ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

Consolidated with Nos. 19-1239, -1241, -1242, -1243, -1245, -1246, and -1249

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNION OF CONCERNED SCIENTISTS et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION et al.,

Intervenors for Respondent.

MOTION TO COMPLETE ADMINISTRATIVE RECORD

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
Senior Assistant Attorney General
GARY E. TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JULIA K. FORGIE
M. ELAINE MECKENSTOCK
Deputy Attorneys General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6623
Counsel for State of California, by and through Governor Gavin Newsom, Attorney General Xavier Becerra, and California Air Resources Board

Additional parties and counsel listed on signature pages

INTRODUCTION

On February 26, 2020, respondents National Highway Traffic Safety Administration (NHTSA) and U.S. Environmental Protection Agency (EPA) filed amended certified indices of their administrative records, adding certain materials whose omission petitioners had pointed out in a letter to counsel. EPA's amended index, however, still omits numerous public comments and supporting documents that were properly before the agency at the time of its decision. These materials form part of "the whole record," 5 U.S.C. § 706, that this Court must review to determine the legality of EPA's actions.

Counsel for EPA now assert that public comments and supporting documents submitted after the comment closing date, 11 months before the agency took final action, are categorically excluded from the administrative record because EPA could and did ignore them. But EPA could not reasonably disregard these important materials, many of which are adverse to its decision. EPA committed in this joint proceeding to consider all materials submitted after the comment closing date to the extent practicable, and, when it took final action, EPA did not claim that any comments had been received too late to be practicably considered. Its cooperating agency, NHTSA, properly included such materials in its own administrative record. Further, EPA's explanation for its final actions discussed in detail other, supposedly favorable evidence that long postdated the comment closing date. In these circumstances, EPA cannot categorically exclude materials submitted after the closing date from the administrative record for judicial review.

These exclusions matter. Petitioners and others submitted new information after the comment closing date, but well in time to be practicably considered by EPA, that bears directly on—and substantially undermines—the agency's explanation of its final actions. Petitioners in Cases No. 19-1230, -1239, -1241, -1243, and -1246 move that this Court order EPA to complete its administrative record with public comments and supporting documents submitted after the comment closing date of October 26, 2018.

All petitioners support this motion. Respondents oppose the motion and intend to file a response, and intervenors take no position.

BACKGROUND

These petitions concern three actions that NHTSA and EPA jointly proposed in August 2018 and finalized in September 2019. *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 83 Fed. Reg. 42,986 (Aug. 24, 2018) (Proposed Action); *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (Final Action). First, NHTSA promulgated regulations (the Preemption Rule) asserting that the Energy Policy and Conservation Act preempts state greenhouse-gas and zero-emission-vehicle standards for passenger cars and light trucks. Final Action, 84 Fed. Reg. at 51,311–28. Second, EPA, relying on the Preemption Rule and a novel interpretation of the Clean Air Act, issued an order (the Waiver Revocation) purporting to revoke portions of a federal-preemption waiver that had entitled the State of California to adopt and enforce its own greenhouse-gas and zero-emission-vehicle standards. *Id.* at 51,328–50.

Third, EPA issued a determination (the Section 177 Determination) announcing that, whether or not California has a valid Clean Air Act preemption waiver for greenhouse-gas standards, Section 177 of the Act does not authorize any other State to adopt or enforce greenhouse-gas standards identical to California's standards. *Id.* at 51,350–51.

NHTSA and EPA originally had proposed to finalize these three actions at the same time as other actions to weaken federal vehicular greenhouse-gas and fuel-economy standards. Proposed Action, 83 Fed. Reg. 42,986. Despite "the breadth and depth of the record to review, the changes from prior analyses conducted on the same topic, and the importance of the proposal in terms of its potential effects on the U.S. economy, safety, health, and the environment," the agencies initially limited to 60 days the period for public comment on their omnibus proposal. *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Extension of Comment Period*, 83 Fed. Reg. 48,578, 48,580 (Sept. 26, 2018). Because that period fell short of minimum statutory requirements, the agencies extended it by three days, but they denied eighteen requests by automakers, other industry groups, states, municipalities, state and local regulatory agencies, members of Congress, and public-interest organizations for a more substantial extension. *See id.* at 48,580–81.

