ORAL ARGUMENT REMOVED FROM CALENDAR

No. 15-1381 (and consolidated cases)

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

STATE OF NORTH DAKOTA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions for Review of Final Agency Action of the United States Environmental Protection Agency 80 Fed. Reg. 64,510 (Oct. 23, 2015) and 81 Fed. Reg. 27,442 (May 6, 2016)

SUPPLEMENTAL BRIEF OF PETITIONERS AND PETITIONER-INTERVENORS

Wayne Stenehjem
ATTORNEY GENERAL OF NORTH DAKOTA
Margaret Olson
Assistant Attorney General
500 N. 9th Street
Bismarck, ND 58501
Tel: (701) 328-3640
wstenehjem@nd.gov
maiolson@nd.gov
Paul M. Seby
Jerry Stouck
Special Assistant Attorneys General
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 24
Denver, CO 80202
Tel: (303) 572-6584
sebyp@gtlaw.com

Counsel for Petitioner State of North Dakota

Patrick Morrisey
ATTORNEY GENERAL OF WEST VIRGINIA
Elbert Lin
Solicitor General
Counsel of Record
Thomas M. Johnson, Jr.
Deputy Solicitor General
Katlyn M. Miller
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
elbert.lin@wvago.gov

Counsel for Petitioner State of West Virginia

DATED: May 15, 2017

Additional counsel listed on following pages

F. William Brownell
Allison D. Wood
Henry V. Nickel
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
Fax: (202) 778-2201
bbrownell@hunton.com
awood@hunton.com
hnickel@hunton.com
tszymanski@hunton.com
aknudsen@hunton.com

Counsel for Petitioners Utility Air Regulatory Group and American Public Power Association

Steven T. Marshall
ATTORNEY GENERAL OF ALABAMA
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2609
abrasher@ago.state.al.us

Counsel for Petitioner State of Alabama

Geoffrey K. Barnes
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Tel: (216) 479-8646
geoffrey.barnes@squirepb.com
wendy.lavey@squirepb.com
john.lazzaretti@squirepb.com
bobby.cheren@squirepb.com

Counsel for Petitioner Murray Energy Corporation

Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
Dominic E. Draye
Solicitor General
Counsel of Record
Keith J. Miller
Assistant Solicitor General
Maureen Scott
Janet Wagner
Arizona Corporation Commission,
Staff Attorneys
1275 West Washington Street
Phoenix, AZ 85007-2997
Tel: (602) 542-3333
Fax: (602) 542-8308
dominic.draye@azag.gov
keith.miller@azag.gov
SolicitorGeneral@azag.gov

Counsel for Petitioner Arizona Corporation Commission

Tristan L. Duncan
Thomas J. Grever
SHOOK HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64018
Tel: (816) 474-6550
Fax: (816) 421-5547
tlduncan@shb.com
tgrever@shb.com

Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
Fax: (312) 379-0467
jmassey@masseygail.com

Counsel for Petitioner Peabody Energy Corporation

Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
Tel: (301) 639-5238 (cell)
emtrisko7@gmail.com

Counsel for Petitioner International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO

Leslie Rutledge
ATTORNEY GENERAL OF ARKANSAS
Lee Rudofsky
Solicitor General
Counsel of Record
Nicholas J. Bronni
Deputy Solicitor General
Jamie L. Ewing
Assistant Attorney General
323 Center Street, Suite 400
Little Rock, AR 72201
Tel: (501) 682-5310
lee.rudofsky@arkansasag.gov
jamie.ewing@arkansasag.gov

Counsel for Petitioner State of Arkansas

Pamela Jo Bondi
ATTORNEY GENERAL OF FLORIDA
Jonathan L. Williams
Deputy Solicitor General
Counsel of Record
Jonathan A. Glogau
Special Counsel
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel: (850) 414-3818
Fax: (850) 410-2672
jonathan.williams@myfloridalegal.com
jonathan.glogau@myfloridalegal.com

Counsel for Petitioner State of Florida

Grant F. Crandall
General Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2429
gcrandall@umwa.org

Arthur Traynor, III
Staff Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2457
atraynor@umwa.org

Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
emtrisko7@gmail.com

Counsel for Petitioner United Mine Workers of America, AFL-CIO

Christopher M. Carr
ATTORNEY GENERAL OF GEORGIA
Sarah Hawkins Warren
Solicitor General
Counsel of Record
Office of the Attorney General
40 Capitol Square S.W.
Atlanta, GA 30334-1300
Tel: (404) 463-0070
Fax: (404) 657-8773
swarren@law.ga.gov

Counsel for Petitioner State of Georgia

Stacey Turner
SOUTHERN COMPANY SERVICES, INC.
600 18th Street North
BIN 14N-8195
Birmingham, AL 35203
Tel: (205) 257-2923
staturner@southernco.com

Counsel for Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company

C. Grady Moore III
Steven G. McKinney
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35303-4642
Tel: (205) 251-8100
Fax: (205) 488-5704
gmoore@balch.com
smckinney@balch.com

Counsel for Petitioner Alabama Power Company

Curtis T. Hill, Jr.
ATTORNEY GENERAL OF INDIANA
Thomas M. Fisher
Solicitor General
Counsel of Record
Office of the Attorney General
Indiana Government Ctr. South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Tel: (317) 232-6255
Fax: (317) 232-7979
tom.fisher@atg.in.gov

Counsel for Petitioner State of Indiana

Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
Counsel of Record
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov
bryan.clark@ag.ks.gov

Counsel for Petitioner State of Kansas

Margaret Claiborne Campbell
Angela J. Levin
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308-2216
Tel: (404) 885-3000
margaret.campbell@troutmansanders.com
angela.levin@troutmansanders.com

Counsel for Petitioner Georgia Power Company

Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Joseph A. Newberg II
Assistant Attorney General
Counsel of Record
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov

Counsel for Petitioner Commonwealth of Kentucky

Jeffrey A. Stone
BEGGS & LANE, RLLP
501 Commendencia Street
Pensacola, FL 32502
Tel: (850) 432-2451
JAS@beggslane.com

James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

Counsel for Petitioner Gulf Power Company

Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Steven B. "Beaux" Jones
Counsel of Record
Environmental Section – Civil Division
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
Fax: (225) 326-6099
jonesst@ag.state.la.us

Counsel for Petitioner State of Louisiana

Terese T. Wyly
Ben H. Stone
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Tel: (228) 214-0413
twyly@balch.com
bstone@balch.com

Counsel for Petitioner Mississippi Power Company

Herman Robinson
General Counsel
Donald Trahan
Counsel of Record
Spencer Bowman
Elliott Vega
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Legal Division
P.O. Box 4302
Baton Rouge, LA 70821-4302
Tel: (225) 219-3985
Fax: (225) 219-4068
donald.trahan@la.gov
spencer.bowman@la.gov
elliott.vega@la.gov

Counsel for Petitioner State of Louisiana Department of Environmental Quality

Randy E. Brogdon
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308-2216
Tel: (404) 885-3000
randy.brogdon@troutmansanders.com

Counsel for Petitioner Southern Power Company

Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
Counsel of Record
Neil D. Gordon
Assistant Attorney General
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov

Counsel for Petitioner People of the State of Michigan

David M. Flannery
Kathy G. Beckett
Edward L. Kropp
STEPTOE & JOHNSON, PLLC
707 Virginia Street East
Charleston, WV 25326
Tel: (304) 353-8000
dave.flannery@steptoe-johnson.com
kathy.beckett@steptoe-johnson.com
skipp.kropp@steptoe-johnson.com

Stephen L. Miller
STEPTOE & JOHNSON, PLLC
700 N. Hurstbourne Parkway, Suite 115
Louisville, KY 40222
Tel: (502) 423-2000
steve.miller@steptoe-johnson.com

Counsel for Petitioner Indiana Utility Group

Josh Hawley
ATTORNEY GENERAL OF MISSOURI
D. John Sauer
Solicitor General
Counsel of Record
Laura Elsbury
Assistant Attorney General
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102
Tel: (573) 751-1800
Fax: (573) 751-0774
john.sauer@ago.mo.gov

Counsel for Petitioner State of Missouri

P. Stephen Gidiere III
Thomas L. Casey III
Julia B. Barber
BALCH & BINGHAM LLP
1901 6th Avenue N., Suite 1500
Birmingham, AL 35203
Tel: (205) 251-8100
sgidiere@balch.com

Stephanie Z. Moore
Executive Vice President & General Counsel
VISTRA ENERGY CORP.
1601 Bryan Street, 22nd Floor
Dallas, TX 75201

Daniel J. Kelly
Vice President & Associate General Counsel
VISTRA ENERGY CORP.
1601 Bryan Street, 43rd Floor
Dallas, TX 75201

Counsel for Petitioners Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC

Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Dale Schowengerdt
Solicitor General
Counsel of Record
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov

Counsel for Petitioner State of Montana

Thomas A. Lorenzen
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
tlorenzen@crowell.com

Counsel for Petitioners National Rural Electric Cooperative Association; Sunflower Electric Power Corporation; and Tri-State Generation and Transmission Association, Inc.

Of Counsel

Rae Cronmiller
Environmental Counsel
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Blvd.
Arlington, VA 22203
Tel: (703) 907-5500
rae.cronmiller@nreca.coop

Douglas J. Peterson
ATTORNEY GENERAL OF NEBRASKA
Dave Bydlaek
Chief Deputy Attorney General
Justin D. Lavene
Assistant Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2834
justin.lavene@nebraska.gov

Counsel for Petitioner State of Nebraska

Christina F. Gomez
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Tel: (303) 295-8000
Fax: (303) 295-8261
cgomez@hollandhart.com

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82001
Tel: (307) 778-4200
Fax: (307) 778-8175
pday@hollandhart.com

Counsel for Petitioner Basin Electric Power Cooperative

John M. Holloway III
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 383-0100
Fax: (202) 383-3593
jayholloway@eversheds-sutherland.com

Counsel for Petitioners East Kentucky Power Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; and Minnkota Power Cooperative, Inc.

Michael DeWine
ATTORNEY GENERAL OF OHIO
Eric E. Murphy
State Solicitor
Counsel of Record
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner State of Ohio

Mike Hunter
ATTORNEY GENERAL OF OKLAHOMA
P. Clayton Eubanks
Deputy Solicitor General
Counsel of Record
Oklahoma Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-8992
Fax: (405) 522-0608
clayton.eubanks@oag.ok.gov

Counsel for Petitioner State of Oklahoma

Jeffrey R. Holmstead
BRACEWELL LLP
2001 M Street, N.W., Suite 900
Washington, D.C. 20036
Tel: (202) 828-5852
Fax: (202) 857-4812
jeff.holmstead@bracewelllaw.com

Counsel for Petitioner American Coalition for Clean Coal Electricity

Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
Counsel of Record
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov

Counsel for Petitioner State of South Carolina

Peter S. Glaser
TROUTMAN SANDERS LLP
401 Ninth Street N.W., Suite 1000
Washington, D.C. 20004
Tel: (202) 274-2998
Fax: (202) 654-5611
peter.glaser@troutmansanders.com

Carroll W. McGuffey III
Justin T. Wong
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308
Tel: (404) 885-3000
mack.mcguffey@troutmansanders.com
justin.wong@troutmansanders.com

Counsel for Petitioner National Mining Association

Marty J. Jackley
ATTORNEY GENERAL OF SOUTH DAKOTA
Steven R. Blair
Assistant Attorney General
Counsel of Record
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel: (605) 773-3215
steven.blair@state.sd.us

Counsel for Petitioner State of South Dakota

Chaim Mandelbaum
Litigation Manager
FREE MARKET ENVIRONMENTAL LAW CLINIC
726 N. Nelson Street, Suite 9
Arlington, VA 22203
Tel: (703) 577-9973
chaim12@gmail.com

Counsel for Petitioner Energy & Environment Legal Institute

Peter D. Keisler
C. Frederick Beckner III
Ryan C. Morris
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8027
pkeisler@sidley.com

Counsel for Petitioners Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Foundry Society; American Iron and Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association

Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
First Assistant Attorney General
Scott A. Keller
Solicitor General
Counsel of Record
P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 936-1700
scott.keller@texasattorneygeneral.gov

Counsel for Petitioner State of Texas

Sean Reyes
ATTORNEY GENERAL OF UTAH
Tyler R. Green
Solicitor General
Counsel of Record
Parker Douglas
Chief Federal Deputy
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320
tylergreen@agutah.gov
pdouglas@agutah.gov

Counsel for Petitioner State of Utah

Steven P. Lehotsky
Sheldon B. Gilbert
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
slehotsky@uschamber.com

Counsel for Petitioner Chamber of Commerce of the United States of America

Brad D. Schimel
ATTORNEY GENERAL OF WISCONSIN
Misha Tseytlin
Solicitor General
Counsel of Record
Delanie M. Breuer
Chief of Staff
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
Tel: (608) 267-9323
tseytlinm@doj.state.wi.us

Counsel for Petitioner State of Wisconsin

Linda E. Kelly
Quentin Riegel
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 637-3000
qriegel@nam.org

Counsel for Petitioner National Association of Manufacturers

Peter K. Michael
ATTORNEY GENERAL OF WYOMING
James Kaste
Deputy Attorney General
Counsel of Record
Erik Petersen
Elizabeth Morrisseau
Senior Assistant Attorneys General
2320 Capitol Avenue
Cheyenne, WY 82002
Tel: (307) 777-6946
Fax: (307) 777-3542
james.kaste@wyo.gov

Counsel for Petitioner State of Wyoming

Richard S. Moskowitz
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, N.W., Suite 700
Washington, D.C. 20006
Tel: (202) 457-0480
rmoskowitz@afpm.org

Counsel for Petitioner American Fuel & Petrochemical Manufacturers

Karen R. Harned
Executive Director
Elizabeth A. Milito
Senior Executive Counsel
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
Tel: (202) 314-2061
karen.harned@nfib.org
elizabeth.milito@nfib.org

Counsel for Petitioner National Federation of Independent Business

Mark Walters
Michael J. Nasi
JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, TX 78701
Tel: (512) 236-2000
Fax: (512) 236-2002
mwalters@jw.com
mnasi@jw.com

Douglas Bryan Hughes
LAW OFFICES OF D. BRYAN HUGHES
701 N. Pacific Street
Mineola, TX 75773
Tel: (903) 569-8880
Fax: (903) 569-8889
bryan@hughesfirm.com

Counsel for Petitioner-Intervenors Lignite Energy Council and Gulf Coast Lignite Coalition

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Statute

Rule

Regulations

Other Authorities

GLOSSARY OF TERMS

EPA	United States Environmental Protection Agency
Rule	U.S. Environmental Protection Agency, Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,510 (Oct. 23, 2015)

Petitioners and Petitioner-Intervenors respectfully submit this supplemental brief pursuant to this Court's Order of April 28, 2017, directing the parties to address whether these cases should be remanded to the Environmental Protection Agency ("EPA") rather than held in abeyance. ECF No. 1673072. For two reasons, this Court should hold these cases in abeyance pending EPA's review of the Rule.

First, there is no basis to distinguish these cases from those that this Court has held in abeyance within the last month pending EPA regulatory review. Several of those cases had also been fully briefed and scheduled for oral argument. *See* Order, *Walter Coke, Inc. v. EPA*, No. 15-1166 (and consolidated cases) (D.C. Cir. Apr. 24, 2017), ECF No. 1672430 (oral argument previously scheduled for May 8, 2017); Order, *Murray Energy Corp. v. EPA*, No. 15-1385 (and consolidated cases) (D.C. Cir. Apr. 11, 2017), ECF No. 1670626 (oral argument previously scheduled for April 19, 2017); Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (and consolidated cases) (D.C. Cir. Apr. 27, 2017), ECF No. 1672987 (oral argument previously scheduled for May 18, 2017); *see also* Order, *Dalton Trucking, Inc. v. EPA*, No. 13-74019 (9th Cir. May 10, 2017), ECF No. 10428699 (oral argument previously scheduled for May 18, 2017).[1]

[1] Respondent-Intervenors have argued in *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.) (and consolidated cases), that the Supreme Court's stay of the rule at issue in that case distinguishes it from other cases with respect to abeyance. That argument lacks merit, as Petitioners and Petitioner-Intervenors in that case explain in the supplemental brief filed in that proceeding today. Regardless of the merits of that argument, the Rule at issue in this proceeding has not been stayed.

As in those instances, these cases should be held in abeyance consistent with this Court's longstanding practice in a wide variety of procedural circumstances. For example, in 2009, this Court held in abeyance the State of California's challenge to EPA's denial of a waiver for new motor vehicle emission standards, *see* Order, *California v. EPA*, No. 08-1178 (and consolidated cases) (D.C. Cir. Feb. 25, 2009), ECF No. 1167136, which the agency later rescinded and reversed, *see* Order, *California v. EPA*, No. 08-1178 (and consolidated cases) (D.C. Cir. Sept. 3, 2009), ECF No. 1204414 (dismissing the petitions for review as moot). This Court has also granted abeyance based on the agency's intention to revisit a rule after merits briefing had concluded. *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 384 (D.C. Cir. 2012). And this Court has held in abeyance petitions for review of the Federal Communications Commission's rules pending reconsideration by the Commission. *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1316 (D.C. Cir. 2000).

The reasons for this established practice are well known. As this Court has explained and appears to have recognized in its Order, it makes little sense to actively proceed with judicial review when an agency has embarked on a review that could ultimately lead to a substantial revision or rescission of the rule. *See Am. Petroleum Inst. v. EPA*, 683 F.3d at 388 (holding a case in abeyance where a new proposal "would likely moot the analysis [the court] could undertake" in deciding the case); *see also U.S. Telecom Ass'n v. FCC*, No. 15-1063 (and consolidated cases), 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017) (Srinivasan & Tatel, JJ., concurring in the denial of rehearing

en banc) (noting that "en banc review would be particularly unwarranted" where the agency "will soon consider adopting a Notice of Proposed Rulemaking that would replace the existing rule with a markedly different one"). Abeyance conserves judicial and party resources, and allows the Court to efficiently dispose of petitions for review if the challenges become moot. *See Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016) (when a petition challenges a "regulation [that] no longer exists, [the Court] can do nothing to affect [petitioners'] rights relative to it, thus making th[e] case classically moot"); *Larsen v. U.S. Navy*, 525 F.3d 1, 4-5 (D.C. Cir. 2008) (concluding challenge to a withdrawn policy was moot).

Second, holding these cases in abeyance best protects Petitioners' rights to judicial review and this Court's ability to resolve challenges to the Rule should EPA ultimately not revise or rescind the Rule. As EPA has noted, the President has directed the agency to review the Rule, *see* Exec. Order No. 13,783, "Promoting Energy Independence and Economic Growth," § 4, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017), and EPA has commenced that review, *see* Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Case in Abeyance (Mar. 28, 2017), ECF No. 1668276; 82 Fed. Reg. 16,329 (Apr. 4, 2017). But as shown in a prior analogous situation described below, such a review may not necessarily result in any change to the Rule even if that outcome is widely anticipated, and abeyance clearly preserves both Petitioners' rights and this Court's responsibility to consider the legality of the Rule.

In 2009, the then-new presidential administration sought and received from this Court abeyance of a pending legal challenge while EPA reviewed a National Ambient Air Quality Standard for ozone that had been adopted the previous year. *See* Order, *Mississippi v. EPA*, No. 08-1200 (and consolidated cases) (D.C. Cir. Jan. 21, 2010), ECF No. 1226738; Order, *Mississippi v. EPA*, No. 08-1200 (and consolidated cases) (D.C. Cir. Mar. 19, 2009), ECF No. 1171013. The standard had been criticized, and it was believed that EPA would reset the standard at a lower level. *See, e.g.*, Robin Bravender, *Tighter smog regs expected as EPA studies Bush rule*, E&E NEWS PM (Sept. 16, 2009) (attached as Ex. A). Indeed, claiming that the standard was "not legally defensible," EPA formally proposed to tighten the standard. Letter from Lisa P, Jackson, Adm'r, EPA, to Sen. Thomas R. Carper at 2 (July 13, 2011) (attached as Ex. B); 75 Fed. Reg. 2,938 (Jan. 19, 2010). In the end, however, EPA decided not to revise the standard but instead to leave the rule in place unchanged, and this Court proceeded simply to lift the abeyance and decide the merits of the legal challenge. *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (per curiam).

This example illustrates the benefits of abeyance in these cases. By holding these cases in abeyance, this Court retains jurisdiction over the pending petitions for review. And if EPA ultimately does not decide to revise or rescind the Rule, this Court can lift that abeyance, reactivate these cases, and proceed directly to resolving the merits of the legal challenges to the Rule.

By contrast, the possible remand suggested by this Court raises questions about continued judicial review if EPA does not revise or rescind the Rule. D.C. Circuit Rules provide that if this Court remands "the record" in a case to the agency, the Court "retains jurisdiction over the case." D.C. Cir. R. 41(b). But if the Court remands "the case," the Court "does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand." *Id.* This Court's Order suggests that it is considering the latter form of remand, asking whether "the[] consolidated cases" should be remanded. Order, ECF No. 1673072.[2]

If this Court remands the consolidated cases without vacating the Rule and without retaining jurisdiction, and if EPA ultimately keeps the Rule in place, Petitioners could face arguments that this Court lacks jurisdiction to review the Rule. Under the Clean Air Act, a petition for review "shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such

[2] Moreover, this Court generally remands the record to allow the agency to provide reasons for its decision or clarify the record. *See, e.g., Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994) (remanding the record for the agency to explain its basis for its decision to exclude transient, non-community waters systems from its regulation); *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 461 (D.C. Cir. 1989) ("remand[ing] the record to the agency for clarification of its interpretation of its own regulations"). The remand this Court appears to contemplate is for the different and broader purpose of allowing EPA to review and possibly rescind the challenged rule itself.

sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). The initial 60-day period would have long ago expired, and the exception for cases filed on after-arising grounds has been narrowly interpreted by this Court.[3] As a result, even though Petitioners timely filed their petitions for review in these cases, these statutory limitations could be used in an attempt to shield the Rule from any judicial review if, after a remand by this Court, EPA were ultimately not to change course.

While Petitioners do not concede that their timely-exercised rights to judicial review can be extinguished in this way, and believe that review would be available, these questions would be avoided by abeyance.

CONCLUSION

This Court should hold the consolidated cases in abeyance.

[3] *See, e.g.*, *Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 27 (D.C. Cir. 2016) (rejecting argument that "'the mere application of a regulation,' without anything more, constitutes after-arising grounds"); *see also Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 662-63 (D.C. Cir. 2014) (rejecting argument, in construing similar provision under Surface Mining Control and Reclamation Act, that emergence of parties not previously in existence constitutes after-arising grounds).

Dated: May 15, 2017

Respectfully submitted,

/s/ Allison D. Wood
F. William Brownell
Allison D. Wood
Henry V. Nickel
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
Fax: (202) 778-2201
bbrownell@hunton.com
awood@hunton.com
hnickel@hunton.com
tszymanski@hunton.com
aknudsen@hunton.com

Counsel for Petitioners Utility Air Regulatory Group and American Public Power Association

/s/ Elbert Lin
Patrick Morrisey
ATTORNEY GENERAL OF WEST VIRGINIA
Elbert Lin
Solicitor General
Counsel of Record
Thomas M. Johnson, Jr.
Deputy Solicitor General
Katlyn M. Miller
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
elbert.lin@wvago.gov

Counsel for Petitioner State of West Virginia

/s/ Geoffrey K. Barnes
Geoffrey K. Barnes
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Tel: (216) 479-8646
geoffrey.barnes@squirepb.com
wendy.lavey@squirepb.com
john.lazzaretti@squirepb.com
bobby.cheren@squirepb.com

Counsel for Petitioner Murray Energy Corporation

/s/ Paul M. Seby
Wayne Stenehjem
ATTORNEY GENERAL OF NORTH DAKOTA
Margaret Olson
Assistant Attorney General
North Dakota Attorney General's Office
600 E. Boulevard Avenue #125
Bismarck, ND 58505
Tel: (701) 328-3640
wstenehjem@nd.gov
maiolson@nd.gov

Paul M. Seby
Jerry Stouck
Special Assistant Attorneys General
State of North Dakota
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Tel: (303) 572-6500
Fax: (303) 572-6540
sebyp@gtlaw.com
stouckj@gtlaw.com

Counsel for Petitioner State of North Dakota

/s/ Tristan L. Duncan
Tristan L. Duncan
Thomas J. Grever
SHOOK HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64018
Tel: (816) 474-6550
Fax: (816) 421-5547
tlduncan@shb.com
tgrever@shb.com@shb.com

Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
Fax: (312) 379-0467
jmassey@masseygail.com

Counsel for Petitioner Peabody Energy Corporation

/s/ Eugene M. Trisko
Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
Tel: (301) 639-5238 (cell)
emtrisko7@gmail.com

Counsel for Petitioner International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO

/s/ Dominic E. Draye
Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
Dominic E. Draye
Solicitor General
Counsel of Record
Keith J. Miller
Assistant Solicitor General
Maureen Scott
Janet Wagner
Arizona Corporation Commission,
Staff Attorneys
1275 West Washington Street
Phoenix, AZ 85007-2997
Tel: (602) 542-3333
Fax: (602) 542-8308
dominic.draye@azag.gov
keith.miller@azag.gov
SolicitorGeneral@azag.gov

Counsel for Petitioner Arizona Corporation Commission

/s/ Lee Rudofsky
Leslie Rutledge
ATTORNEY GENERAL OF ARKANSAS
Lee Rudofsky
Solicitor General
Counsel of Record
Nicholas J. Bronni
Deputy Solicitor General
Jamie L. Ewing
Assistant Attorney General
323 Center Street, Suite 400
Little Rock, AR 72201
Tel: (501) 682-5310
lee.rudofsky@arkansasag.gov
jamie.ewing@arkansasag.gov

Counsel for Petitioner State of Arkansas

/s/ Grant F. Crandall
Grant F. Crandall
General Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2429
gcrandall@umwa.org

Arthur Traynor, III
Staff Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2457
atraynor@umwa.org

Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (304) 258-1977
emtrisko7@gmail.com

Counsel for Petitioner United Mine Workers of America, AFL-CIO

/s/ Jonathan L. Williams
Pamela Jo Bondi
ATTORNEY GENERAL OF FLORIDA
Jonathan L. Williams
Deputy Solicitor General
Counsel of Record
Jonathan A. Glogau
Special Counsel
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel: (850) 414-3818
Fax: (850) 410-2672
jonathan.williams@myfloridalegal.com
jonathan.glogau@myfloridalegal.com

Counsel for Petitioner State of Florida

/s/ Stacey Turner
Stacey Turner
SOUTHERN COMPANY SERVICES, INC.
600 18th Street North
BIN 14N-8195
Birmingham, AL 35203
Tel: (205) 257-2923
staturner@southernco.com

Counsel for Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company

/s/ C. Grady Moore III
C. Grady Moore III
Steven G. McKinney
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35303-4642
Tel: (205) 251-8100
Fax: (205) 488-5704
gmoore@balch.com
smckinney@balch.com

Counsel for Petitioner Alabama Power Company

/s/ Sarah Hawkins Warren
Christopher M. Carr
ATTORNEY GENERAL OF GEORGIA
Sarah Hawkins Warren
Solicitor General
Counsel of Record
Office of the Attorney General
40 Capitol Square S.W.
Atlanta, GA 30334-1300
Tel: (404) 463-0070
Fax: (404) 657-8773
swarren@law.ga.gov

Counsel for Petitioner State of Georgia

/s/ Thomas M. Fisher
Curtis T. Hill, Jr.
ATTORNEY GENERAL OF INDIANA
Thomas M. Fisher
Solicitor General
Counsel of Record
Office of the Attorney General
Indiana Government Ctr. South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Tel: (317) 232-6255
Fax: (317) 232-7979
tom.fisher@atg.in.gov

Counsel for Petitioner State of Indiana

/s/ Margaret Claiborne Campbell
Margaret Claiborne Campbell
Angela J. Levin
TROUTMAN SANDERS LLP
600 Peachtree Street, NE, Suite 5200
Atlanta, GA 30308-2216
Tel: (404) 885-3000
margaret.campbell@troutmansanders.com
angela.levin@troutmansanders.com

Counsel for Petitioner Georgia Power Company

/s/ Jeffrey A. Chanay
Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
Counsel of Record
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov
bryan.clark@ag.ks.gov

Counsel for Petitioner State of Kansas

/s/ Jeffrey A. Stone
Jeffrey A. Stone
BEGGS & LANE, RLLP
501 Commendencia Street
Pensacola, FL 32502
Tel: (850) 432-2451
JAS@beggslane.com

James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

Counsel for Petitioner Gulf Power Company

/s/ Joseph A. Newberg II
Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Joseph A. Newberg II
Assistant Attorney General
Counsel of Record
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov

Counsel for Petitioner Commonwealth of Kentucky

/s/ Terese T. Wyly
Terese T. Wyly
Ben H. Stone
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Tel: (228) 214-0413
twyly@balch.com
bstone@balch.com

Counsel for Petitioner Mississippi Power Company

/s/ Randy E. Brogdon
Randy E. Brogdon
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308-2216
Tel: (404) 885-3000
randy.brogdon@troutmansanders.com

Counsel for Petitioner Southern Power Company

/s/ Steven B. "Beaux" Jones
Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Steven B. "Beaux" Jones
Counsel of Record
Environmental Section – Civil Division
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
Fax: (225) 326-6099
jonesst@ag.state.la.us

Counsel for Petitioner State of Louisiana

/s/ Donald Trahan
Herman Robinson
Executive Counsel
Donald Trahan
Counsel of Record
Spencer Bowman
Elliott Vega
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Legal Division
P.O. Box 4302
Baton Rouge, LA 70821-4302
Tel: (225) 219-3985
Fax: (225) 219-4068
donald.trahan@la.gov
spencer.bowman@la.gov
elliott.vega@la.gov

Counsel for Petitioner State of Louisiana Department of Environmental Quality

/s/ David M. Flannery
David M. Flannery
Kathy G. Beckett
Edward L. Kropp
STEPTOE & JOHNSON, PLLC
707 Virginia Street East
Charleston, WV 25326
Tel: (304) 353-8000
dave.flannery@steptoe-johnson.com
kathy.beckett@steptoe-johnson.com
skipp.kropp@steptoe-johnson.com

Stephen L. Miller
STEPTOE & JOHNSON, PLLC
700 N. Hurstbourne Parkway, Suite 115
Louisville, KY 40222
Tel: (502) 423-2000
steve.miller@steptoe-johnson.com

Counsel for Petitioner Indiana Utility Group

/s/ Aaron D. Lindstrom
Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
Counsel of Record
Neil D. Gordon
Assistant Attorney General
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov

Counsel for Petitioner People of the State of Michigan

/s/ P. Stephen Gidiere III
P. Stephen Gidiere III
Thomas L. Casey III
Julia B. Barber
BALCH & BINGHAM LLP
1901 6th Avenue N., Suite 1500
Birmingham, AL 35203
Tel: (205) 251-8100
sgidiere@balch.com

Stephanie Z. Moore
Executive Vice President & General Counsel
VISTRA ENERGY CORP.
1601 Bryan Street, 22nd Floor
Dallas, TX 75201

Daniel J. Kelly
Vice President & Associate General Counsel
VISTRA ENERGY CORP.
1601 Bryan Street, 43rd Floor
Dallas, TX 75201

Counsel for Petitioners Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC

/s/ D. John Sauer
Josh Hawley
ATTORNEY GENERAL OF MISSOURI
D. John Sauer
Solicitor General
Counsel of Record
Laura Elsbury
Assistant Attorney General
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102
Tel: (573) 751-1800
Fax: (573) 751-0774
john.sauer@ago.mo.gov

Counsel for Petitioner State of Missouri

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
tlorenzen@crowell.com

Counsel for Petitioners National Rural Electric Cooperative Association; Sunflower Electric Power Corporation; and Tri-State Generation and Transmission Association, Inc.

Of Counsel

Rae Cronmiller
Environmental Counsel
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION
4301 Wilson Blvd.
Arlington, VA 22203
Tel: (703) 907-5500
rae.cronmiller@nreca.coop

/s/ Dale Schowengerdt
Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Dale Schowengerdt
Solicitor General
Counsel of Record
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov

Counsel for Petitioner State of Montana

/s/ Christina F. Gomez
Christina F. Gomez
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Tel: (303) 295-8000
Fax: (303) 295-8261
cgomez@hollandhart.com

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82001
Tel: (307) 778-4200
Fax: (307) 778-8175
pday@hollandhart.com

Counsel for Petitioner Basin Electric Power Cooperative

/s/ John M. Holloway III
John M. Holloway III
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 383-0100
Fax: (202) 383-3593
jayholloway@eversheds-sutherland.com

Counsel for Petitioners East Kentucky Power Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; and Minnkota Power Cooperative, Inc.

/s/ Justin D. Lavene
Douglas J. Peterson
ATTORNEY GENERAL OF NEBRASKA
Dave Bydlaek
Chief Deputy Attorney General
Justin D. Lavene
Assistant Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2834
justin.lavene@nebraska.gov

Counsel for Petitioner State of Nebraska

/s/ Jeffrey R. Holmstead
Jeffrey R. Holmstead
BRACEWELL LLP
2001 M Street, N.W., Suite 900
Washington, D.C. 20036
Tel: (202) 828-5852
Fax: (202) 857-4812
jeff.holmstead@bracewelllaw.com

Counsel for Petitioner American Coalition for Clean Coal Electricity

/s/ Eric E. Murphy
Michael DeWine
ATTORNEY GENERAL OF OHIO
Eric E. Murphy
State Solicitor
Counsel of Record
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner State of Ohio

/s/ Peter S. Glaser
Peter S. Glaser
TROUTMAN SANDERS LLP
401 Ninth Street N.W., Suite 1000
Washington, D.C. 20004
Tel: (202) 274-2998
Fax: (202) 654-5611
peter.glaser@troutmansanders.com

Carroll W. McGuffey III
Justin T. Wong
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308
Tel: (404) 885-3000
mack.mcguffey@troutmansanders.com
justin.wong@troutmansanders.com

Counsel for Petitioner National Mining Association

/s/ Chaim Mandelbaum
Chaim Mandelbaum
Litigation Manager
FREE MARKET ENVIRONMENTAL LAW CLINIC
726 N. Nelson Street, Suite 9
Arlington, VA 22203
Tel: (703) 577-9973
chaim12@gmail.com

Counsel for Petitioner Energy & Environment Legal Institute

/s/ P. Clayton Eubanks
Mike Hunter
ATTORNEY GENERAL OF OKLAHOMA
P. Clayton Eubanks
Deputy Solicitor General
Oklahoma Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-8992
Fax: (405) 522-0608
clayton.eubanks@oag.ok.gov

Counsel for Petitioner State of Oklahoma

/s/ James Emory Smith, Jr.
Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
Counsel of Record
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov

Counsel for Petitioner State of South Carolina

/s/ Peter D. Keisler
Peter D. Keisler
C. Frederick Beckner III
Ryan C. Morris
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8027
pkeisler@sidley.com

Counsel for Petitioners Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Foundry Society; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association

/s/ Steven R. Blair
Marty J. Jackley
ATTORNEY GENERAL OF SOUTH DAKOTA
Steven R. Blair
Assistant Attorney General
Counsel of Record
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel: (605) 773-3215
steven.blair@state.sd.us

Counsel for Petitioner State of South Dakota

/s/ Steven P. Lehotsky
Steven P. Lehotsky
Sheldon B. Gilbert
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
slehotsky@uschamber.com

Counsel for Petitioner Chamber of Commerce of the United States of America

/s/ Scott A. Keller
Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
First Assistant Attorney General
Scott A. Keller
Solicitor General
Counsel of Record
P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 936-1700
scott.keller@texasattorneygeneral.gov

Counsel for Petitioner State of Texas

/s/ Quentin Riegel
Linda E. Kelly
Quentin Riegel
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 637-3000
qriegel@nam.org

Counsel for Petitioner National Association of Manufacturers

/s/ Richard S. Moskowitz
Richard S. Moskowitz
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, N.W., Suite 700
Washington, D.C. 20006
Tel: (202) 457-0480
rmoskowitz@afpm.org

Counsel for Petitioner American Fuel & Petrochemical Manufacturers

/s/ Tyler R. Green
Sean Reyes
ATTORNEY GENERAL OF UTAH
Tyler R. Green
Solicitor General
Counsel of Record
Parker Douglas
Chief Federal Deputy
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320
tylergreen@utah.gov
pdouglas@utah.gov

Counsel for Petitioner State of Utah

/s/ Misha Tseytlin
Brad D. Schimel
ATTORNEY GENERAL OF WISCONSIN
Misha Tseytlin
Solicitor General
Counsel of Record
Delanie M. Breuer
Chief of Staff
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
Tel: (608) 267-9323
tseytlinm@doj.state.wi.us

Counsel for Petitioner State of Wisconsin

/s/ Karen R. Harned
Karen R. Harned
Executive Director
Elizabeth A. Milito
Senior Executive Counsel
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
Tel: (202) 314-2061
karen.harned@nfib.org
elizabeth.milito@nfib.org

Counsel for Petitioner National Federation of Independent Business

/s/ Mark Walters
Mark Walters
Michael J. Nasi
JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, TX 78701
Tel: (512) 236-2000
Fax: (512) 236-2002
mwalters@jw.com
mnasi@jw.com

Douglas Bryan Hughes
LAW OFFICES OF D. BRYAN HUGHES
701 N. Pacific Street
Mineola, TX 75773
Tel: (903) 569-8880
Fax: (903) 569-8889
bryan@hughesfirm.com

Counsel for Petitioner-Intervenors Lignite Energy Council and Gulf Coast Lignite Coalition

/s/ James Kaste
Peter K. Michael
ATTORNEY GENERAL OF WYOMING
James Kaste
Deputy Attorney General
Counsel of Record
Erik Petersen
Elizabeth Morrisseau
Senior Assistant Attorneys General
2320 Capitol Avenue
Cheyenne, WY 82002
Tel: (307) 777-6946
Fax: (307) 777-3542
james.kaste@wyo.gov

Counsel for Petitioner State of Wyoming

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(2)(C), I hereby certify that the foregoing Supplemental Brief of Petitioners and Petitioner-Intervenors contains 1,626 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, and that this supplemental brief therefore is within the word limit of 3,900 words established by the Court in its Order of April 28, 2017. I also certify that this supplemental brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Garamond font.

Dated: May 15, 2017

/s/ Elbert Lin
Elbert Lin

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of May, 2017, a copy of the foregoing Supplemental Brief of Petitioners and Petitioner-Intervenors was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Elbert Lin
Elbert Lin

Exhibit A

E&E NEWS PM

LATE-BREAKING NEWS

<< Back to E&E News PM index page.

AIR POLLUTION

Tighter smog regs expected as EPA studies Bush rule

Robin Bravender, E&E reporter

Published: Wednesday, September 16, 2009

The Obama administration is expected to issue substantially tougher smog standards after reconsidering the contentious 2008 regulations set by the George W. Bush administration, clean air experts say.

In response to a court deadline, U.S. EPA announced today that it will reconsider the national air quality standards for ozone, or smog. The Bush EPA tightened the national limits last year, but critics assailed the administration for adopting a standard that failed to protect public health (***Greenwire***, Sept. 16).

EPA said it plans to conduct a full review of the science that influenced the 2008 decision -- including more than 1,700 scientific studies and public comments that were submitted during that process. The agency said it would also review the findings of EPA's independent science advisory committee, which recommended stricter limits than those ultimately adopted.

"This is one of the most important protection measures we can take to safeguard our health and our environment," said EPA Administrator Lisa Jackson. "Reconsidering these standards and ensuring acceptable levels of ground-level ozone could cut health care costs and make our cities healthier, safer places to live, work and play."

Experts tracking the issue say the reconsideration will almost certainly lead to stricter standards.

"It is unimaginable that EPA would go through this whole process to come up with a standard that weakens the status quo," said Bill Becker, executive director of the National Association of Clean Air Agencies.

The Bush EPA strengthened the ozone limits from 84 parts per billion (ppb) to 75 ppb, although EPA's Clean Air Scientific Advisory Committee (CASAC) had recommended a primary health-based standard between 60 and 70 ppb.

Environmentalists also accused the Bush White House of interfering to prevent EPA from establishing a more stringent secondary standard to protect forests, crops and wildlife, something EPA staff members and science advisers had recommended.

