

ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

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

| | | | |
|------------------------------------|---|---|--------------------------|
| <hr/> | |) | |
| MURRAY ENERGY CORPORATION, et al., |) |) | |
| |) |) | |
| Petitioners, |) |) | Case No. 16-1127, |
| |) |) | (and consolidated cases) |
| v. |) |) | |
| |) |) | |
| UNITED STATES ENVIRONMENTAL |) |) | |
| PROTECTION AGENCY, et al., |) |) | |
| |) |) | |
| Respondents. |) |) | |
| <hr/> | |) | |

**STATE AND LOCAL GOVERNMENT RESPONDENT-INTERVENORS’
OPPOSITION TO MOTION TO CONTINUE ORAL ARGUMENT**

The undersigned Respondent-Intervenor State and Local Governments (“State Intervenor”) oppose the U.S. Environmental Protection Agency’s (“EPA”) Motion to Continue Oral Argument, which seeks to postpone the impending May 18, 2017 oral argument indefinitely while, in light of the change in administration, EPA evaluates “reconsider[ing]” the Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) (“Supplemental Finding”) that is the subject of this litigation. Mot. at 6, 8, ECF No. 1671687 (Apr. 18, 2017). EPA provides no basis, much less the required “extraordinary cause,” D.C. Cir. R. 34(g), for why that reevaluation warrants an

unlimited continuance, particularly since EPA is unlikely to be able to lawfully rescind the Supplemental Finding or the power-plant hazardous air emissions limits (“Standards”) predicated upon it, which have been in effect since April 2015. Over the course of sixteen years, EPA has made no less than three findings concluding that regulation of power-plant hazardous air emissions is “appropriate and necessary” under section 112(n)(1)(A) of the Clean Air Act. Those determinations are supported by an extensive scientific record that plainly demonstrates that withdrawal of the Standards would pose severe risks to human health and the environment. Any attempt by EPA to rescind the Supplemental Finding or the Standards would be untenable under section 112(c)(9)’s stringent, health-protective delisting criteria, and would be indistinguishable from the Agency’s prior attempt to administratively rescind its 2000 “appropriate and necessary” determination—an action this Court vacated in *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). The requested continuance is thus not warranted, and would serve only to waste the substantial resources already expended in this case and further delay resolution of the long-running litigation—now pending for a dozen years—over EPA’s regulation of highly toxic power-plant hazardous air emissions.

BACKGROUND

Fossil-fueled power plants are the Nation's largest source of hazardous air emissions, including mercury, which is a potent neurotoxin; acid gases, which are associated with numerous chronic and acute health disorders; and non-mercury metals, such as arsenic, chromium, and nickel, which are known or suspected carcinogens. 77 Fed. Reg. at 9310. Of particular concern to State Intervenor is the ubiquitous mercury contamination of our Nation's waterways, which has necessitated mercury-related fish consumption advisories in all fifty states. State Intervenor Br. at 1, ECF No. 1667698. Because power-plant mercury emissions traverse state borders, State Intervenor has long sought the strict national mercury emission limits provided by the Standards in order to reduce mercury pollution from uncontrolled, out-of-state power plants. *Id.* at 1, 2.

Section 112(n)(1)(A) of the Clean Air Act requires EPA to regulate emissions of hazardous air pollutants from power plants if it determines, after studying the public health hazards of those emissions, that it is "appropriate and necessary" to do so. 42 U.S.C. § 7412(n)(1)(A). EPA first made that determination in 2000, based on an extensive record reflecting over a decade of scientific research and actual power-plant emissions data, and listed power plants as a section 112(c)(1) source category subject to regulation. In 2012, after an unlawful 2005 attempt to delist power plants and regulate them under section 111,

see New Jersey v. EPA, 517 F.3d at 583, EPA reaffirmed its “appropriate and necessary” determination, relying on a growing body of scientific and public health evidence, and it promulgated the Standards, which set national, technology-based emission limits for power plants. 77 Fed. Reg. at 9308, 9310-11. Compliance with those Standards has been ongoing since April 2015, and has produced massive reductions in toxic emissions from power plants. 80 Fed. Reg. 75,025, 75,033 (Dec. 1, 2015) (estimating that, when fully implemented in 2016, the Standards would reduce annual power-plant emissions of mercury by 75 percent, hydrogen chloride gas by 88 percent, and non-mercury metals by 19 percent); Joint Mot. of State, Local Gov’t, and Pub. Health Resp’t-Intervenors for Remand Without Vacatur at 12, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100, ECF No. 1574820 (Sept. 24, 2015). That compliance has been achieved by industry at a cost far lower than EPA initially projected. Industry Intervenors Br. at 14-15, ECF No. 16660762.

