ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, INC., *et al.*,	)	Case No. 09-1322 (and consolidated cases 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, and 10-1049)
Petitioners,	)	
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

JOINT OPPOSITION OF PROPOSED-STATE-INTERVENOR-RESPONDENTS TO MOTIONS TO REMAND TO ADDUCE ADDITIONAL EVIDENCE[1]

The Commonwealth of Massachusetts, *et al.*,[2] ("Proposed State-Intervenor-Respondents") hereby submit this joint opposition in response to three motions to remand to adduce additional evidence (*see* n.1, *supra*) filed by numerous petitioners including industry groups and companies, U.S. representatives, and the

[1] This joint opposition responds to the following three motions: Motion for Remand to Adduce Additional Evidence (Document 1240105) filed by Petitioners in Case No. 10-1035 on April 15, 2010 ("Linder Motion"); Joint Motion of the State of Alabama and the Commonwealth of Virginia to Remand to Adduce Additional Evidence (Document 1240064) filed in Case No. 10-1036 on April 15, 2010 ("AL/VA Motion"); and Ohio Coal Association's Motion to Remand to Adduce Additional Evidence (Document 1239917) filed in Case No. 10-1040 on April 14, 2010 ("OCA Motion").

[2] The States of Arizona, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Pennsylvania Department of Environmental Protection, and the City of New York.

States of Alabama and Virginia (collectively, "Movants"). Movants' position that the Court should dispose of this case through remand to EPA prior to merits briefing or before any demonstration by Petitioners that jurisdictional requirements are met, and while EPA is still reviewing petitions for reconsideration involving the same issue raised in Movants' remand motions, seeks to bypass the appeal process that they themselves initiated. Disposal of the case in this manner is not warranted.

BACKGROUND

On December 15, 2009, EPA issued a final rule under the Clean Air Act. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule. 74 Fed. Reg. 66496, *et seq*. (Dec. 15, 2009) ("Endangerment Finding"). Seventeen petitions for review challenging the Endangerment Finding have been filed and consolidated under docket number 09-1322. This case includes more than 50 petitioners, more than 60 movant-intervenors, and six amici curiae.

The Court has pending before it, in addition to Movants' remand motions, a motion from EPA requesting the Court hold the case in abeyance while EPA completes its review of ten pending administrative petitions for reconsideration (including seven supplements to the petitions for reconsideration), which EPA expects to do by July 30, 2010. *See* Respondent's Motion to Hold Case in Abeyance Pending Completion of Administrative Proceedings on Petitions for

Reconsideration, 3 & n.2 (Document No. 1240145) ("EPA Abeyance Motion"), filed April 15, 2010.

ARGUMENT

I. Movants' Request to Remand the Endangerment Finding to EPA Should Be Rejected.

A. CAA §307(c) Does Not Apply Here.

Movants attempt to leap frog directly to the ultimate remedy of remand, apparently attempting to avoid the jurisdictional hurdle they will have to face at the merits briefing stage. Specifically, Movants argue that the Court, pursuant to CAA §307(c), should remand this case to EPA to adduce additional evidence related to the Endangerment Finding. However, CAA §307(c) does not apply in this context.

The express language of CAA §307(c) makes clear that it applies only in agency determinations made through *formal* rulemaking. *See* CAA §307(c) (authorizing remand of a determination "required to be made on the record after notice and opportunity for hearing"); *see also* 5 U.S.C. § 553(c) (providing that only rules "required by statute to be made on the record after opportunity for an agency hearing" must use the *formal* rulemaking procedures prescribed by 5 U.S.C. §§556-557). Few organic statutes require the implementing agency to promulgate rules "on the record after opportunity for an agency hearing," which is the magic language that requires an agency to conduct an oral, evidentiary hearing that is the hallmark of *formal* rulemaking. S*ee* 1 Richard J Pierce, Jr.,

Administrative Law Treatise, § 7.2 (5th Ed. 2010) (even a statute requiring "full hearing" does not trigger formal rulemaking and may be satisfied with notice and comments). Thus, the typical situation is where the organic statutes allow *informal* rulemaking through notice and comments (5 U.S.C. § 553) or other informal processes (such as public hearings) that the agency may prescribe, short of trial-type procedures. Pierce, §7.2.

Here, the Endangerment Finding is the result of *informal* rulemaking. Although Movants do not dispute this, they ignore the critical formal/informal rulemaking distinction, and treat CAA §307(c) as if it has broad applicability. To support their argument, Movants rely on out-of-context references to inapplicable legislative history. However, because the textual limitation on the face of CAA §307(c) controls, there is no need to parse the numerous errors and legal deficiencies of Movants' arguments.