On the other hand, NHTSA and EPA committed to consider all materials submitted after the comment closing date "[t]o the extent practicable," and to treat all materials submitted to either agency's administrative docket as submitted to both agencies. Proposed Action, 83 Fed. Reg. at 43,471. EPA docketed 66 substantive, non-duplicative

public comments between the comment closing date and the decision date, including dozens of comments from petitioners, along with more than 100 supporting documents. At least one comment was submitted to both agencies during this period but docketed only by NHTSA. *See infra*, page 10 & note 5.

Thirteen months after the proposal, NHTSA finalized the Preemption Rule and EPA finalized the Waiver Revocation and Section 177 Determination. EPA's explanation of its decision included no assertion that any of the comments submitted after the comment closing date, but before final action, had been "received too late for [the agency] to practicably consider." Proposed Action, 83 Fed. Reg. at 43,471. Moreover, EPA addressed at length selective evidence postdating the comment period that the agency "d[id] not believe it appropriate to ignore." Final Action, 84 Fed. Reg. at 51,329. Nonetheless, the certified index of the administrative record EPA filed in this Court on January 9, 2020, excluded all public comments and supporting documents submitted after October 26, 2018. NHTSA's index, by contrast, included all comments submitted to its own administrative docket before September 19, 2019, the date of final action.

On January 24, 2020, counsel for the State of California, a petitioner in Case No. 19-1239, and counsel for public-interest organization petitioners in Cases No. 19-1230 and -1243 sent a letter to respondents' counsel requesting that EPA and NHTSA amend their indices to include materials that are properly part of their administrative records, including public comments and supporting documents filed after the comment closing

date. Respondents agreed to include some of the materials discussed in petitioners' letter but declined to include in EPA's index any materials submitted after the comment closing date. Respondents' counsel represented that EPA had not considered those materials and was not required to consider them. On February 26, 2020, EPA filed an amended index that continued to exclude all materials submitted after October 26, 2018.

STANDARD FOR COMPLETING THE ADMINISTRATIVE RECORD

The Administrative Procedure Act (APA) mandates that "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706.[1] The "whole record" means "the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *see also IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997). The full administrative record "consists of (1) the order involved; (2) any findings or reports on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16(a); *accord* 28 U.S.C. § 2112(b).

In this Court, a respondent agency must proffer "a certified list of the contents of the administrative record." D.C. Cir. R. 17(b). That list is presumed complete, *see Oceana*, 920 F.3d at 865, but the presumption is rebutted by "a substantial showing," *id.*

[1] The APA prescribes the scope of judicial review of EPA's Waiver Revocation and Section 177 Determination because no other statute prescribes a different scope of judicial review. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496 & n.18 (2004); U.S. Opp. to Mots. for Abeyance at 12, ECF No. 1823683 (Jan. 10, 2020) (noting that the standard of judicial review in Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)–(9), does not govern this Court's review of EPA's Waiver Revocation).

(quotation omitted), that the agency "omitted from the record any portion of the proceedings before" it, 28 U.S.C. § 2112(b). Where movants seek only to *complete* the administrative record with non-privileged "materials that were before the agency at the time its decision was made," *IMS*, 129 F.3d at 623, rather than *expand* the judicial record with other materials, *see, e.g.*, *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (en banc), a court need not find "bad faith or improper behavior" by the agency before ordering supplementation of the record, *Overton Park*, 401 U.S. at 420. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–74 (2019) (distinguishing between "completion of the administrative record and extra-record discovery"); *In re United States*, 138 S. Ct. 371, 372–74 (2017) (Breyer, J., dissenting from grant of stay) (same).