Industry, states, and environmental groups challenged EPA’s 2012 “appropriate and necessary” determination and the Standards on multiple grounds, and in 2014 this Court upheld the determination and the Standards in full. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (D.C. Cir. 2014) (per curiam). Petitioners sought review in the Supreme Court, which granted certiorari on a single issue—whether EPA was required to consider the cost of regulating as

part of its “appropriate” determination—and held that EPA had acted unreasonably when it failed to do so. *Michigan*, 135 S. Ct. at 2704. On remand, this Court declined to vacate the 2012 “appropriate and necessary” determination and the Standards—which State and Non-Governmental Intervenors contended would have allowed power plants to emit tens of thousands of tons of hazardous air pollutants during the remand period. *See Order, White Stallion*, No. 12-1100, ECF No. 1588459 (Dec. 15, 2015); Joint Mot. at 12, No. 12-1100, ECF No. 1574820. The Supreme Court subsequently refused to stay the Standards pending petitions for review of this Court’s decision not to vacate, and subsequently denied certiorari petitions seeking that review. *Michigan v. EPA*, No. 15A886, *stay application denied* (U.S. Mar. 3, 2016), *Michigan v. EPA*, No. 15-1152, *cert. denied* (U.S. June 13, 2016).

On April 25, 2016, after notice and comment, EPA published the Supplemental Finding, determining that, considering costs, regulation of power-plant hazardous emissions was “appropriate,” 81 Fed. Reg. at 24,420, and reaffirming, once again, the massive health and environmental benefits of reducing those emissions. That determination is the subject of Petitioners’ latest challenge to section 112 regulation of power plants. On February 9, 2017, the Court denied Petitioners’ request to delay the briefing schedule in light of the change in

administration. Order, ECF No. 1660381. This case is now fully briefed and scheduled for oral argument in less than a month.

MARCH 28, 2017 EXECUTIVE ORDER

On March 28, 2017, President Trump issued an Executive Order instructing EPA to review any agency action that could “potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.” Exec. Order No. 13783, 82 Fed. Reg. 16,093, 16,093 (Mar. 28, 2017) (“Executive Order”). The Executive Order includes a schedule for completing that review, requiring EPA to, among other things, submit a draft report with “specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production,” within 120 days, and to complete a final report, within 180 days. *Id.* at 16,094. The Executive Order directs EPA to “publish for notice and comment proposed rules suspending, revising, or rescinding”¹ any agency action determined in the final report to create a potential burden to domestic energy production. *Id.* While the Executive Order instructs EPA to take specific action on a large number of agency actions, it does not name the Supplemental Finding or the Standards. *See id.* at 16,094-96.

¹ The Executive Order does not cite any legal authority for EPA to “suspend” a final rule, and under the Clean Air Act, EPA is only authorized to stay a final rule for three months during administrative reconsideration. 42 U.S.C. § 7607(d)(7)(B).

ARGUMENT

I. EPA Has Failed to Satisfy the Standard for Continuing Oral Argument.

EPA's motion does not cite, much less satisfy, the Court's requirement that a movant identify an "extraordinary cause" to justify the continuance of oral argument. D.C. Cir. R. 34(g); *see also Handbook of Practice and Internal Procedures* 49 (Jan. 26, 2017) ("The Court disfavors motions to postpone oral argument. . . ."). Rather, EPA requests an open-ended postponement of the May 18, 2017 oral argument, based on little more than its claimed inherent authority to revisit past decisions and its vague intent to "review" the Supplemental Finding and potentially "reconsider[]" it because the Agency's "prior positions . . . may not necessarily reflect its ultimate conclusions after that review is complete." Mot. at 1, 5-6.

EPA's reliance on the principle that, when supported by a rational explanation, an agency may revise or rescind past decisions, *id.* at 5-6, would hardly constitute an "extraordinary" basis for indefinitely delaying oral argument in a typical case. Indeed, this Court has cautioned against abandoning review just because an agency asserts it is reconsidering a challenged rule. *See Am. Petroleum Ins. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (recognizing that a "savvy agency could perpetually dodge review" by initiating new rulemakings). This is not, however, a typical case, since Congress—as affirmed by this Court—long ago

acted to ensure that, once power plants were listed as sources of hazardous pollutants under section 112, EPA could not, as a consequence of a change in administration or otherwise, administratively roll back that critical predicate to controlling the largest sources of the most dangerous pollutants in the Nation.