In addition, the cases on which Movants rely are inapposite as they do not involve remand under CAA §307(c), nor do they arise where the agency is reviewing petitions for reconsideration. *See* AL/VA Motion at 7-8; OCA Motion at 9-10. For example, in *Ethyl Corp. v. Browner*, 989 F.2d 522, 523-24 (D.C. Cir. 1993), the Court ordered a remand, as EPA had requested, after full merits briefing and oral argument, and not under CAA §307(c). In *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001), the Federal Circuit reversed the Court of

International Trade and ordered it to remand to the Department of Commerce, as Commerce had requested, after briefing and oral argument on the merits, and not under CAA §307(c).

In short, CAA §307(c) does not apply, and remand is not now available.

B. The Appropriate Mechanism to Seek EPA Review of Movants' "Additional Evidence" is an Administrative Petition for Reconsideration Under CAA §307(d)(7)(B), Which Movants have Filed and EPA is Reviewing.

Where a person objects to a rule, such as the Endangerment Finding, and demonstrates certain specific statutory criteria are met, then CAA §307(d)(7)(B) requires the Administrator to "convene a proceeding for reconsideration." CAA §307(d)(7)(B). Movants know this: they submitted to EPA petitions for reconsideration of the Endangerment Finding concerning the same "additional evidence" that they put at issue here.

Because they cannot contest that CAA §307(d)(7)(B) is the proper means by which to seek EPA's review of its alleged "additional evidence," Movants characterize that "avenue" as having been unavailing, thereby necessitating their current reliance on CAA §307(c) as a last resort. *See* AL/VA Motion at 8; OCA Motion at 6, 9; Linder Motion at 2 (incorporating OCA's Argument, Section I). Movants claim that EPA refused to consider the petitions and also that EPA denied them "*de facto*" by issuance of motor vehicle GHG emissions standards. *See e.g.*, AL/VA Motion at 4, OCA Motion at 5, Linder Motion at 6-7, *citing* Light-Duty

Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, issued jointly by EPA and NHTSA, April 1, 2010 ("Motor Vehicle Rule").

However, EPA's express statements prove these contentions to be false. As Movants are aware (*see e.g.*, Linder Motion at 7), in the Motor Vehicle Rule, EPA expressly rejected the suggestion that that final rule amounted to a denial of the pending requests for reconsideration. EPA stated that it "has not taken final action on these administrative requests, and issuance of this vehicle rule is not final agency action, explicitly or implicitly, on those requests." Motor Vehicle Rule at 161. On April 15, 2010, EPA reiterated to the Court that its review of the pending petitions for reconsideration remains ongoing, and that it intends to complete such review by July 30, 2010. *See* EPA Abeyance Motion at 1, 6.

There is no substantive reason to discount EPA's representations that its review is ongoing.[3] Given the importance and complexity of the issues, the

[3] Moreover, EPA's ongoing review has the benefit of various recent independent investigations examining the issues raised by Movants. *See e.g.*, Report of the International Panel Set up by the University of East Anglia to Examine the Research of the Climatic Research Unit (April 2010) at, http://www.uea.ac.uk/mac/comm/media/press/CRUstatements/SAP; U.K. House of Commons, Science and Technology Committee, Eighth Report of Session 2009-10, The Disclosure of Climate Data from the Climatic Research Unit at the University of East Anglia (March 31, 2010), Vols. I and Vol. II, links at http://www.parliament.uk/parliamentary_committees/science_technology/s_t_cru_inquiry.cfm; RA-10 Inquiry Report: Concerning the Allegations of Research Misconduct Against Dr. Michael E. Mann, The Pennsylvania State University,

volume of underlying data and information, and the intricacies of the regulatory scheme involved, the length of time EPA is taking to carefully review the administrative petitions is reasonable. As opposed to Movants' request for remand, EPA's proposed path of abeyance to allow time for the agency to complete its review process is legally proper, makes sense and would promote judicial efficiency.

In fact, when judicial review of an agency action has been initiated and administrative reconsideration is ongoing, the Court's common practice is to hold the case in abeyance to allow administrative reconsideration to proceed. *Wrather-Alvarez Broadcasting v. FCC*, 248 F.2d 646, 648-49 (D.C. Cir. 1957). Logic dictates that this practice should also be applied to an agency still processing petitions for reconsideration as well.