REASONS TO COMPLETE EPA'S ADMINISTRATIVE RECORD

Public comments and supporting documents submitted to NHTSA and EPA after the comment closing date but before final action "were before the agenc[ies] at the time [their] decision[s] w[ere] made." *IMS*, 129 F.3d at 623. These materials comprise a "portion of the proceedings before the agenc[ies]," 28 U.S.C. § 2112(b); *accord* Fed. R. App. P. 16(a), and are part of the administrative records for judicial review, as NHTSA appears to recognize. But counsel for EPA now assert that the agency was entitled to ignore every comment and supporting document submitted after the comment closing date and may exclude them from its administrative record on that basis. EPA is wrong.

The APA does not generally require agencies to consider comments that are not timely filed. *See Personal Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 543 (D.C.

Cir. 1995). And, in a typical administrative proceeding, comments must be filed before a designated closing date to be timely. But "it is always within [an agency's] discretion" to "modify [that] procedural rule[] … when in a given case the ends of justice require it." *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (quotation omitted).

EPA exercised that discretion here by committing to consider public comments on the Waiver Revocation or Section 177 Determination submitted after the designated comment closing date, except for any comments "received too late … to practicably consider." Proposed Action, 83 Fed. Reg. at 43,471; *see also* 49 C.F.R. § 553.23 (codifying this commitment for NHTSA rulemakings). In essence, EPA broadened the definition of a "timely" comment to include every comment that the agency practicably could consider before taking final action. EPA thereby "grant[ed] interested persons [an] 'additional procedural right[],'" *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C. Cir. 1983) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 524 (1978)), namely, the right to have otherwise "late" comments considered by the agency.[2]

At the merits stage of this case, that additional procedural right will give rise to claims that EPA improperly failed to consider significant public comments. More relevant here, though, the agency's commitment to consider all public comments to the

[2] Agencies routinely grant procedural rights during individual proceedings rather than via generally applicable rules. Indeed, whenever an agency voluntarily extends the period for public comment on a specific proposal beyond a statutory or regulatory minimum, it grants interested persons a procedural right to consideration of comments that otherwise would have been tardy. It would be "arbitrary, capricious," and unlawful, 5 U.S.C. § 706(2)(A), to revoke that procedural right and fail to consider such comments.

extent practicable means that every comment EPA practicably could have considered is properly "part[] of the proceedings before the agency," Fed. R. App. P. 16(a)(3), and thus material to this Court's review of EPA's actions. *Cf. Oceana*, 920 F.3d at 865 (indicating that an agency may exclude "immaterial or irrelevant" matter from its administrative record). EPA did not assert when it took final action that any comments received by that time had been impracticable to consider.[3] Nor did EPA purport to revoke the procedural right it had granted earlier in the proceeding. Those comments and supporting documents therefore must be included in EPA's administrative record.[4]

Notably, NHTSA, which made an identical procedural commitment, has properly included in its administrative record all public comments and supporting documents submitted to its administrative docket prior to final action. EPA necessarily received those materials no later than NHTSA because "comments submitted to the NHTSA

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[3] At a congressional hearing on June 20, 2019, acting NHTSA Administrator Heidi King, testifying alongside EPA Assistant Administrator William Wehrum, stated that "[w]e are reading the public comments and we are considering all public comments we receive before we make decisions in the final rulemaking." *Driving in Reverse: The Administration's Rollback of Fuel Economy and Clean Car Standards: Hearing before the Subcomm. on Consumer Protection & Commerce and the Subcomm. on Env't & Climate Change of the H. Comm. on Energy & Commerce*, Tr. at 144:3332–34, available at https://docs.house.gov/meetings/IF/IF17/20190620/109670/HHRG-116-IF17-Transcript-20190620.pdf.

