

## ORAL ARGUMENT NOT YET SCHEDULED

**No. 19-1230**

Consolidated with Nos. 19-1239, -1241,  
-1242, -1243, -1245, -1246, and -1249

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

UNION OF CONCERNED SCIENTISTS et al.,

*Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

*Respondent,*

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION et al.,

*Intervenors for Respondent.*

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**REPLY IN SUPPORT OF MOTION TO  
COMPLETE ADMINISTRATIVE RECORD**

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XAVIER BECERRA  
Attorney General of California  
ROBERT BYRNE  
Senior Assistant Attorney General  
GARY E. TAVETIAN  
DAVID A. ZONANA  
Supervising Deputy Attorneys General  
JULIA K. FORGIE  
M. ELAINE MECKENSTOCK  
Deputy Attorneys General  
300 S. Spring Street, Suite 1702  
Los Angeles, CA 90013  
Telephone: (213) 269-6623

*Additional parties and counsel listed on  
signature pages*

*Counsel for State of California, by and through  
Governor Gavin Newsom, Attorney General Xavier  
Becerra, and California Air Resources Board*

Petitioners have moved that this Court order EPA to complete its administrative record with public comments and supporting documents submitted in accordance with the procedures that the agency established for the administrative proceeding at issue. EPA bound itself to consider these materials to the extent practicable before taking final action and, when it took final action, EPA did not find that consideration of any of the materials had been impracticable.

EPA argues that the materials do not belong in the administrative record for three reasons. First, EPA claims the power to exclude these materials from the administrative record by ignoring them notwithstanding its obligation to consider them. Second, EPA contends that it was not bound by its own express adoption of procedures requiring it to consider these materials to the extent practicable. Third, EPA attempts to justify a blanket, post hoc determination that it was impracticable to consider any public comments or supporting documents it received during the 11 months prior to final action. The Court should reject EPA's arguments and order the agency to complete its administrative record before the parties begin briefing the merits of this complex case.

**1. EPA cannot exclude from the administrative record materials that the agency bound itself to consider but that were not actually considered.**

Congress has defined the administrative record for judicial review to include “the pleadings, evidence, and proceedings before the agency.” 28 U.S.C. § 2112(b); *see also* Fed. R. App. P. 16(a)(3). “If a court is to review an agency’s action fairly, it should have before it neither more nor less information than did the agency when it made its

decision.” *Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). Public comments and supporting documents that were “submitted in accordance with agency procedures during the [administrative] process,” *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 210–11 (D.C. Cir. 2011), were “before the agency” at the time of its decision and must be included in the record.

EPA asserts (Opp. at 2) that “‘before the agency’ means material that the agency actually considered.” Put another way, EPA claims that a court reviewing an agency’s action cannot consider material that the agency was obliged to consider but still failed to consider. That argument is specious. It would nullify the canonical proposition that an agency acts arbitrarily and capriciously if it “d[oes] not consider material in the record” important to its decision. *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)); *see also W. Coal Traffic League v. United States*, 677 F.2d 915, 927 (D.C. Cir. 1982) (“[A]n agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors.”). Materials that were presented to the agency in accordance with the procedural ground rules established by the agency are part of the administrative record, whether or not the agency actually considered those materials.

EPA’s authorities are inapposite. In *Theodore Roosevelt Conservation Partnership v. Salazar*, this Court refused to consider materials that “were available to commenters” but that “they had never sought to introduce” during the agency proceeding. 616 F.3d

497, 515 (D.C. Cir. 2010). In *Bar MK Ranches v. Yuetter*, the Tenth Circuit held that plaintiffs had not met their burden to show that the certified record “includ[ed] some documents not considered by the agency and fail[ed] to include other documents that were considered by the agency.” 994 F.2d 735, 739 (10th Cir. 1993). The court in *Bar MK Ranches* thus never considered whether an agency may exclude materials properly presented to it merely because the agency declined to consider the materials. Nor was that question presented in either of the two district court cases cited by EPA. See *Stand Up for California! v. U.S. Dep’t of Interior*, 315 F. Supp. 3d 289, 295 (D.D.C. 2018) (holding that material “unavailable to [the agency] at the time of its decision” was not “before the agency”); *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 7 (D.D.C. 2006) (declining to supplement the record absent “evidence that the [agency] decisionmaker(s) were actually aware of the ... documents” at issue).