As to Movants' contention that remand would be more efficient than abeyance (*see e.g.*, AL/VA Motion at 18), we believe the opposite is true. If, after reviewing the petitions, EPA denies them and refuses to conduct administrative reconsideration, then CAA §307(d)(7)(B) provides for judicial review of that refusal. In that circumstance, common practice of the Court would entail consolidation of any such petitions for review with the present case. *See e.g.*, *Catawba County, North Carolina v. EPA*, 571 F.3d 20, 29 (D.C. Cir. 2009)

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found at: http://www.research.psu.edu/orp/Findings_Mann_Inquiry.pdf.

("We stayed proceedings in this court while EPA considered the petitions for reconsideration. Once EPA resolved the petitions for reconsideration, we consolidated all petitions for review"). Such a practice would provide the Court with the benefit of EPA's rationale for any denial and allow judicial review to be conducted upon a fully-developed, complete administrative record. Movants' suggested path, on the other hand, would terminate this case (*see* D.C. Cir. Rule 41(b)) so that any judicial review sought of EPA's post-remand conduct would require duplication of the numerous pleadings and other filings already made here – causing prejudice to parties that did not move for remand – and provide no benefit.

C. Movants have Not Demonstrated that Jurisdictional Requirements are Met.

Even if the above-discussed defects with Movants' motions were put aside, this Court cannot order the ultimate relief of remand, as Movants request, without having first satisfied itself that it has jurisdiction over the case. At this preliminary stage, satisfaction of jurisdictional requirements has not been properly addressed or established.

For the Court to have jurisdiction to hear this case, petitioners must demonstrate that the case presents an actual case or controversy. *See* U.S. Const., Art. III. The overlapping doctrines of ripeness and standing spring from the actual controversy requirement of Article III. *See e.g., Vander Jagt v. O'neill*, 699 F.2d

1166, 1178-79 (D.C. Cir. 1983) (Bork, J. *concurring*), *cert. denied,* 464 U.S. 823 (1983).

The ripeness doctrine, in particular, is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). *See also, Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736-37 (1998). In addition, standing must be affirmatively shown by petitioners, by affidavit if necessary, to gain any relief. *See, e.g., Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

Here, the Endangerment Finding does not impose any requirements or obligations on Movants. Indeed, the rule does not place any requirements or obligations on *any* entity. Rather, the Endangerment Finding sets forth the Administrator's determination that emissions of greenhouse gases from motor vehicles and engines that are subject to CAA § 202(a) contribute to global warming air pollution that may reasonably be anticipated to endanger public health and welfare. At this stage, Movants have not established that they are feeling effects of the Endangerment Finding, themselves, in a concrete way, so as to satisfy their

burden of proving the jurisdictional requirements of standing and ripeness.

Movants' attempt to go straight to the ultimate remedy, bypassing such inquiries, must fail: jurisdiction must be demonstrated.

CONCLUSION

For the foregoing reasons, Proposed-State-Intervenor-Respondents respectfully request that this Court deny Movants' motions to remand to adduce additional evidence.

CONSENT PURSUANT TO ECF-3(B)

Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), the undersigned counsel for the Commonwealth of Massachusetts hereby represents that the other parties listed in the signature blocks below have consented to the filing of this joint opposition.

Respectfully Submitted,

Dated: April 29, 2010

FOR THE COMMONWEALTH OF MASSACHUSETTS

MARTHA COAKLEY
ATTORNEY GENERAL

By:
/s/ Carol Iancu
Carol Iancu
Tracy Triplett
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2428
carol.iancu@state.ma.us

FOR THE STATE OF ARIZONA
TERRY GODDARD
ATTORNEY GENERAL

Joseph P. Mikitish
James T. Skardon
Assistant Attorneys General
1275 W Washington Street
Phoenix, AZ 85007
(602) 542-8535

FOR THE STATE OF CALIFORNIA BY AND THROUGH GOVERNOR ARNOLD SCHWARZENEGGER, THE CALIFORNIA AIR RESOURCES BOARD, AND EDMUND G. BROWN, JR.
ATTORNEY GENERAL

Marc N. Melnick
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
(510) 622-2133

FOR THE STATE OF CONNECTICUT
RICHARD BLUMENTHAL
ATTORNEY GENERAL

Kimberly P. Massicotte
Matthew I. Levine
Scott N. Koschwitz
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
(860) 808-5250

FOR THE STATE OF DELAWARE
JOSEPH R. BIDEN, III
ATTORNEY GENERAL

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

FOR THE STATE OF ILLINOIS
LISA MADIGAN
ATTORNEY GENERAL

Matthew J. Dunn
Gerald T. Karr
Assistant Attorneys General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-3369

FOR THE STATE OF IOWA
THOMAS J. MILLER
ATTORNEY GENERAL

David R. Sheridan
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th Street, Ground Flr.
Des Moines, IA 50319
(515) 281-5351