[4] In *Reytblatt v. U.S. Nuclear Regulatory Commission*, this Court held that an agency's representation in the preamble of a *final* rule "that it *had* considered all comments, including those received after the deadline," did not "oblig[e] [the] agency to specifically address untimely comments." 105 F.3d 715, 723 (D.C. Cir. 1997) (emphasis added). Petitioners in that case did not raise, and this Court did not decide, the question whether an agency must abide by a commitment at the *outset* of a proceeding to consider comments received after a designated closing date to the extent practicable.

docket [were] considered comments to the EPA docket." Proposed Action, 83 Fed. Reg. at 43,470. And EPA cannot claim that it reached a final decision internally before NHTSA did, because EPA premised its Waiver Revocation in part on NHTSA's decision to finalize the Preemption Rule. *See* Final Action, 84 Fed. Reg. at 51,337–38.

Moreover, EPA did not limit itself to evidence predating the comment closing date. On the contrary, the agency selectively considered after-arising evidence it deemed favorable. For example, the preamble explaining EPA's Waiver Revocation devoted 1,250 words to a December 2018 action and a July 2019 announcement by the State of California that EPA regarded as supporting its decision. Final Action, 84 Fed. Reg. at 51,311, 51,329, 51,334, 51,336. EPA "d[id] not believe it appropriate to ignore these recent actions and announcements," *id.* at 51,329, yet the agency apparently believed it appropriate to ignore contemporaneous public comments it had promised to consider.[5]

[5] This incongruity is arbitrary and capricious with respect to all the comments at issue, and particularly so with respect to comments delayed by EPA's own behavior. For example, New York and 11 other States submitted a comment highlighting EPA's belated response to a Freedom of Information Act (FOIA) request in which New York had asked the agency for evidence supporting its assertion that it had "complied with [the] requirements" of Executive Order 13,132, under which agencies must "consult with State and local officials early in the process of developing" actions (like EPA's Waiver Revocation and Section 177 Determination) "that ha[ve] federalism implications." Proposed Action, 83 Fed. Reg. at 43,476; *see also* E.O. 13,132, § 6(b). After New York sued to compel disclosure of responsive records, *see New York v. EPA*, S.D.N.Y. No. 1:19-cv-00712 (filed Jan. 24, 2019), EPA confirmed on June 20, 2019, that it "did not locate any additional responsive records" outside its administrative docket, which "may" contain evidence of compliance with the executive order, *see* Comment of Barbara D. Underwood, Attorney General of New York, et al., Dkt. No. EPA-HQ-2018-0283-7589, at 4 (submitted July 23, 2019) (quoting EPA's response). Ignoring the States' comment and its own belated FOIA response, EPA simply reiterated when it took final

EPA selectively addressed other evidence postdating the comment closing date as well. For instance, EPA cited one chapter of a November 2018 governmental report on domestic impacts of climate change, *see* Final Action, 84 Fed. Reg. at 51,343 n.265, while improperly ignoring other chapters of that report to which several commenters promptly had directed EPA's attention, *see* Comment of Barbara D. Underwood, Attorney General of New York, et al., Dkt. No. EPA-HQ-OAR-2018-0283-7440 (submitted Dec. 11, 2018); Comment of Center for Biological Diversity et al., Dkt. No. EPA-HQ-OAR-2018-0283-7438 (submitted Dec. 14, 2018); Comment of Xavier Becerra, Attorney General of California, et al., Dkt. No. EPA-HQ-OAR-2018-0283-7447 (submitted Dec. 21, 2018). Once the administrative record is completed, this Court will need to decide whether "it was arbitrary and capricious for EPA to rely on portions of studies in the record that [purportedly] support its position, while ignoring [other portions of] those studies that do not." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018).

Other public comments that EPA improperly ignored also "fairly detract from" its decision. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). For example, the California Air Resources Board directed EPA to a scientific study published after the comment closing date, but well before EPA's final decision, showing that greenhouse gases emitted from California sources have direct and localized impacts within the State.

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action that it had "complied with [the] Order's requirements." Final Action, 84 Fed. Reg. at 51,361.