EPA also relies (Opp. at 3) on *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299 (D.C. Cir. 1991), but that case actually supports movants’ position. There, this Court declined to consider data the petitioner had “failed to submit ... to the proper division of [the agency] or even to flag ... as relevant to” the administrative proceeding. 938 F.2d at 1305. Although some of the data became available only after the formal closing date for public comments, this Court admonished the petitioner for not submitting the new data to EPA anyway because the agency had committed to “consider late-filed comments ‘to the extent practicable.’” *Id.* at 1306. This Court’s opinion strongly implies that it would have been improper for EPA to renege on its obligation to consider

materials that commenters submitted through the proper channel after the comment closing date.

**2. EPA bound itself in this proceeding to consider every public comment that was received in time to be practicably considered by the agency.**

The procedures governing public participation for the EPA actions under review were prescribed by statute and by the ground rules that EPA and NHTSA established at the outset of this joint proceeding. Congress mandated that EPA afford the public sufficient time “to meaningfully review” its proposed actions “and provide informed comment.” *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019); *see* 5 U.S.C. § 553(c) (requiring federal agencies to “consider[]” “written data, views, or arguments” “presented” by “interested persons” before finalizing rulemaking); *id.* § 555(e); 42 U.S.C. § 7543(b)(1) (requiring “notice and opportunity for public hearing” for actions under Section 209(b) of the Clean Air Act). Beyond that, however, EPA had the discretion to specify when public comments needed to be submitted to assure their consideration.

EPA exercised that discretion by binding itself not only to consider all comments submitted by October 26, 2018, but also to consider any comments submitted after that date to the extent practicable. EPA and NHTSA made the latter commitment the subject of a special section in the Federal Register notice that announced their proposed actions. *See* Proposed Action, 83 Fed. Reg. 42,986, 43,471 (Aug. 24, 2018). EPA’s assurance that it would consider all public comments to the extent practicable comported with its “past

... practice” in Clean Air Act preemption-waiver proceedings. *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32,744, 32,747, 32,781–82 (July 8, 2009); *see also* EPA, Notice of Filing Certified Index to the Administrative Record, ECF 1212736, *Chamber of Commerce v. EPA*, D.C. Cir. No. 09-1237 (Oct. 26, 2009) (certifying a record for a Clean Air Act preemption-waiver proceeding that included comments submitted after the formal comment period).

Agencies must comply with procedural obligations that are “intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion.” *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003) (quotation omitted); *accord Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”). EPA’s announcement that it would consider all comments submitted after the formal closing date to the extent practicable conferred just such a procedural benefit on commenters.

EPA asserts (Opp. at 4) that it could flout this procedural obligation because the agency made it “in this case” rather than in a rule of general applicability. But EPA offers no support for that distinction. Although agency procedures may be easier to *change* if they have not been incorporated into formal regulations, no agency has license to *ignore* the ground rules it establishes for a proceeding or violate them without explanation—regardless of whether those ground rules are set forth in a formal regulation. *See Morton*,

415 U.S. at 234–35. Here, EPA never made any change to the procedures established at the outset of this administrative proceeding. Instead, the agency simply ignored those procedures. Just as EPA could not have reneged on its duty “in this case” to consider comments submitted by October 26, 2018, the agency could not renege on its duty to consider all comments submitted after that date to the extent practicable.

Because EPA bound itself to consider public comments submitted after October 26, 2018, to the extent practicable, and then made no finding that any such comments had been received too late to practicably consider, all those comments and supporting documents were properly “part[] of the proceedings before the agency,” Fed. R. App. P. 16(a)(3), and belong in EPA’s administrative record.

### **3. EPA’s post hoc assertion of impracticability is unavailing.**

Crucially, when it took final action, EPA did not find that consideration of any public comments and supporting documents submitted after October 26, 2018, had been impracticable. Now, in this Court, EPA asserts for the first time (Opp. at 5) that it “was not practicable” to consider those materials. Counsel’s post hoc assertion cannot justify the exclusion of all these materials from EPA’s administrative record.