As this Court made clear in *New Jersey*, once EPA lists power plants as a source category under section 112(c)(1), it has *no inherent authority to delist them* without meeting the section 112(c)(9) delisting criteria. 517 F.3d at 579, 583 (“section 112(c)(9) . . . unambiguously limit[s] EPA’s discretion to remove sources, including [power plants], from the section 112(c)(1) list once they have been added to it”). Because EPA’s Supplemental Finding reaffirmed its 2012 and 2000 determinations that regulation of power plants is “appropriate and necessary,” after considering the costs of such regulation in accordance with *Michigan’s* directive, power plants remain a listed source category under section 112(c)(1). And, once EPA lists a source category under section 112(c)(1), it *must* establish emissions standards for that category. *See* 42 U.S.C. § 7412(c)(2) (EPA “shall establish emissions standards under subsection (d)” for all listed categories and subcategories of sources). Thus, while this Court has authority to review EPA’s Supplemental Finding, EPA has no authority to remove power plants from the list of section 112 source categories without meeting the stringently protective health and environmental requirements of section 112(c)(9). Such removal would be a

mandatory prerequisite to rescinding the Supplemental Finding or the Standards. Given that the extensive record compiled by EPA beginning in 2000 documents a multitude of serious health and environmental harms posed by power plant hazardous emissions, it is doubtful that EPA could meet those requirements in order to delist power plants lawfully.² Accordingly, EPA's claim that the new Administration's review of the Supplemental Finding supports—much less provides the requisite “extraordinary cause” for—indefinitely delaying oral argument is wholly without merit.

For the same reason, EPA's claim that the issuance of the Executive Order supports an unlimited continuance is unavailing. Mot. at 7. The Executive Order cannot alter EPA's obligation to regulate power-plant hazardous emissions after making an “appropriate and necessary” determination or the extensive record supporting the Supplemental Finding, nor can it override the section 112(c)(9) delisting requirements. Moreover, it is unclear whether the Executive Order even

² For example, given power plants' dominant share of domestic mercury emissions and the widespread mercury contamination of the Nation's waterways, State Intervenor Br. at 1, demonstrating that delisting power plants would “cause no adverse environmental effect,” as required by section 112(c)(9), would be very difficult, if not impossible. See 42 U.S.C. § 7412(c)(9)(B)(ii) (requiring EPA to “determine that emissions from no source in the category . . . concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source”). See also *id.* § 7412(c)(9)(B)(i) (requiring EPA to find that emissions from no single source will “cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed” to those emissions).

applies to the Supplemental Finding, Mot. at 7 (“EPA is currently reviewing the Executive Order to determine whether the Supplemental Finding is *potentially* subject to the [Executive Order’s] review process”) (emphasis added). Regardless, the various cost metrics EPA evaluated in the Supplemental Finding specifically addressed this issue and demonstrated that compliance with the Standards would minimally affect the industry and would not impair its ability to provide reliable and affordable electricity to consumers—consistent with the experience of the numerous states that have long implemented their own more rigorous power-plant mercury controls. 81 Fed. Reg. at 24,424-26; State Intervenors Br. at 12.

Finally, EPA’s concern that it “would likely be unable to represent the current Administration’s conclusive position” until review of the Supplemental Finding is complete in no way constitutes an “extraordinary cause” justifying an unlimited continuance of oral argument. Mot. at 7. Again, given that EPA lacks the discretion to reverse its determination under the Supplemental Finding that regulation continues to be “appropriate and necessary,” without first meeting the section 112(c)(9) delisting criteria, that concern is of little consequence.

Moreover, the only agency positions germane to this litigation are contained in the record supporting the Supplemental Finding, not any speculative, future positions EPA may take. *See* 42 U.S.C. § 7607(d)(7)(A); *Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (“The court is not bound to accept, and

indeed generally should not uncritically accept, an agency's concession of a significant merits issue."). However, if EPA is no longer willing to defend the Supplemental Finding based on that record, State Intervenors are ideally situated to do so, as intervenors have done in similar cases involving agency regulations. *See, e.g., Env'tl Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007); *Wyoming v. U.S. Dept. of Agriculture*, 661 F.3d 1209, 1225-26 (10th Cir. 2011), *cert. denied* 133 S. Ct. 417 (2012); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F.Supp.2d 3, 5 (D.D.C. 2009). Indeed, State Intervenors have, for fifteen years, pursued litigation and regulatory efforts to limit power-plant hazardous air emissions, including by successfully challenging EPA's 2005 attempt to delist power plants and by defending its 2012 "appropriate and necessary" determination and the Standards in this Court and the Supreme Court.

II. Postponing Oral Argument Would Be Extremely Inefficient.

Contrary to EPA's claim, Mot. at 8, continuing oral argument would frustrate, not promote, judicial economy, given the advanced stage of the current litigation and the lengthy prior litigation preceding it. The case has been fully briefed for nearly a month. It represents the culmination of more than a decade of litigation encompassing three findings—made by EPA over the course of sixteen years—that regulation of power-plant hazardous emissions is "appropriate and necessary." This Court has already issued two decisions upholding regulation of

power plants under section 112, *White Stallion*, 748 F.3d at 1245; *New Jersey*, 517 F.3d at 583, and another keeping the Standards in place after *Michigan* narrowly reversed and remanded on the cost consideration issue, Order, *White Stallion*, No. 12-1100, ECF No. 1588459. And the Supreme Court last year rejected Petitioners' requests to stay the Standards and review that decision. *Michigan v. EPA*, No. 15A886, *stay application denied* (U.S. Mar. 3, 2016), *Michigan v. EPA*, No. 15-1152, *cert. denied* (U.S. June 13, 2016). Petitioners' last-gasp challenge to EPA's decision—first issued in 2000—to regulate the Nation's largest source of toxic air pollution is more than ready for oral argument.

By contrast, granting what would amount to an open-ended stay of the litigation at this late date would undercut the substantial efforts exerted by the courts and the litigants over the last dozen years. There is simply no basis—extraordinary or not—for this Court to delay oral argument while EPA evaluates, yet again, whether to reconsider its “appropriate and necessary” determination. This is particularly true since, as discussed above, any attempt by EPA to rescind the Supplemental Finding must meet the rigorous delisting requirements under section 112(c)(9)—a hurdle EPA cannot reasonably expect to clear as the record

plainly demonstrates that rescission would pose severe risks to human health and the environment.³

CONCLUSION

The motion should be denied.

Respectfully submitted,

Dated: April 21, 2017

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By: /s/ TRACY L. TRIPLETT⁴
MELISSA HOFFER
JILLIAN M. RILEY
TRACY L. TRIPLETT
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2431
tracy.triplett@state.ma.us
*Attorneys for Intervenor
Commonwealth of Massachusetts*

³ Even if that delisting hurdle did not exist, proceeding with the instant litigation would resolve legal arguments that would likely need to be addressed by EPA in any reconsideration of the Supplemental Finding. These issues include Petitioners' claims that EPA was required to undertake some form of cost-benefit analysis, Pet'rs' Br. at 29, ECF No. 1667698; that EPA was prohibited from considering co-benefits, *id.* at 42-55; and that *Chevron* deference does not apply to EPA's cost consideration, Pet'rs' Reply Br. at 7 n.1, ECF No. 1667700.

⁴ Pursuant to D.C. Cir. Rule 32(a)(2), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this motion.

XAVIER BECERRA
ATTORNEY GENERAL OF
CALIFORNIA

ERIN GANAHL
Deputy Attorney General
DAVID A. ZONANA
Supervising Deputy Attorney General
California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
(510) 622-2100

Counsel for the State of California

GEORGE JEPSEN
ATTORNEY GENERAL OF
CONNECTICUT

MATTHEW I. LEVINE
SCOTT N. KOSCHWITZ
Assistant Attorneys General
55 Elm Street
Hartford, CT 06141
(860) 808-5250

Counsel for the State of Connecticut

MATTHEW P. DENN
ATTORNEY GENERAL OF
DELAWARE

VALERIE S. EDGE
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3rd Floor
Dover, DE 19904
(302) 739-4636

Counsel for the State of Delaware

LISA MADIGAN
ATTORNEY GENERAL OF
ILLINOIS

MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
69 W. Washington Street, 18th Floor
Chicago, IL 60602
(312) 814-0660