"We all knew that [the Obama administration] wanted to reconsider it, but now the question is, what do they do?" said Jeff Holmstead, former EPA air chief during the Bush administration. "Most of us that watch these things think they'll probably end up lowering it to 70 or 69 or something."

Becker and Earthjustice attorney David Baron, who represented environmental groups in a lawsuit challenging the Bush standard, predicted that EPA will set the limit in its science advisers' recommended range of between 60 and 70 ppb.

"It's most likely to be somewhere within the range recommended by CASAC," Baron said. "Where that will be is an open question right now."

Despite EPA's best intentions to safeguard public health, Holmstead said it seems unlikely that regions already struggling to meet the current standards will be able to comply with stricter limits.

"It really forces regulators to be dishonest, because they have to come up with this modeling and these plans that purport to show that whatever they're doing is going to allow them in 10 years or in 20 years to meet the

standard," Holmstead said. "But everybody knows that they're not going to do that."

Baron dismissed that argument, saying that EPA must set a high bar in order to encourage innovation.

"We've had strong standards set in the past or standards that seemed to be strong that we've been able to meet," Baron said. "Unless you set protective targets, you're not going to generate the efforts to meet those standards."

Amy Chai, staff counsel for the National Association of Home Builders, said she is optimistic that the agency will relax the standards. The industry association sued the agency over the Bush administration rule, arguing that the ozone levels were too stringent and would prove costly to businesses.

"I remain hopeful, but you know I really don't know which way it's going go," Chai said. "Our concerns have always been that these requirements are going to lead to increased burdens on our industry."

The agency plans to issue a proposed rule by Dec. 21 and to sign the final rule by Aug. 31, 2010.

Exhibit B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 13 2011

THE ADMINISTRATOR

The Honorable Thomas R. Carper
United States Senate
Washington, D.C. 20510

Dear Senator Carper:

Thank you for your letter of July 11, 2011, regarding the U.S. Environmental Protection Agency's reconsideration of the 2008 National Ambient Air Quality Standard (NAAQS) for ground-level ozone, which is commonly known as "smog." I appreciate the opportunity to clarify why the Agency is undertaking a reconsideration of the 2008 standard, which had been set by the previous Administration.

For more than 40 years, the Clean Air Act (CAA) has protected Americans against diseases from air pollution – guarding the public by setting national health standards based on the best science. The review of the ozone standard every five years, as demanded by the Clean Air Act, is particularly vital. Ozone is among the most widespread and stubborn air pollutants. It contributes to the smog which can shroud U.S. cities, fields and canyons. It is responsible for tens of thousands of visits to emergency rooms by Americans each year for serious bronchial conditions, including asthma. It is hardest on the breathing of the very old and the very young, but it can affect everyone. It is responsible for millions of lost days of school due to illness and damages vegetation in the United States -- an estimated $500 million in reduced crop production each year.

The CAA sets up a two-step process for addressing unhealthy levels of six different air pollutants, including ozone. The first step is setting ambient air quality standards, which is the science-based step. The second step is reducing pollution levels to meet the standards; cost and other factors are considered in this step. Ozone pollution, or smog, is commonly associated with aggravated asthma attacks, but it also contributes to thousands of premature deaths a year, and millions of lost work and school days.

In setting the health-based ambient standards, Congress required EPA to review the best available science every 5 years and, if appropriate, revise the ambient standards to a level requisite to protect human health with an adequate margin of safety. The CAA requires that this standard setting be based solely on science. Since science is the cornerstone of all of our actions, we rely on the work of an independent, Congressionally-established body, the Clean Air Science Advisory Committee (CASAC), to review the work of the Agency health scientists and provide recommendations to the Agency on where protective standards ought to be set. This group is made up of wholly independent expert scientists, public health officials and other similar experts.

In the 2008 standard-setting process, the CASAC submitted recommendations to the Agency that a protective standard for ground-ozone would be appropriate within the range of 0.060-0.070 parts per million (ppm). However, the Bush EPA set the standard outside of the CASAC-recommended range, at 0.075 ppm. Based on arguments that the 0.075 ppm designation was "arbitrary and capricious" because it was not consistent with the recommendations of CASAC, the Bush-era EPA's decision was immediately challenged in court.

The legal defensibility of the 2008 decision posed major challenges for the Federal Government given the strength of the scientific record at the time, the weakness of the 2008 ozone decision in light of that scientific record and the requirements of the CAA, and other factors. Were the standard to be overturned in court, it would have resulted in more financial and planning uncertainty for Cities and States, when they could afford it the least.

Upon my confirmation as EPA Administrator, I had to choose between defending the Bush-era ozone standard in court or agreeing to reconsider the 2008 designation. I decided that reconsideration was the appropriate path based on concerns that the 2008 standards were not legally defensible given the scientific evidence in the record for the rulemaking, the requirements of the Clean Air Act and the recommendation of the CASAC. This reconsideration will be based on the scientific record that was the basis for the 2008 standard.

I am committed to working with states and local areas to provide healthy air to all Americans by identifying cost-effective implementation solutions to meet any revised standards. There is much flexibility in the Clean Air Act that EPA can build into implementation of the reconsidered ozone standard, and I recognize that this flexibility will be critical to states working under constrained resources to continue economic development and job growth.

As history has shown us, this flexibility will minimize the costs associated with updating the standard. In 1997, for instance, the Agency heard claims about excessively high costs and unreasonable burdens associated with meeting the standards we set at the time ozone and particulate matter. Critics said that the new EPA standards would result in banning barbecues, fireworks and antique cars, and have other serious effects on our society and that they would cost tens of billions of dollars a year and that many areas would never be able to attain the standards. In reality, it has cost a fraction of that amount, and the vast majority of areas around the country now meet those standards, or will as a result of the Cross-State Air Pollution Rule that we finalized last week.

Again, I thank you for your leadership and your inquiry. Should you have any further questions, please feel free to contact me.

Sincerely,

Lisa P. Jackson