See Dkt. No. NHTSA-2018-0067-12411 (submitted May 31, 2019).[6] Ignoring that comment and study, EPA based its Waiver Revocation and Section 177 Determination on a fundamental premise that greenhouse gases emitted from vehicles in California do not affect the State differently than greenhouse gases emitted from vehicles and other pollution sources outside the State. Final Action, 84 Fed. Reg. at 51,346–49, 51,351; *see also Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) ("[A]n agency must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision." (quotation omitted)).

Additionally, the California Air Resources Board and public-interest organizations directed EPA to other scientific studies published after the comment closing date, but well before EPA's final decision, that underscore the enormous damage that climate change already has wreaked on the State of California and the unique risks that it poses to the State in the future. *See* Comment of Environmental Defense Fund et al., Dkt. No. EPA-HQ-OAR-2018-0283-7452 (submitted Apr. 5, 2019); Comment of California Air Resources Board, Dkt. No. NHTSA-2018-0067-12411 (submitted May 31, 2019); Comment of California Air Resources Board, Dkt. No. EPA-HQ-OAR-2018-0283-7594 (submitted Aug. 22, 2019). Ignoring those comments and studies, EPA based its

[6] This public comment was submitted to EPA as well as NHTSA but for some reason was not docketed by EPA. In any event, as noted above, EPA committed in this proceeding to consider comments submitted only to NHTSA's administrative docket.

Waiver Revocation on a conclusory rejection of "California's claims that it is uniquely susceptible to certain risks" from climate change. Final Action, 84 Fed. Reg. at 51,348.

Petitioners were prejudiced by EPA's failure to consider these and other public comments submitted after the comment closing date, but well in time to be practicably considered by the agency before it took final action. The APA's "whole record" rule prohibits EPA from "withhold[ing] evidence unfavorable to its case" that was properly presented to the agency but improperly ignored. *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). This Court cannot adequately review EPA's final actions unless and until the comments discussed above and others submitted in time to be practicably considered by the agency are included in the administrative record.

CONCLUSION

This Court should order EPA to complete its administrative record with public comments and supporting documents submitted between October 27, 2018, and September 19, 2019.

Dated: February 27, 2020

Respectfully submitted,

For Petitioners in Cases No. 19-1239, 19-1246:

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
Senior Assistant Attorney General
GARY E. TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JESSICA BARCLAY-STROBEL
MEREDITH J. HANKINS
JENNIFER KALNINS TEMPLE
M. ELAINE MECKENSTOCK
CAROLYN NELSON ROWAN
JONATHAN A. WIENER
Deputy Attorneys General

/s/ Julia K. Forgie
JULIA K. FORGIE
Deputy Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6623
Julia.Forgie@doj.ca.gov

Attorneys for Petitioner State of California, by and through its Governor Gavin Newsom, Attorney General Xavier Becerra, and California Air Resources Board

Additional Counsel on Following Pages

FOR THE STATE OF COLORADO

PHIL WEISER
Colorado Attorney General

/s/ Eric R. Olson
ERIC R. OLSON
Solicitor General
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6562
eric.olson@coag.gov

Attorneys for Petitioner State of Colorado

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut
MATTHEW I. LEVINE
Assistant Attorney General

/s/ Scott N. Koschwitz
SCOTT N. KOSCHWITZ
Assistant Attorney General
165 Capitol Avenue
Hartford, CT 06106
Telephone: (860) 808-5250
Fax: (860) 808-5386
Scott.Koschwitz@ct.gov

Attorneys for Petitioner State of Connecticut

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General of the State of Delaware

/s/ Kayli H. Spialter
KAYLI H. SPIALTER
CHRISTIAN WRIGHT
Deputy Attorneys General
Delaware Department of Justice
820 N. French Street, 6th Floor
Wilmington, DE 19801
Telephone: (302) 395-2604
Kayli.spialter@delaware.gov

Attorneys for Petitioner State of Delaware

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General of the District of Columbia

