IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLEAN AIR COUNCIL, et al., Plaintiffs, v. **UNITED STATES OF AMERICA, et al.,** Defendants.	Case No. 2:17-cv-04977-PD

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants file this Notice to alert the Court of four recent and relevant judicial decisions issued after Defendants filed their Supplemental Motion to Dismiss and Reply to Plaintiffs' Response on May 3, 2018 (ECF No. 31). Three of the decisions find that a judicial solution for claims arising out of climate change—like that requested in this case—is barred by the separation of powers. Two find that there is no constitutional right to a healthy environment or stable climate, in contrast to Plaintiffs' claims here.

In *City of Oakland v. BP P.L.C.*, the cities of Oakland and San Francisco asserted a public nuisance claim under federal common law against five of the largest oil and gas companies in the world. Nos. 17-06011, 17-06012, 2018 WL 3109726 (N.D. Cal. June 25, 2018). The cities alleged that the companies' "sale of fossil fuels leads to their eventual combustion, which leads to more carbon dioxide in the atmosphere, which leads to more global warming and consequent ocean rise." *Id.* at *4. In its decision, the court "accept[ed] the science behind global warming" but nevertheless dismissed the cities' claims, finding them barred by the separation of powers. *Id.* at *9. The court determined that "questions of how to appropriately balance" the ills of climate change "against the worldwide positives of" fossil fuels, "and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate." *Id.* at *7. Courts must "respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches." *Id.* at *9.

A court in the Southern District of New York reached the same conclusion in *City of New York v. BP P.L.C.*, No. 18-cv-182, 2018 WL 3475470 (S.D.N.Y. July 19, 2018). In that case, the City of New York sued the same five oil and gas companies on trespass and nuisance theories alleging that their sale and promotion

of fossil fuels have contributed to climate change. *Id.* at *2. The court first found that the Clean Air Act displaced any federal common law claims regarding domestic greenhouse gas emissions because "Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act." *Id.* at *5. The court then went on to find that any claims attempting to hold the companies liable for foreign emissions were barred by the separation of powers:

> The "immense and complicated problem of global warming requires a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms. To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. government."

Id. at *7.

The Superior Court of the State of Washington raised similar concerns in *Aji P. v. Washington*, No. 18-2-04448-1, 2018 WL 3978310 (Wash. Super. Aug. 14, 2018). There, twelve young residents of the State of Washington accused the State of failing to adequately address climate change. *Id.* at *2. They requested that the court order the State to develop "an enforceable state climate recovery plan" and retain jurisdiction to "approve, monitor and enforce compliance" with that plan. *Id.* The court dismissed the case, finding that the "relief requested by Plaintiffs

would require the Court to usurp the roles of the legislative and executive branches of our state government" in violation of the separation of powers. *Id.* at *3.

The court in *Aji P.* also addressed another issue relevant to this case: whether the Constitution provides for a fundamental right to a healthy climate. In that case, the plaintiffs asserted a constitutional right nearly identical to the one that Plaintiffs request the Court to recognize here: a right to "stable climate system that sustains human life and liberty." 2018 WL 3978310, at *3. The court declined to recognize such a right, distinguishing it from the fundamental *individual* rights protected by the Due Process Clause. *Id.* The court explained:

> A stable and healthy climate, like world peace and economic prosperity, is a shared aspiration – the goal of a people, rather than the right of a person. These types of aims are the objectives of a polity, to be pursued through the political branches of government. They are not individual rights that can be enforced by a court of law.

Id. at *4.

Although the court in *Aji P.* acknowledged that a single court in the District of Oregon identified a previously unrecognized right to a stable climate system in the Due Process Clause of the Fifth Amendment, *see Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), it found the Oregon decision to be "an outlier" and observed that, in every other case in which "federal courts have faced assertions of fundamental rights to a 'healthful environment' or to freedom from

harmful contaminants, they have invariably rejected those claims." 2018 WL 3978310, at *3 (quoting *Lake v. City of Southgate*, 2017 WL 767879, at *4 & n.3 (E.D. Mich. Feb. 28, 2017)).

The D.C. Circuit also recently declined to recognize a constitutional right to a healthy environment in *Delaware Riverkeeper Network v. FERC*. There, the plaintiff alleged that the Federal Energy Regulatory Commission had violated its Fifth Amendment due process right to "clean air, pure water, and preservation of the environment" by approving new pipelines and other energy projects. 895 F.3d 102, 106, 108 (D.C. Cir. 2018). The court rejected that contention, holding that there is no federally-protected liberty or property interest in a healthy environment. *Id.* at 108-09. The court found that the asserted right to a healthy environment "bears no relationship to the quintessential liberty interest—'freedom from bodily restraint'"—and, as it applies collectively to all people, protects no individual property right. *Id.*

These four decisions strongly support Defendants' Supplemental Motion to Dismiss in this case. To have any effect on climate change, the remedy requested by Plaintiffs would require a global reduction in greenhouse gas emissions and the development and implementation of a complex regulatory scheme. ECF No. 31 at 10-11. As the Northern District of California, the Southern District of New York,

and the Superior Court of Washington have held, such a complex global solution is beyond the purview of the courts. In addition, *Aji P.* and *Delaware Riverkeeper* support Defendants' argument that Plaintiffs' constitutional claims must be dismissed because "there is no cognizable fundamental right to a life-sustaining climate system." ECF No. 31 at 20-25.

Dated: September 5, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Sean C. Duffy
MARISSA A. PIROPATO (MA Bar No. 651630)
SEAN C. DUFFY (NY Bar No. 4103131)
Trial Attorneys
GUILLERMO A. MONTERO (MA Bar No. 660903)
Assistant Chief
Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel | (202) 305-0470
Fax | (203) 305-0506

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I, Sean Duffy, hereby certify that, on September 5, 2018, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated: September 5, 2018

/s/ Sean C .Duffy
Sean C. Duffy

Attorney for Federal Defendants