

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL ENVIRONMENTAL
DEVELOPMENT ASSOCIATION'S CLEAN AIR
PROJECT,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ALLIANCE FOR RESPONSIBLE
ATMOSPHERIC POLICY, INC., ET AL.,

Intervenors.

Case No. 17-1016

Consolidated with Case
Nos. 17-1017, 20-1150,
20-1151

**JOINT UNOPPOSED MOTION OF PETITIONER NRDC, STATE AND
MUNICIPAL PETITIONERS, AND RESPONDENTS
ENVIRONMENTAL PROTECTION AGENCY AND ADMINISTRATOR
WHEELER TO AMEND BRIEFING FORMAT
(CASE NOS. 20-1150 AND 20-1151)**

INTRODUCTION

This proceeding involves four consolidated petitions for review of two different rules issued by Respondents United States Environmental Protection Agency and Administrator Andrew Wheeler (together, EPA).¹ After the Court set a briefing format and schedule, instead of submitting an opening brief, Petitioners National Environmental Development Association's Clean Air Project (NEDA/CAP) and Air Permitting Forum moved to voluntarily dismiss their two petitions challenging one of the rules (Case Nos. 17-1016 and 17-1017). In the event the Court grants the voluntary dismissal motion, Petitioners and Respondents in the remaining two cases in this consolidated proceeding (Case Nos. 20-1150 and 20-1151) respectfully request that the Court amend the briefing format to reestablish parity between the parties by revising the word limit for EPA's answering brief to 10,000 words.

Counsel for Intervenors Auto Industry Forum and Air Permitting Forum in Case Nos. 20-1150 and 20-1151 indicated that Intervenors have no objection to this motion.

¹ Petitioners and Respondents note that former EPA Administrator Gina McCarthy was a named Respondent in Case No. 17-1017. Ms. McCarthy has since been automatically substituted by her successor pursuant to Federal Rule of Appellate Procedure 43(c)(2). As a result, Respondents in Case No. 17-1017 are the Environmental Protection Agency and Administrator Andrew Wheeler.

BACKGROUND

On January 17, 2017, NEDA/CAP and Air Permitting Forum filed separate petitions for review of a final rule issued by EPA under the Clean Air Act entitled “Protection of Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act,” 81 Fed. Reg. 82,272 (Nov. 18, 2016) (“2016 Rule”). Pet. for Review, *Nat’l Emvtl. Dev. Ass’n’s Clean Air Project v. EPA*, Case No. 17-1016 (D.C. Cir. Jan. 17, 2017); Pet. for Review, *Air Permitting Forum v. EPA*, Case No. 17-1017 (D.C. Cir. Jan. 17, 2017). The Court consolidated these two petitions for review of the 2016 Rule. Order, Jan. 18, 2017, Doc. 1656395.

At EPA’s request, beginning in August 2018, the Court held these challenges in abeyance. *See, e.g.*, EPA’s Unopposed Mot. to Hold Litig. in Abeyance for 14 Days, Aug. 30, 2018, Doc. 1748325; Order, Aug. 31, 2018, Doc. 1748590; EPA’s Unopposed Mot. to Hold Litig. in Abeyance for 14 Days, Sept. 13, 2018, Doc. 1750545; Order, Sept. 14, 2018, Doc. 1750770. On March 11, 2020, EPA published a final rule entitled “Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program’s Extension to Substitutes,” which rescinded portions of the 2016 Rule. 85 Fed. Reg. 14,150 (“2020 Rule”).

On May 11, 2020, Petitioners Natural Resources Defense Council (NRDC) and a coalition of state and municipal governments² filed petitions for review challenging the 2020 Rule, which the Court consolidated. Pet. for Review, *NRDC v. Wheeler*, Case No. 20-1150 (D.C. Cir. May 11, 2020); Pet. for Review, *New York v. Wheeler*, Case No. 20-1151 (D.C. Cir. May 11, 2020); Order, May 12, 2020, Doc. 1842454.

On June 30, 2020, EPA moved to consolidate the challenges to the 2016 and 2020 Rules. EPA's Mot. to Consolidate, Doc. 1849631. On July 21, 2020, the Court granted EPA's motion and consolidated all four petitions. Order 2, Doc. 1852797.