/s/ Loren L. AliKhan
LOREN L. ALIKHAN
Solicitor General
Office of the Attorney General for the District of Columbia
One Judiciary Square
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
Telephone: (202) 727-6287
Fax: (202) 730-1864
Loren.AliKhan@dc.gov

Attorneys for Petitioner District of Columbia

FOR THE STATE OF HAWAII

CLARE E. CONNORS
Attorney General

/s/ William F. Cooper
WILLIAM F. COOPER
Deputy Attorney General
State of Hawaii Office of the Attorney General
425 Queen Street
Honolulu, HI 96813
Telephone: (808) 586-4070
Bill.F.Cooper@Hawaii.gov

Attorneys for Petitioner State of Hawaii

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois
MATTHEW J. DUNN
Chief, Environmental Enforcement/ Asbestos Litigation Division
JASON E. JAMES
Assistant Attorney General

/s/ Daniel I. Rottenberg
DANIEL I. ROTTENBERG
Assistant Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
Telephone: (312) 814-3816
DRottenberg@atg.state.il.us

Attorneys for Petitioner State of Illinois

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General of Maine

/s/ Laura E. Jensen
LAURA E. JENSEN
Assistant Attorney General
6 State House Station
Augusta, ME 04333
Telephone: (207) 626-8868
Fax: (207) 626-8812
Laura.Jensen@maine.gov

Attorneys for Petitioner State of Maine

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General of Maryland

/s/ Roberta R. James
ROBERTA R. JAMES
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230
Telephone: (410) 537-3748

JOHN B. HOWARD, JR.
JOSHUA M. SEGAL
STEVEN J. GOLDSTEIN
Special Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Telephone: (410) 576-6300

Attorneys for Petitioner State of Maryland

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General
CHRISTOPHE COURCHESNE
Assistant Attorney General
Chief, Environmental Protection Division
CAROL IANCU
Assistant Attorney General
MEGAN M. HERZOG
Special Assistant Attorney General

/s/ Matthew Ireland
MATTHEW IRELAND
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 727-2200
matthew.ireland@mass.gov

Attorneys for Petitioner Commonwealth of Massachusetts

FOR THE PEOPLE OF THE STATE OF MICHIGAN

DANA NESSEL
Attorney General of Michigan

/s/ Neil D. Gordon
NEIL D. GORDON
GILLIAN E. WENER
Assistant Attorneys General
Michigan Department of Attorney General
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 335-7664
gordonn1@michigan.gov

Attorneys for Petitioner People of the State of Michigan

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

/s/ Peter N. Surdo
PETER N. SURDO
Special Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN, 55101
Telephone: (651) 757-1061
Peter.Surdo@ag.state.mn.us

Attorneys for Petitioner State of Minnesota

FOR THE STATE OF NEVADA

AARON D. FORD
Attorney General of Nevada

/s/ Heidi Parry Stern
HEIDI PARRY STERN
Solicitor General
DANIEL P. NUBEL
Deputy Attorney General
Office of the Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701
HStern@ag.nv.gov

Attorneys for Petitioner State of Nevada

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General of New Jersey

/s/ Aaron A. Love
AARON A. LOVE
Deputy Attorney General
25 Market St., PO Box 093
Trenton, NJ 08625-0093
Telephone: (609) 376-2762
Fax: (609) 341-5031
aaron.love@law.njoag.gov

Attorneys for Petitioner State of New Jersey

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

/s/ William Grantham
WILLIAM GRANTHAM
Assistant Attorney General
State of New Mexico Office of the Attorney General
Consumer & Environmental Protection Division
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
wgrantham@nmag.gov

Attorneys for Petitioner State of New Mexico

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York
YUEH-RU CHU
Chief, Affirmative Litigation Section
Environmental Protection Bureau
AUSTIN THOMPSON
Assistant Attorney General