FOR THE STATE OF MAINE
JANET T. MILLS
ATTORNEY GENERAL

Gerald D. Reid
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333-0006
(207) 626-8545

FOR THE STATE OF MARYLAND
DOUGLAS F. GANSLER
ATTORNEY GENERAL

Mary Raivel
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Boulevard, Suite 6048
Baltimore, MD 21230
(410) 537-3035

FOR THE STATE OF MINNESOTA
LORI SWANSON
ATTORNEY GENERAL

Steven M. Gunn
Deputy Attorney General
Jocelyn F. Olson
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101
(651) 757-1244

FOR THE STATE OF NEW HAMPSHIRE
MICHAEL A. DELANEY
ATTORNEY GENERAL

K. Allen Brooks
Senior Assistant Attorney General
33 Capitol Street
Concord, NH 03301
(603) 271-3679

FOR THE STATE OF NEW MEXICO
GARY K. KING
ATTORNEY GENERAL

Stephen R. Farris
Seth T. Cohen
Assistant Attorneys General
P.O. Box 1508
Santa Fe, NM 87504-1508
(505) 827-6601

FOR THE STATE OF NEW YORK
ANDREW M. CUOMO
ATTORNEY GENERAL

Michael J. Myers
Yueh-Ru Chu
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 474-8096

FOR THE STATE OF OREGON
JOHN KROGER
ATTORNEY GENERAL

Jerome Lidz
Solicitor General
Denise Fjordbeck
Attorney-in-Charge, Civil/Admin. Appeals
Paul Logan
Assistant Attorney General Appellate Div.
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-5648

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION
SUSAN SHINKMAN
CHIEF COUNSEL

Robert A. Reiley
Kristen M. Furlan
Assistant Counsels
Department of Environmental Protection
400 Market St., 9th Floor
Harrisburg, PA 17105
(717) 787-0478

FOR THE STATE OF RHODE ISLAND
PATRICK C. LYNCH
ATTORNEY GENERAL

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

FOR THE STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

Thea J. Schwartz
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

FOR THE STATE OF WASHINGTON
ROBERT M. MCKENNA
ATTORNEY GENERAL

Leslie R. Seffern
Assistant Attorney General
Washington State Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6770

FOR THE CITY OF NEW YORK
MICHAEL A. CARDOZO
CORPORATION COUNSEL

Susan Kath
Carrie Noteboom
Christopher King
Assistant Corporation Counsel
100 Church Street
New York, New York 10007
(212) 788-0771

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Joint Opposition of Proposed-State-Intervenor-Respondents to Motions to Remand to Adduce Additional Evidence" filed today through the Court's CM/ECF System has been served electronically on all registered participants of the CM/ECF System as identified in the Notice of Docket Activity, and that paper copies will be sent by first class mail, postage prepaid, to those indicated as non-registered participants who have not consented in writing to electronic service, as listed below, on April 29, 2010.

Mr. Wayne K. Stenehjem
Office of the Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-2210

Mr. Harry M. Nq
American Petroleum Institute
1220 L Street , NW
Washington, DC 20005-4070

Mr. Michael R. Barr
Pillsbury Winthrop Shaw Pittman, LLP
50 Fremont Street
San Francisco, CA 94105

Mr. Christopher G. King
New York City Law Department, 6-143
100 Church Street
New York, NY 10007

Mr. Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
North Tower-Suite 1500
Washington, DC 20004-1790

Mr. David G. Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002-0000

Mr. Mark J. Bennett
Office of the Attorney General
State of Hawaii
Department of Agriculture
425 Queen Street
Honolulu, HI 96813-0000

Mr. Jon C. Bruning
Office of the Attorney General
State of Nebraska
2115 State Capitol
PO Box 98920
Lincoln, NE 68509-8920

Mr. Charles E. James, JR.
Office of the Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Mr. Sam Kazman
Competitive Enterprise Institute
1899 L Street, NW
12th Floor
Washington, DC 20036

Mr. Troy King
Office of the Attorney General
State of Alabama
500 Dexter Avenue
Montgomery, AL 36130

Mr. Greg Abbott
Office of the Attorney General
State of Texas
PO Box 12548
Austin, TX 78711-2548

Ms. Karen R. Harned
National Federation of Independent
Business
1201 F Street, NW
Suite 200
Washington, DC 20004

Mr. Robert R. Gasaway
Kirkland & Ellis LLP
655 15th Street, NW
Suite 1200
Washington, DC 20005

Mr. William Orr
c/o Dr. Bonner Cohen
1600 North Oak Street # 617
Arlington, VA 22209

/s/ Carol Iancu
Carol Iancu