On August 17, 2020, the Court issued a briefing schedule and format for the consolidated proceeding. Order, Doc. 1856810.³ In relevant part, the order provided for Petitioners challenging the 2016 Rule to file an opening brief not to exceed 10,000 words, and Petitioners challenging the 2020 Rule to file up to two opening briefs not to exceed 10,000 words in total. The Court provided that EPA's answering brief was not to exceed 20,000 words, in response to the 20,000 total words allowed for opening briefs. *Id.* The Court set deadlines of October 16, 2020, for opening briefs and December 15, 2020, for EPA's answering brief. Intervenors in the 2016 Rule challenges, NRDC and the Alliance for Responsible Atmospheric Policy, were given

² The government petitioners ("State and Municipal Petitioners") are the States of New York, Connecticut, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Virginia, and Washington; the District of Columbia; and the City of New York.

³ In this order, the Court also severed certain issues, which were assigned to Case No. 20-1309. That case is being held in abeyance.

up to 7,000 words for an intervenor brief due January 26, 2021. Intervenors in the 2020 Rule challenges, Air Permitting Forum and Auto Industry Forum, were also given up to 7,000 words for an intervenor brief due January 26, 2021.

On October 16, 2020, Petitioners NRDC and State and Municipal Petitioners filed their opening brief, complying with the Court's 10,000-word limit. Initial Opening Br. of Pet'r NRDC & State & Municipal Pet'rs, Doc. 1866890. The same day, Petitioners NEDA/CAP and Air Permitting Forum moved for voluntary dismissal of their challenges to the 2016 Rule in Case Nos. 17-1016 and 17-1017. Joint Mot. of Nat'l Env'tl. Dev. Ass'n's Clean Air Project & Air Permitting Forum for Voluntary Dismissal, Oct. 16, 2020, Doc. 1866884. The unopposed motion for voluntary dismissal remains pending with the Court.

ARGUMENT

In the event the Court grants NEDA/CAP and Air Permitting Forum's motion for voluntary dismissal, revising the word limit for EPA's answering brief to 10,000 words will be appropriate. Under the previous briefing format, EPA had 20,000 words through which to respond to two opening briefs of 10,000 words each. *See* Order, Doc. 1856810. Instead of filing an opening brief, NEDA/CAP and Air Permitting Forum moved to dismiss their challenges. If the Court grants the pending unopposed motion for voluntary dismissal of Case Nos. 17-1016 and 17-1017, EPA's answering brief will respond only to a single 10,000-word joint brief by Petitioners NRDC and State and Municipal Petitioners.

The parties agree that an amended briefing format with a 10,000-word limit for Respondent EPA's brief due December 15, 2020, is appropriate if the Court grants the pending unopposed motion for voluntary dismissal. *Cf.* Fed. R. App. P. 32(a)(7)(B) (providing equivalent words for principal briefs of petitioners and respondents). The remaining deadlines for briefs associated with the challenges to the 2016 Rule in Case Nos. 17-1016 and 17-1017 are moot because Petitioners in those cases declined to submit an opening brief, instead moving to voluntarily dismiss those cases. The parties further agree that the other deadlines and word limits for briefs associated with the 2020 Rule challenges in Case Nos. 20-1150 and 20-1151 need not be adjusted, should the Court grant the voluntary dismissal motion.

CONCLUSION

For the foregoing reasons, Petitioners and Respondents in Case Nos. 20-1150 and 20-1151 respectfully request, if the Court grants the pending motion for voluntary dismissal of Case Nos. 17-1017 and 17-1017, that the Court amend the word limit for EPA's answering brief to 10,000 words.

Dated: November 25, 2020

FOR THE STATE OF NEW YORK
LETTIA JAMES
Attorney General
BARBARA D. UNDERWOOD
Solicitor General

Respectfully submitted,

/s/ Sarah C. Tallman

Sarah C. Tallman⁴
Natural Resources Defense Council
20 N. Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 651-7918

⁴ Counsel for NRDC represents that all parties listed in the signature block consent to this filing.

STEVEN C. WU
Deputy Solicitor General
MICHAEL J. MYERS
Senior Counsel
JOSHUA M. TALLENT
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2456
michael.myers@ag.ny.gov
joshua.tallent@ag.ny.gov

FOR THE STATE OF
CONNECTICUT
WILLIAM TONG
Attorney General
JILL LACEDONIA
Assistant Attorney General
Office of the Attorney General
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5250
jill.lacedonia@ct.gov

FOR THE STATE OF ILLINOIS
KWAME RAOUL
Attorney General
MATTHEW J. DUNN
Chief, Environmental
Enforcement/Asbestos Litigation
Division
DANIEL I. ROTTENBERG
Assistant Attorney General
Illinois Attorney General's Office
69 W. Washington Street, 18th Floor
Chicago, IL 60602
(312) 814-3816
drottenberg@atg.state.il.us

stallman@nrdc.org

Melissa J. Lynch
David D. Doniger
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 289-6868
llynch@nrdc.org
ddoniger@nrdc.org

Julia Jonas-Day
Natural Resources Defense Council
40 W 20th Street
New York, NY 10011
(781) 799-8675
jjonasday@nrdc.org

*Counsel for Petitioner Natural Resources
Defense Council*

FOR THE STATE OF
WASHINGTON
ROBERT W. FERGUSON
Attorney General
CHRIS REITZ
Assistant Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504
(360) 586-4614
chris.reitz@atg.wa.gov

FOR THE STATE OF MARYLAND
BRIAN E. FROSH
Attorney General
JOHN B. HOWARD, JR.
Special Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM

Attorney General

PAUL GARRAHAN

Attorney-in-Charge

Natural Resources Section

Oregon Department of Justice

1162 Court Street NE

Salem, OR 97301

(503) 947-4593

paul.garrahan@doj.state.or.us

(410) 576-6300

jbhoward@oag.state.md.us

FOR THE STATE OF MAINE

AARON M. FREY

Attorney General

LAURA E. JENSEN

Assistant Attorney General

Office of the Attorney General

6 State House Station

Augusta, ME 04333

(207) 626-8812

laura.jensen@maine.gov

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL

Attorney General

LISA J. MORELLI

Deputy Attorney General

New Jersey Division of Law

25 Market Street

Trenton, NJ 08625

(609) 376-2745

lisa.morelli@dol.lps.state.nj.us

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING

Attorney General

DONALD D. ANDERSON

Deputy Attorney General

PAUL KUGELMAN, JR.

Senior Assistant Attorney General and Chief

CAITLIN COLLEEN

GRAHAM O'DWYER

Assistant Attorney General

Environmental Section

202 North 9th Street

Richmond, VA 23219

(804) 786-1780

pkugelman@oag.state.va.us

godwyer@oag.state.va.us

FOR THE STATE OF MINNESOTA

KEITH ELLISON

Attorney General

PETER N. SURDO

Special Assistant Attorney General

Minnesota Attorney General

445 Minnesota Street, Suite 1400

Saint Paul, MN 55101

(651) 757-1061

peter.surdo@ag.state.mn.us

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE

Attorney General

LOREN L. ALIKAHN

Solicitor General

Office of the Attorney General

for the District of Columbia

FOR THE CITY OF NEW YORK

JAMES E. JOHNSON

Corporation Counsel

CHRISTOPHER G. KING

Senior Counsel

New York City Law Department

100 Church Street

New York, NY 10007
(212) 356-2319
cking@law.nyc.gov

400 6th Street, NW, Suite 8100
Washington, DC 20001
(202) 727-6287
loren.alikhan@dc.gov

BENJAMIN CARLISLE
REDDING CATES
NY Bar # 4734612 (Carlisle)
CA Bar # 269055 (Cates)
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
Phone: (202) 514-9771 (Carlisle)
Phone: (202) 514-2617 (Cates)
Fax: (202) 514-8865
Benjamin.Carlisle@usdoj.gov
Redding.Cates@usdoj.gov

*Counsel for Respondents EPA and
Administrator Wheeler*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this motion complies with the length limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,107 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

I further certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in Microsoft Word using 14-point Garamond, a proportionally spaced font.

November 25, 2020

/s/ Sarah C. Tallman

Sarah C. Tallman
Natural Resources Defense Council
20 N. Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 651-7918
stallman@nrdc.org

*Counsel for Petitioner Natural Resources
Defense Council*

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 2020, the foregoing Joint Unopposed Motion of Petitioner NRDC, State and Municipal Petitioners, and Respondents Environmental Protection Agency and Administrator Wheeler to Amend Briefing Format has been served on all registered counsel through the Court's electronic filing system.

/s/ Sarah C. Tallman

Sarah C. Tallman
Natural Resources Defense Council
20 N. Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 651-7918
stallman@nrdc.org

*Counsel for Petitioner Natural Resources
Defense Council*