/s/ Gavin G. McCabe
GAVIN G. MCCABE
Assistant Attorney General
28 Liberty Street, 19th Floor
New York, NY 10005
Telephone: (212) 416-8469
gavin.mccabe@ag.ny.gov

Attorneys for Petitioner State of New York

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

/s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
Paul.Garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

Attorneys for Petitioner State of Oregon

FOR THE STATE OF NORTH CAROLINA

JOSHUA H. STEIN
Attorney General
DANIEL S. HIRSCHMAN
Senior Deputy Attorney General
FRANCISCO BENZONI
Special Deputy Attorney General

/s/ Asher P. Spiller
ASHER P. SPILLER
TAYLOR CRABTREE
Assistant Attorneys General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6400

Attorneys for Petitioner State of North Carolina

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania

/s/ Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
JACOB B. BOYER
Deputy Attorney General
Office of Attorney General
1600 Arch St. Suite 300
Philadelphia, PA 19103
Telephone: (215) 560-2171
mfischer@attorneygeneral.gov

Attorneys for Petitioner Commonwealth of Pennsylvania

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island

/s/ Gregory S. Schultz
GREGORY S. SCHULTZ
Special Assistant Attorney General
Office of Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400
gschultz@riag.ri.gov

Attorneys for Petitioner State of Rhode Island

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

/s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
Telephone: (802) 828-3171
nick.persampieri@vermont.gov

Attorneys for Petitioner State of Vermont

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General
PAUL KUGELMAN, JR.
Senior Assistant Attorney General
Chief, Environmental Section

/s/ Caitlin C. G. O'Dwyer
CAITLIN C. G. O'DWYER
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
202 North 9th Street
Richmond, VA 23219
Telephone: (804) 786-1780
godwyer@oag.state.va.us

Attorneys for Petitioner Commonwealth of Virginia

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

/s/ Emily C. Nelson
EMILY C. NELSON
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504
Telephone: (360) 586-4607
emily.nelson@atg.wa.gov

Attorneys for Petitioner State of Washington

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General of Wisconsin

/s/ Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53702-7857
Telephone: (608) 266-7741
Fax: (608) 267-2223
vandermeusejl@doj.state.wi.us

Attorneys for Petitioner State of Wisconsin

FOR THE CITY OF LOS ANGELES

MICHAEL N. FEUER
Los Angeles City Attorney
MICHAEL J. BOSTROM
Assistant City Attorney

/s/ Michael J. Bostrom
MICHAEL J. BOSTROM
Assistant City Attorney
200 N. Spring Street, 14th Floor
Los Angeles, CA 90012
Telephone: (213) 978-1882
Fax: (213) 978-2286
Michael.Bostrom@lacity.org

Attorneys for Petitioner City of Los Angeles

FOR THE CITY OF NEW YORK

JAMES E. JOHNSON
New York City Corporation Counsel
CHRISTOPHER G. KING
ROBERT L. MARTIN
Senior Counsel
SHIVA PRAKASH
Assistant Corporation Counsel

/s/ Christopher G. King
CHRISTOPHER G. KING
Senior Counsel
New York City Law Department
100 Church Street
New York, New York
Telephone: (212) 356-2074
Fax: (212) 356-2084
cking@law.nyc.gov

Attorneys for Petitioner City of New York

FOR THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

/s/ Robb Kapla
ROBB KAPLA
Deputy City Attorney
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
Telephone: (415) 554-4647
robb.kapla@sfcityatty.org

Attorneys for Petitioner City and County of San Francisco

For Petitioners in Cases No. 19-1230, 19-1243:

/s/ Matthew Littleton
MATTHEW LITTLETON
SEAN H. DONAHUE
Donahue, Goldberg, Weaver & Littleton
1008 Pennsylvania Avenue SE
Washington, DC 20003
(202) 683-6895
matt@donahuegoldberg.com

VICKIE L. PATTON
PETER M. ZALZAL
ALICE HENDERSON
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7215
vpatton@edf.org