Counsel for the State of Illinois

THOMAS J. MILLER
ATTORNEY GENERAL OF
IOWA

JACOB J. LARSON
Assistant Attorney General
Environmental Law Division
Office of the Iowa Attorney General
Wallace State Office Building
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5341

Counsel for the State of Iowa

JANET T. MILLS
ATTORNEY GENERAL OF
MAINE

GERALD D. REID
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333
(207) 626-8545

Counsel for the State of Maine

BRIAN E. FROSH
ATTORNEY GENERAL OF
MARYLAND

ROBERTA R. JAMES
Assistant Attorney General
Office of the Attorney General
Maryland Department of the
Environment
1800 Washington Blvd., Suite 6048
Baltimore, MD 21230
(410) 537-3748

Counsel for the State of Maryland

FOR THE STATE OF MINNESOTA

BY ITS COMMISSIONER OF
THE MINNESOTA POLLUTION
CONTROL AGENCY

LORI SWANSON
ATTORNEY GENERAL

MAX KIELEY
Assistant Attorney General
KAREN D. OLSON
Deputy Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1244

*Counsel for the State of Minnesota
by its Commissioner
of the Minnesota Pollution Control
Agency*

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF
NEW YORK

VICTOR PALADINO
Assistant Solicitor General
MICHAEL J. MYERS
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2382

Counsel for the State of New York

ELLEN F. ROSENBLUM
ATTORNEY GENERAL OF
OREGON

PAUL A. GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
(503) 947-4593

Counsel for the State of Oregon

HECTOR BALDERAS
ATTORNEY GENERAL OF
NEW MEXICO

WILLIAM GRANTHAM
Assistant Attorney General
Environmental Protection Division
P.O. Box 1508
Santa Fe, NM 87504
(505) 827-6695

Counsel for the State of New Mexico

PETER F. KILMARTIN
ATTORNEY GENERAL OF
RHODE ISLAND

GREGORY S. SCHULTZ
Special Assistant Attorney General
Rhode Island Department of
Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2400

Counsel for the State of Rhode Island

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL OF
VERMONT

NICHOLAS F. PERSAMPIERI
Assistant Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-6902

Counsel for the State of Vermont

MARK R. HERRING
ATTORNEY GENERAL OF
VIRGINIA

JOHN W. DANIEL, II
Deputy Attorney General
DONALD D. ANDERSON
Senior Assistant Attorney General and
Chief
MATTHEW L. GOOCH
Assistant Attorney General
Environmental Section
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 225-3193

*Counsel for the Commonwealth of
Virginia*

ROBERT W. FERGUSON
ATTORNEY GENERAL OF
WASHINGTON

KATHARINE G. SHIREY
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504
(360) 586-6769

Counsel for the State of Washington

KARL A. RACINE
ATTORNEY GENERAL FOR THE
DISTRICT OF COLUMBIA

JAMES C. MCKAY, JR.
Senior Assistant Attorney General
Office of the Attorney General
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

Counsel for the District of Columbia

DAVID E. RALPHACTING CITY
SOLICITOR FOR THE CITY OF
BALTIMORE

WILLIAM R. PHELAN, JR.
Chief Solicitor
DAWN S. LETTMAN
Assistant City Solicitor
100 N. Holliday Street
Baltimore, MD 21202
(410) 396-4094

Counsel for the City of Baltimore

EDWARD N. SISSEL
CORPORATION COUNSEL OF THE
CITY OF CHICAGO

BENNA RUTH SOLOMON
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764

Counsel for the City of Chicago

ZACHARY W. CARTER
CORPORATION COUNSEL OF THE
CITY OF NEW YORK

CHRISTOPHER KING
CARRIE NOTEBOOM
Assistant Corporation Counsel
100 Church Street
New York, NY 10007
(212) 356-2319

Counsel for the City of New York

MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

JEREMY TOTH
Second County Attorney
Erie County Department of Law
95 Franklin Street, 16th Floor
Buffalo, NY 14202
(716) 858-2200

Counsel for Erie County

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing State and Local Government Respondent-Intervenors' Opposition to Motion to Continue Oral Argument complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2777 words, excluding parts exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

DATED: April 21, 2017

/s/ TRACY L. TRIPLETT

Tracy L. Triplett

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent-Intervenors' Opposition to Motion to Continue Oral Argument have been served through the Court's CM/ECF system on all registered counsel.

DATED: April 21, 2017

/s/ TRACY L. TRIPLETT

Tracy L. Triplett