EPA argues (Opp. at 8) that its “certification of the record” for judicial review is “the only necessary statement” of impracticability. But the act of certifying the record for this Court cannot serve as the justification for excluding materials from that record that were properly before the agency at the time of its decision. *Cf. Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative

record *already in existence*, not some new record made initially in the reviewing court.” (emphasis added)). Regardless, EPA did not make a finding of impracticability even when it certified the record, *see* ECF 1830413, and EPA cannot rest on an unexplained, blanket assertion of impracticability to constrict the record for judicial review.

Nor can EPA exclude material from the administrative record “on the basis of a post hoc explanation by agency counsel.” *Owner-Operator Indep. Drivers Ass’n v. FMCSA*, 494 F.3d 188, 204 n.4 (D.C. Cir. 2007). “[I]n dealing with a determination or judgment which an administrative agency alone is authorized to make, [the court] must judge the propriety of such action solely by the grounds invoked by the agency.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). That “fundamental rule of administrative law,” *id.*, applies not only to EPA’s ultimate decision but also to the subsidiary determinations that inform its decision. One such determination is whether a public comment was “received too late for [the agency] to practicably consider.” Proposed Action, 83 Fed. Reg. at 43,471. EPA did not make, much less explain, any impracticability determination at the time of decision, and it cannot invent one now in the throes of litigation.

In any event, counsel’s impracticability arguments are unpersuasive. Although “over seven thousand” distinct comments were submitted on EPA’s and NHTSA’s omnibus proposal by October 26, 2018, Opp. at 5, the agencies did not see fit to address “the vast majority of” those comments before taking the actions under review, Final Action, 84 Fed. Reg. 51,310 (Sept. 27, 2019). More fundamentally, EPA fails to explain how, in the absence of any external deadline for these final actions, the overall volume

of comments received could have made it impracticable for the agency to consider any of the relatively small number of additional comments that had been submitted after October 26, 2018.

Further, EPA has admitted that its decision “to move forward” with finalizing the actions under review was prompted, in part, by a step taken by California on July 25, 2019, almost nine months after the comment closing date. Final Action, 84 Fed. Reg. at 51,310–11. *Contra* Opp. at 7 (asserting, without support, that “EPA would have been well into finalizing” these actions by July 23, 2019). EPA fails to establish that it was impracticable to consider public comments received before (in some cases, long before) the agency had even decided to finalize these actions. In particular, EPA does not try to explain how it was practicable to consider, cite, and rely on parts of a major government report published in November 2018 and yet impracticable to consider the December 2018 comments explaining that other parts of the same report undercut EPA’s rationale for its actions. *See* Mot. at 10. Nor does EPA show that it was impracticable to consider a May 2019 comment by the California Air Resources Board—the regulatory body whose authority EPA had targeted—casting doubt on a fundamental premise of EPA’s proposal. *See id.* at 10–11; *see also id.* at 11 (citing other public comments from the spring of 2019 addressing the extraordinary risks to the State of California from climate change).

Instead, EPA catalogues (Opp. at 6–7) other comments submitted in the summer of 2019, closer to the date of final action.\* The agency made no finding that it was impracticable to consider those comments either. But even had EPA done so, that would not explain why the agency categorically refused to consider *any* comments submitted after October 26, 2018. The exclusion of *all* those comments underscores that EPA’s current arguments are post hoc rationalizations for a blanket decision to ignore “late” comments—a decision that EPA evidently reached on some entirely different, and entirely unexplained, basis.

\* \* \*

For the foregoing reasons, and the reasons stated in the motion to complete the administrative record, this Court should order EPA to complete the record with public comments and supporting documents submitted from October 27, 2018, to September 19, 2019. Resolution of this motion will provide certainty about the scope of the administrative record for judicial review and maximize the efficiency of merits briefing in this already complex case.

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\* EPA does not dispute (Opp. at 7) that its unlawful delay in responding to a September 2018 FOIA request was the cause of any “untimel[iness]” in a comment submitted by 12 States on July 23, 2019, addressing EPA’s response to that request. *See* Mot. at 9 n.5. It is improper for EPA to withhold relevant information from the public until after the close of the formal comment period and then omit comments on that information from the administrative record on the ground that EPA could not practicably consider them.