MARTHA ROBERTS
Environmental Defense Fund
1875 Connecticut Avenue NW, Suite 600
Washington, DC 20009
(202) 572-3243
mroberts@edf.org

Counsel for Environmental Defense Fund

Additional Counsel on Following Pages

ANCHUN JEAN SU
Center For Biological Diversity
1411 K Street NW, Suite 1300
Washington, DC 20005
(202) 849-8399
jsu@biologicaldiversity.org

MAYA GOLDEN-KRASNER
Center For Biological Diversity
660 South Figueroa Street, Suite 1000
Los Angeles, CA 90017
(213) 785-5402
mgoldenkrasner@biologicaldiversity.org

Counsel for Center For Biological Diversity

ARIEL SOLASKI
JON A. MUELLER
Chesapeake Bay Foundation, Inc.
6 Herndon Avenue
Annapolis, MD 21403
(443) 482-2171
asolaski@cbf.org

Counsel for Chesapeake Bay Foundation, Inc.

SHANA LAZEROW
Communities For A Better Environment
6325 Pacific Boulevard, Suite 300
Huntington Park, CA 90255
(323) 826-9771
slazerow@cbecal.org

Counsel for Communities For A Better Environment

EMILY K. GREEN
Conservation Law Foundation
53 Exchange Street, Suite 200
Portland, ME 04102
(207) 210-6439
egreen@clf.org

Counsel for Conservation Law Foundation

MICHAEL LANDIS
The Center For Public Interest Research
1543 Wazee Street, Suite 400
Denver, CO 80202
(303) 573-5995 ext. 389
mlandis@publicinterestnetwork.org

Counsel for Environment America

ROBERT MICHAELS
ANN JAWORSKI
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 795-3713
rmichaels@elpc.org

Counsel for Environmental Law & Policy Center

IAN FEIN
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100
ifein@nrdc.org

DAVID D. DONIGER
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 289-6868
ddoniger@nrdc.org

Counsel for Natural Resources Defense Council, Inc.

JOANNE SPALDING
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
joanne.spalding@sierraclub.org

PAUL CORT
REGINA HSU
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
(415) 217-2077
pcort@earthjustice.org

VERA PARDEE
726 Euclid Avenue
Berkeley, CA 94708
(858) 717-1448
pardeelaw@gmail.com

Counsel for Sierra Club

SCOTT L. NELSON
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Counsel for Public Citizen, Inc.

TRAVIS ANNATOYN
Democracy Forward Foundation
1333 H Street NW
Washington, DC 20005
(202) 601-2483
tannatoyn@democracyforward.org

Counsel for Union Of Concerned Scientists

For Petitioners in Case No. 19-1241:

/s/ Brian Tomasovic
BARBARA BAIRD, Chief Deputy Counsel
BRIAN TOMASOVIC
KATHRYN ROBERTS
South Coast Air Quality Mgmt. District
21865 Copley Dr.
Diamond Bar, CA 91765
Telephone: (909) 396-3400
Fax: (909) 396-2961

Counsel for South Coast Air Quality Management District

/s/ Brian C. Bunger
BRIAN BUNGER, District Counsel
RANDI WALLACH
Bay Area Air Quality Mgmt. District
375 Beale Street, Suite 600
San Francisco, CA 94105
Telephone: (415) 749-4720
Fax: (415) 749-5103

Counsel for Bay Area Air Quality Management District

/s/ Kathrine Pittard
KATHRINE PITTARD, District Counsel
Sacramento Metropolitan Air Quality Mgmt. District
777 12th Street
Sacramento, CA 95819
Telephone: (916) 874-4907

Counsel for Sacramento Metropolitan Air Quality Management District

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **Motion to Complete Administrative Record** is printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word, it contains 3,262 words.

/s/ Julia K. Forgie
JULIA K. FORGIE

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, I caused a copy of the foregoing **Motion to Complete Administrative Record** to be filed with the Clerk of the Court using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Julia K. Forgie
JULIA K. FORGIE