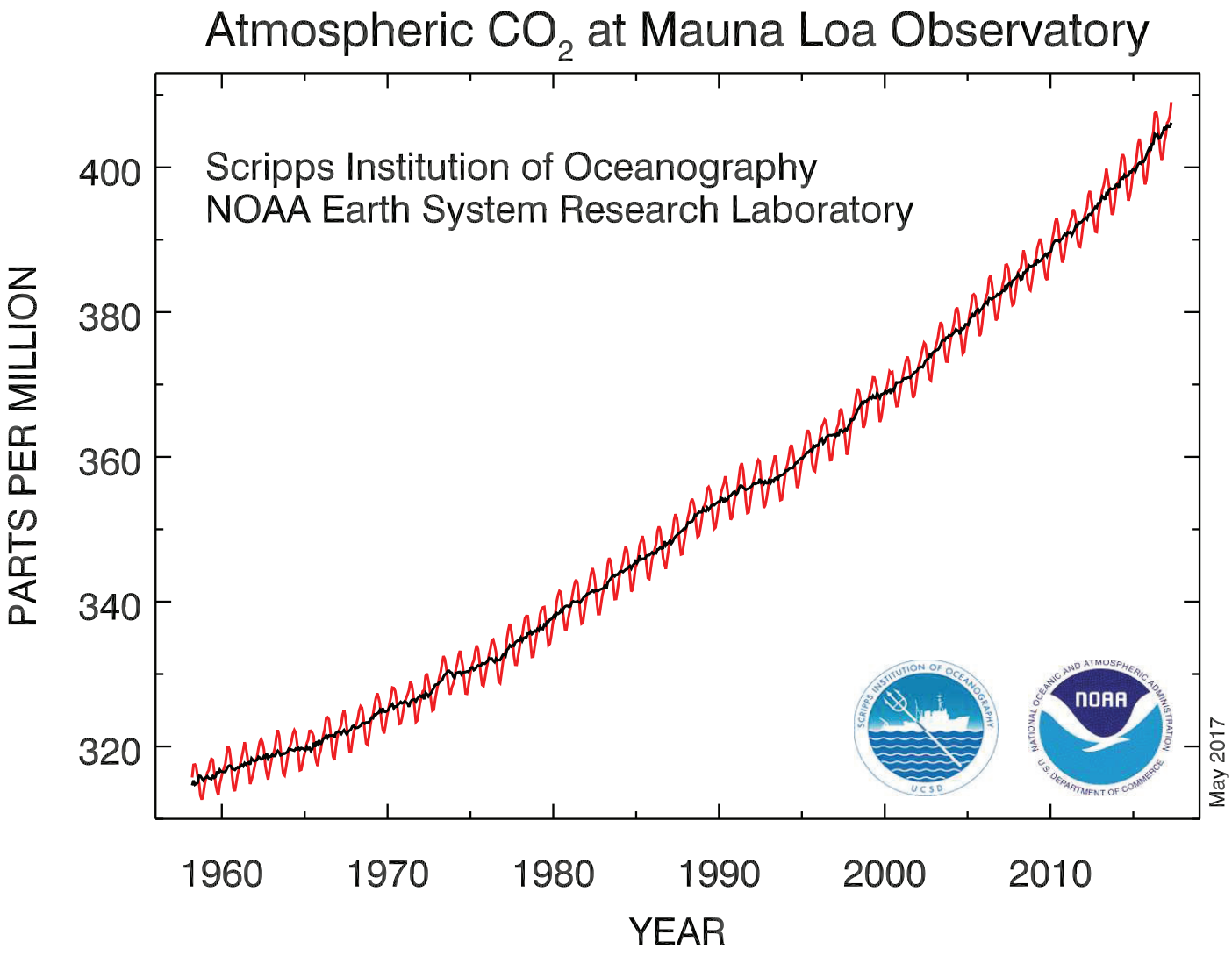
CERTIFICATE OF SERVICE

I certify that on May 15, 2017, the foregoing Supplemental Brief was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue

Attachment 1:

National Oceanic and Atmospheric Administration, Earth System Research Laboratory, "Atmospheric CO_2 at Mona Loa Observatory," available at https://www.esrl.noaa.gov/gmd/ccgg/trends/full.html (last visited May 14, 2017)


Atmospheric CO2 at Mauna Loa Observatory
Scripps Institution of Oceanography
NOAA Earth System Research Laboratory
PARTS PER MILLION
400
380
360
340
320
1960
1970
1980
1990
2000
2010
YEAR
May 2017

Attachment 2:

Order, *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1322 September Term, 2007

Filed On: September 24, 2007

[1068502]
State of New York, et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

Utility Air Regulatory Group, et al.,
Intervenors

BEFORE: Henderson, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of petitioners' motion to govern further proceedings; EPA's motion to govern further proceedings filed May 2, 2007, which includes a request for an extension of time to file motions to govern further proceedings, and the response thereto; EPA's motion for an extension of time for EPA and intervenors to respond to petitioners' motion to govern, and the response thereto; EPA's lodged combined motion to govern further proceedings and response to petitioners' motion to govern; intervenors' lodged combined motion to govern further proceedings and response to petitioners' motion to govern; and petitioners' lodged combined response and reply, it is

ORDERED that EPA's requests for extensions of time be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that this case be remanded to EPA for further proceedings in light of Massachusetts v. EPA, 127 S. Ct. 1438 (2007). It is

FURTHER ORDERED that petitioners' request for vacatur and summary reversal of EPA's decision be denied. Petitioners have not shown that vacatur is warranted, see A.L. Pharma, Inc., v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995); and the merits of the parties' positions are not so clear as to warrant summary action, see Cascade Broadcasting Group, Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

No. 06-1322 September Term, 2007

of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam