UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CLEAN AIR CAROLINA, et al., Plaintiffs, v. U.S. DEPARTMENT OF TRANSPORTATION, et al., Defendants.	1:17-cv-5779-AT ECF Case

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Mitchell S. Bernard
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
212-727-4469
mbernard@nrdc.org

Cecilia D. Segal
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94110
415-875-6112
csegal@nrdc.org

Counsel for Natural Resources Defense Council and U.S. Public Interest Research Group

Kimberley Hunter
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
919-967-1450
khunter@selcnc.org

Counsel for Clean Air Carolina

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INTRODUCTION

The Federal Highway Administration violated the law. It temporarily and then indefinitely suspended—without advance notice or opportunity for public comment, as required by the Administrative Procedure Act—a duly promulgated regulation designed to reduce greenhouse gas emissions from vehicles traveling on national roadways. Plaintiffs brought this suit, seeking to vacate the unlawful suspensions. Nearly two months later, on the eve of the date on which Plaintiffs could file a motion for summary judgment, the agency abruptly changed course and lifted the indefinite suspension.

Defendants now contend this case is moot. It is not: The government has failed to carry its heavy burden of making absolutely clear that the agency's wrongful conduct will not recur. Rather, there is ample reason to believe the agency may again suspend or amend the regulation without notice and comment once the threat of litigation has passed. The Court should deny the motion to dismiss and allow this case to proceed on the merits.

BACKGROUND

In 2012 and 2015, respectively, Congress enacted two laws aimed at funding and reforming the federal surface transportation system: the Moving Ahead for Progress in the 21st Century Act, and the Fixing America's Surface Transportation Act. *See* Pub. L. No. 112-141 & Pub. L. No. 114-94 (codified in relevant part at 23 U.S.C. §§ 119, 134-35, 148-50, 167). Specifically, the Acts mandate measurable progress on seven national transportation goals, including environmental sustainability. *See generally* 23 U.S.C. § 150.

The Acts direct the Secretary of Transportation, through the U.S. Department of Transportation and the Federal Highway Administration (FHWA), to implement this mandate. *See id.* § 150(c). The Secretary must set performance measures that reflect and

support the seven national transportation goals. *Id.* State departments of transportation and metropolitan planning organizations must then adopt corresponding performance targets, and periodically submit progress reports to the Secretary. *Id.* § 150(d), (e).

To comply with Congress's command, in January 2017 the FHWA promulgated a final rule setting measures related to performance of the national highway system, freight movement on the interstate system, and congestion mitigation. 82 Fed. Reg. 5970 (Jan. 18, 2017). One such measure requires state departments of transportation and metropolitan planning organizations to track greenhouse gases emitted by vehicles on the national highway system (the greenhouse gas measure). *Id.* at 5993, 6000.

As its February 17, 2017 effective date approached, the FHWA suspended the rule, postponing its effective date to March 21, 2017. 82 Fed. Reg. 10,441 (Feb. 13, 2017). A month later, the agency suspended the rule a second time, postponing its effective date to May 20, 2017. 82 Fed. Reg. 14,438 (Mar. 21, 2017). On May 19, the agency suspended the greenhouse gas measure indefinitely; all other aspects of the rule took effect the following day. 82 Fed. Reg. 22,879 (May 19, 2017). The agency did not provide advance notice or opportunity for public comment on any of the suspensions. *See* 82 Fed. Reg. at 10,441-42; 82 Fed. Reg. at 14,438; 82 Fed. Reg. at 22,879-80. Instead, it invoked the Administrative Procedure Act's "good cause" exception to notice-and-comment rulemaking, asserting that the new administration needed "adequate time" to review the rule. 82 Fed. Reg. at 10,441-42; 82 Fed. Reg. at 14,438; 82 Fed. Reg. at 22,879-80.

Plaintiffs filed suit on July 31, 2017, alleging that all three suspensions violated the Administrative Procedure Act. Compl. ¶¶ 53-56, ECF No. 1. They asked the Court to vacate the suspensions. *Id.* ¶¶ A, B. Eight states filed a similar suit on the west coast.

California v. U.S. Dep't of Transp., No. 4:17-cv-05439 (N.D. Cal. filed Sept. 20, 2017).

Two months after Plaintiffs filed their complaint—and on the same day its Court-ordered response to Plaintiffs' Rule 56.1 Statement of Material Facts was due—the FHWA published a notice in the Federal Register (the September 28 Notice), lifting the indefinite suspension and allowing the greenhouse gas measure to take immediate effect. 82 Fed. Reg. 45,179 (Sept. 28, 2017). The following week, the agency published another notice in the Federal Register (the October 5 Notice), inviting public comment on its proposal to repeal the measure. 82 Fed. Reg. 46,427, 46,428 (Oct. 5, 2017). Neither notice mentioned the illegality of the earlier suspensions, this lawsuit, or a commitment by the agency not to again suspend or amend the greenhouse gas measure without notice and comment. *See generally* 82 Fed. Reg. at 45,179-80; 82 Fed. Reg. at 46,427-33.

STANDARD OF REVIEW

When reviewing a motion to dismiss a case as moot under Federal Rule of Civil Procedure 12(b)(1), a court must take all facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008); *Jones-Bartley v. McCabe, Weisberg & Conway, P.C.*, 59 F. Supp. 3d 617, 624 (S.D.N.Y. 2014). The court may consider extra-pleading materials to resolve the motion, but may not rely on conclusory statements contained in those materials. *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). While a plaintiff generally bears the burden of proving that subject matter jurisdiction exists, *Morrison*, 547 F.3d at 170, the burden of demonstrating mootness falls on the defendant, *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016).

This burden is both "stringent" and "formidable." *MHANY*, 819 F.3d at 604. To demonstrate that its voluntary cessation of challenged conduct renders a case moot, a defendant must show that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 603 (internal quotation marks omitted). Though "some deference" is owed to a government entity's representation that its illegal conduct has been discontinued, that deference "does not equal unquestioned acceptance." *Id.*; *see also Bell v. City of Boise*, 709 F.3d 890, 899 n.13 (9th Cir. 2013) ("Although we presume a government entity is acting in good faith when it changes its policy, the government entity still must meet its heavy burden of proof" under the voluntary cessation doctrine (citation omitted)).

ARGUMENT

Defendants Fail to Demonstrate That This Case Is Moot

"Mere voluntary cessation of allegedly illegal conduct does not moot a case." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). To overcome this general rule, a defendant must make "absolutely clear" that the allegedly wrongful behavior "could not reasonably be expected to recur." *Id.*

Defendants insist that they meet this stringent standard, arguing that the FHWA's decision to lift the indefinite suspension of the greenhouse gas measure moots this case. To support their argument, Defendants rely on three pieces of evidence: (1) the September 28 Notice allowing the measure to take effect; (2) the October 5 Notice initiating a new rulemaking on the measure's repeal; and (3) a declaration by FHWA Acting Administrator Brandye Hendrickson stating the agency's "intention to allow the [greenhouse gas] measure to remain in effect" until that rulemaking is complete. Defs.' Br. 5-8, ECF No. 30. For the

reasons detailed below, this evidence falls far short of meeting the government's formidable burden to make "absolutely clear" that future suspensions of the greenhouse gas measure without notice and comment "could not reasonably be expected to recur."

A. The September 28 Notice's Suspicious Timing, Failure to Acknowledge Any Wrongdoing, and Impermanence Blunt its Mooting Effect

Relying on the September 28 Notice, Defendants assert that "'[c]orrective action by an agency . . . can moot a previously justiciable issue.'" Defs.' Br. 5 (quoting *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 680 F.2d 810 (D.C. Cir. 1982)). But the mooting effect of such an action—even where "embodied in [an] official document" like a Federal Register notice—may be "blunted . . . by a number of circumstances." *United States v. N.Y.C. Transit Auth.*, 97 F.3d 672, 676 (2d Cir. 1996).

The September 28 Notice's suspicious timing is one such circumstance. A defendant's sudden decision to alter its behavior ahead of a looming court deadline is the type of "strategic maneuver" that suggests an attempt "to conjure up an argument for mootness." *Ahrens v. Bowen*, 646 F. Supp. 1041, 1048 (E.D.N.Y. 1986), *rev'd on other grounds*, 852 F.2d 49 (2d Cir. 1988). Thus, courts have declined to hold a case moot where the purportedly mooting conduct occurred "on the eve of summary judgment." *MHANY*, 819 F.3d at 604; *Ahrens*, 646 F. Supp. at 1048. The same result is compelled here. The FHWA lifted the suspension of the greenhouse gas measure "on the eve of summary judgment." *See* Order, Sept. 14, 2017, ECF No. 23 (requiring Defendants to respond to Plaintiffs' Rule 56.1 Statement of Material Facts by September 28, 2017, and allowing Plaintiffs to file their motion for summary judgment any time thereafter); Defs.' Letter, Sept. 25, 2017, ECF No. 24 (announcing FHWA's decision to lift the suspension, "rendering Plaintiffs' claims moot," and requesting an adjournment of the summary judgment briefing schedule).

The government has presented no evidence that the decision to lift the suspension pre-dated Plaintiffs' suit. *Cf. Bremby v. Price*, No. 3:15-cv-1397 (DJS), 2017 WL 902854, at *4 (D. Conn. Mar. 6, 2017) (finding suspicious timing of agency's actions mitigated where agency offered proof that it had already decided to act before the plaintiff filed his complaint). Far from mooting this case, the September 28 Notice instead represents a "strategic maneuver" designed to evade judicial review.

The September 28 Notice's failure to acknowledge or disavow the unlawfulness of the three suspensions is a second blunting circumstance. *See Ahrens*, 852 F.2d at 53; *Monroe v. Bombard*, 422 F. Supp. 211, 215 n.5 (S.D.N.Y. 1976) (finding that the agency's change in policy did not moot the case where the defendants had "not admitted that the challenged activity is illegal"); *see also Armster v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct."). As explained in Plaintiffs' letter to the Court seeking permission to file a motion for summary judgment, the FHWA violated both the Administrative Procedure Act and controlling Second Circuit law each time it suspended the greenhouse gas measure. Pls.' Letter, Sept. 5, 2017, ECF No. 19. The September 28 Notice, however, makes no mention of the suspensions' illegality or this lawsuit; in fact, the Notice barely mentions the suspensions at all. *See* 82 Fed. Reg. at 45,179-80. The government "cannot escape the pitfalls of litigation" by simply "giving in" to Plaintiffs' claim "without renouncing the challenged conduct." *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 74 F.3d 1308, 1311 (D.C. Cir. 1996), *vacated sub nom. U.S. Dep't of State v. Legal Assistance for Vietnamese Asylum Seekers*, 519 U.S. 1 (1996) (per curiam).

Rather, by failing to repudiate the three suspensions, the September 28 Notice ensures that a legal controversy "remain[s] to be settled." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

A third blunting circumstance is the September 28 Notice's impermanence. "A controversy still smoulders when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct." *Hooker Chem. Co. v. U.S. Envtl. Prot. Agency*, 642 F.2d 48, 52 (3d Cir. 1981). Here, the FHWA repeatedly suspended the greenhouse gas measure without notice and comment, in violation of black letter law. The September 28 Notice does nothing to prevent the agency from doing so again. *See MHANY*, 819 F.3d at 604 (declining to hold the case moot in part because the defendant failed to show it had permanently committed to its new course of action); *Eureka V LLC v. Town of Ridgefield*, 596 F. Supp. 2d 258, 266 (D. Conn. 2009) (denying a motion to dismiss on mootness grounds where the court saw "nothing that would prevent" the defendant from reversing course, and finding it "conceivable" that the defendant could do so "a number of times simply to avoid any liability"). Because the September 28 Notice leaves the FHWA "free to return to its old ways," it has a minimal mooting effect on this case. *See W. T. Grant*, 345 U.S. at 632.

Defendants aver that "'the mere power to reenact a challenged law is not a sufficient basis'" for a court to conclude that the unlawful conduct is likely to recur. Defs.' Br. 8 (quoting *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997)). This principle does not apply here. First, this case involves agency regulations, not legislative enactments. *See Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (distinguishing mootness cases on this basis). While statutory changes may

(sometimes) be enough to render a case moot, regulatory changes are inherently less permanent. Enacting or repealing a statute requires majority votes in the houses of Congress; suspending a regulation requires the signature of a single executive branch official. Accordingly, regulatory changes are less likely to moot a case. *See Bell*, 709 F.3d at 899-901; *see also Dow Chem. Co. v. U.S. Envtl. Prot. Agency*, 605 F.2d 673, 678 (3d Cir. 1979) ("Courts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule."); *Nader v. Volpe*, 475 F.2d 916, 917 (D.C. Cir. 1973) ("Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn.").

Second, the FHWA's power to resuspend the greenhouse gas measure is not the only basis for concluding that a suspension could reasonably be expected to recur. The agency lifted the indefinite suspension of the measure two months after Plaintiffs filed their complaint, on the same day as the Court-imposed deadline to respond to Plaintiffs' Rule 56.1 Statement of Material Facts. 82 Fed. Reg. at 45,179-80; Order, Sept. 14, 2017. In its public pronouncement allowing the measure to take effect, the agency neither disclaimed its unlawful conduct nor promised to avoid such conduct in the future. *See* 82 Fed. Reg. at 45,179-80. These blunting circumstances erase any mooting effect of the September 28 Notice.

B. The October 5 Notice Does Not Preclude the FHWA from Suspending the Greenhouse Gas Measure Again

Defendants next contend that the October 5 Notice removes any "reasonable expectation" that the FHWA will suspend the greenhouse gas measure without notice and comment. Defs.' Br. 7. To the contrary, the proposed agency action announced in the October 5 Notice—rescission of the greenhouse gas measure—may as a practical matter

tempt the agency to violate the law again. If the agency receives, as it no doubt will, voluminous comments opposing the rescission, it will have to consider and respond to those comments. It will also have to reckon with the tens of thousands of comments, some of them technical, that were submitted in support of the measure during its initial promulgation. *See* 82 Fed. Reg. at 5993. Assuming the agency acts in accordance with law, this process will take significant time and agency resources. At the same time, the agency will have to expend resources to implement the now-effective measure. States, too, will have to expend resources to comply with it. *See, e.g.*, 23 C.F.R. § 490.105(c)(5), (e)(1) (requiring states to set greenhouse gas reduction targets by February 20, 2018). If states were to complain that they should not be required to comply with the measure in light of its proposed repeal, the FHWA could be tempted to suspend the measure yet again.[1]

Nothing in the text or meaning of the October 5 Notice precludes the agency from taking such action. Indeed, the agency's drive to repeal the measure may soon provide an incentive for it to issue a separate, interim notice suspending the measure's current effect. Absent an order from this Court, the FHWA will remain free to violate the law again. *See Eureka V LLC*, 596 F. Supp. 2d at 266 (denying a motion to dismiss on mootness grounds where the court saw "nothing that would prevent" the defendant from reversing

[1] For similar reasons, the October 5 Notice makes a third-party legal challenge to the September 28 Notice—which was issued without notice and comment—more likely. *See* 82 Fed. Reg. at 5993 (noting that several state and local transportation agencies submitted comments opposing adoption of the greenhouse gas measure). Such a challenge, if successful, might revive the indefinite suspension of the greenhouse gas measure, injuring Plaintiffs. Defendants dismiss this concern as speculative, stating that "Plaintiffs cannot establish a reasonable expectation of re-occurrence through hypothetical events." Defs.' Br. 8. This attempt to reverse their heavy burden and impose it on Plaintiffs "is insufficient to show mootness." *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1174 (9th Cir. 2009).

course); *Sierra Club v. Hanna Furnace Corp.*, 636 F. Supp. 527, 529 (W.D.N.Y. 1985) (declining to dismiss plaintiff's demand for injunctive relief as moot "[i]n the absence of convincing evidence that defendant *cannot* recommence" the unlawful conduct).

Defendants' remaining argument—that the public-comment process initiated by the October 5 Notice rectifies the FHWA's failure to provide notice and comment each time it suspended the greenhouse gas measure, Defs.' Br. 5—has been expressly rejected by the Second Circuit. *See Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 206 n.14 (2d Cir. 2004) (rejecting argument that "subsequent notice-and-comment procedures . . . either cured or mooted the absence of notice and comment" in the first instance). Several other circuit courts have rejected similar arguments. *See, e.g.*, *United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010); *Ohio Dep't of Human Servs. v. U.S. Dep't of Health & Human Servs.*, 862 F.2d 1228, 1236 (6th Cir. 1988); *Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 683 F.2d 752, 768 (3d Cir. 1982); *U.S. Steel Corp. v. Envtl. Prot. Agency*, 595 F.2d 207, 214-15 (5th Cir. 1979). Otherwise, an agency wishing "to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act." *United States v. Mullins*, No. 2:11-cr-103, 2012 WL 3777067, at *10 (D. Vt. Aug. 29, 2012) (internal quotation mark omitted).

For these reasons, the agency's October 5 Notice does not moot this case.

C. Acting Administrator Hendrickson's Conclusory Statements of Intent Carry Little Weight

Finally, Defendants cite the declaration submitted by FHWA Acting Administrator Hendrickson to support their assertion that the agency will not suspend or amend the greenhouse gas measure until the rulemaking initiated on October 5 is complete. Defs.' Br. 4, 7. That is not what the declaration says. Rather, the Acting Administrator states only that

the FHWA "intends" to allow the greenhouse gas measure to remain in effect and "has no intention of suspending or amending" it. Hendrickson Decl. ¶ 8, ECF No. 31.

These statements of intent "do[] not suffice to make [the] case moot." *W. T. Grant*, 345 U.S. at 633; *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 106 (2d Cir. 1989) (explaining that "narrowly drawn affidavits containing disclaimers only of present intention to resume allegedly unlawful activity" are insufficient to meet defendants' heavy burden of demonstrating mootness). In *New York Public Interest Research Group v. Whitman*, the Second Circuit rejected the government's mootness argument even though the agency had submitted a letter of commitment identifying the changes it had made, and intended to make, to bring the challenged program into compliance. 321 F.3d 316, 327 (2d Cir. 2003). "Although indicative of a degree of good faith," the court explained, the letter of commitment did not "carr[y] the formidable burden of making 'absolutely clear' that the problems identified . . . 'could not reasonably be expected to recur.'" *Id.* (citation omitted). In *Trudeau v. Bockstein*, the court similarly found the agency's statement that it had "no intention" of resuming the challenged activity insufficient to discharge its burden under the voluntary cessation doctrine. No. 05-cv-1019 (GLS-RFT), 2008 WL 541158, at *4-5 (N.D.N.Y. Feb. 25, 2008). The agency's failure to promise that it would "never, under any circumstances" repeat its past wrongs bolstered the court's conclusion. *See id.* at *5 n.6.

Likewise here, Acting Administrator Hendrickson's conclusory expressions of intent are of limited consequence, and fail to make "absolutely clear" that suspension of the greenhouse gas measure "could not reasonably be expected to recur." *Whitman*, 321 F.3d at 327; *see also Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, No. C-02-2708 JCS, 2006 WL 2130905, at *9 (N.D. Cal. July 28, 2006) (even where a court "does not question the [agency's] good

faith," a "conclusory promise of future compliance does not carry a great deal of weight"); *Attica Cent. Sch.*, 386 F.3d at 110 (in deciding a Rule 12(b)(1) motion to dismiss, a court may not rely on conclusory statements contained in affidavits). The Acting Administrator's unwillingness to promise that the agency will "never, under any circumstances" resume its unlawful conduct underscores Plaintiffs' point. *Trudeau*, 2008 WL 541158, at *5 n.6. That language was available to her; she chose not to use it. Absent a firm, unequivocal, and binding commitment not to suspend or amend the greenhouse gas measure without notice and comment, Acting Administrator Hendrickson's statements do not moot Plaintiffs' claim for relief.[2]

* * *

"[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). On the facts of this case, Defendants have not—and cannot—demonstrate that the FHWA will not "pick up where [it] left off" and resuspend the greenhouse gas measure without notice and comment. Accordingly, the Court should reject Defendants' mootness argument and deny the motion to dismiss.

[2] This is especially true in light of the way in which the FHWA's unlawful administrative actions mirror those taken by sister agencies during the first year of the Trump administration. *See generally* Ex. A, Jennifer A. Dlouhy & Alan Levin, *Trump Tests Legal Limits by Delaying Dozens of Obama's Rules*, Bloomberg, July 13, 2017; Ex. B, Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, Harv. L. & Pol'y Rev. (forthcoming). This factual backdrop should further reduce the limited deference a court extends to a government entity acting in good faith. *MHANY*, 819 F.3d at 603.

D. If the Court Does Not Allow the Parties to Proceed to Summary Judgment Briefing, It Should Hold the Case in Abeyance

Because this case is not moot, the Court should allow summary judgment briefing to proceed without further delay. Without a determination on the merits, both Plaintiffs and the public will have been deprived of a definitive resolution of this case, *see W. T. Grant*, 345 U.S. at 632; Defendants will have been given a "free pass" to "ignore their legal obligations" under the Administrative Procedure Act, "making a mockery of the statute," *California v. U.S. Bureau of Land Mgmt.*, No. 17-cv-03804-EDL, 2017 WL 4416409, at *14 (N.D. Cal. Oct. 4, 2017). A summary judgment ruling is both appropriate and necessary.

In the alternative, the Court should hold this case in abeyance until the FHWA completes its rulemaking on the proposed repeal of the greenhouse gas measure. *See* Order, *Am. Lung Ass'n v. Envtl. Prot. Agency*, No. 17-1172 (D.C. Cir. Oct. 6, 2017) (granting petitioners' request for abeyance in case analogous to this one); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (confirming court's inherent authority to hold cases in abeyance). A stay of proceedings would allow Plaintiffs quickly to address any future suspension of the greenhouse gas measure or third-party legal challenges to the September 28 Notice, while conserving judicial resources. *See Readick v. Avis Budget Grp., Inc.*, No. 12 Civ. 3988(PGG), 2014 WL 1683799, at *2 (S.D.N.Y. Apr. 28, 2014) (explaining that a court's decision to grant a stay hinges on the interests of and burdens to the parties, interest to the court, and interest to the public). We see no prejudice to Defendants from this course of action. *See id.*

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully urge the Court to deny Defendants' motion to dismiss and allow the parties to proceed to summary judgment briefing. Alternatively, Plaintiffs ask the Court to hold the case in abeyance until the FHWA completes the rulemaking on the proposed repeal of the greenhouse gas measure.

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Respectfully submitted,

/s/ Mitchell S. Bernard
Mitchell S. Bernard (MB 5823)
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
212-727-4469
mbernard@nrdc.org

/s/ Cecilia D. Segal
Cecilia D. Segal (admitted *pro hac vice*)
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94110
415-875-6112
csegal@nrdc.org

Counsel for Natural Resources Defense Council and U.S. Public Interest Research Group

/s/ Kimberley Hunter
Kimberley Hunter (admitted *pro hac vice*)
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
919-967-1450
khunter@selcnc.org

Counsel for Clean Air Carolina