Dated: March 16, 2020

Respectfully submitted,

*For Petitioners in Cases No. 19-1239, 19-1246:*

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA

Attorney General of California

ROBERT BYRNE

Senior Assistant Attorney General

GARY E. TAVETIAN

DAVID A. ZONANA

Supervising Deputy Attorneys General

JESSICA BARCLAY-STROBEL

MEREDITH J. HANKINS

JENNIFER KALNINS TEMPLE

M. ELAINE MECKENSTOCK

CAROLYN NELSON ROWAN

JONATHAN A. WIENER

Deputy Attorneys General

*/s/ Julia K. Forgie*

JULIA K. FORGIE

Deputy Attorney General

300 S. Spring Street, Suite 1702

Los Angeles, CA 90013

Telephone: (213) 269-6623

Julia.Forgie@doj.ca.gov

*Attorneys for Petitioner State of California, by  
and through its Governor Gavin Newsom,  
Attorney General Xavier Becerra, and California  
Air Resources Board*

*Additional Counsel on Following Pages*

FOR THE STATE OF COLORADO

PHIL WEISER  
Colorado Attorney General

/s/ Eric R. Olson

ERIC R. OLSON  
Solicitor General  
Office of the Attorney General  
1300 Broadway, 10th Floor  
Denver, CO 80203  
Telephone: (720) 508-6562  
eric.olson@coag.gov

*Attorneys for Petitioner State of Colorado*

FOR THE STATE OF CONNECTICUT

WILLIAM TONG  
Attorney General of Connecticut  
MATTHEW I. LEVINE  
Assistant Attorney General

/s/ Scott N. Koschwitz

SCOTT N. KOSCHWITZ  
Assistant Attorney General  
165 Capitol Avenue  
Hartford, CT 06106  
Telephone: (860) 808-5250  
Fax: (860) 808-5386  
Scott.Koschwitz@ct.gov

*Attorneys for Petitioner State of Connecticut*

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS  
Attorney General of the State of  
Delaware

/s/ Kayli H. Spialter

KAYLI H. SPIALTER  
CHRISTIAN WRIGHT  
Deputy Attorneys General  
Delaware Department of Justice  
820 N. French Street, 6th Floor  
Wilmington, DE 19801  
Telephone: (302) 395-2604  
Kayli.spialter@delaware.gov

*Attorneys for Petitioner State of Delaware*

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE  
Attorney General of the District of  
Columbia

/s/ Loren L. AliKhan

LOREN L. ALIKHAN  
Solicitor General  
Office of the Attorney General for the  
District of Columbia  
One Judiciary Square  
441 4th Street, NW, Suite 630 South  
Washington, D.C. 20001  
Telephone: (202) 727-6287  
Fax: (202) 730-1864  
Loren.AliKhan@dc.gov

*Attorneys for Petitioner District of Columbia*

FOR THE STATE OF HAWAII

CLARE E. CONNORS  
Attorney General

/s/ William F. Cooper

WILLIAM F. COOPER  
Deputy Attorney General  
State of Hawaii Office of the Attorney  
General

425 Queen Street  
Honolulu, HI 96813  
Telephone: (808) 586-4070  
Bill.F.Cooper@Hawaii.gov

*Attorneys for Petitioner State of Hawaii*

FOR THE STATE OF ILLINOIS

KWAME RAOUL  
Attorney General of Illinois  
MATTHEW J. DUNN  
Chief, Environmental Enforcement/  
Asbestos Litigation Division  
JASON E. JAMES  
Assistant Attorney General

/s/ Daniel I. Rottenberg

DANIEL I. ROTTENBERG  
Assistant Attorney General  
69 W. Washington St., 18th Floor  
Chicago, IL 60602  
Telephone: (312) 814-3816  
DRottenberg@atg.state.il.us

*Attorneys for Petitioner State of Illinois*

FOR THE STATE OF MAINE

AARON M. FREY  
Attorney General of Maine

*/s/ Laura E. Jensen*

LAURA E. JENSEN  
Assistant Attorney General  
6 State House Station  
Augusta, ME 04333  
Telephone: (207) 626-8868  
Fax: (207) 626-8812  
Laura.Jensen@maine.gov

*Attorneys for Petitioner State of Maine*

FOR THE STATE OF MARYLAND

BRIAN E. FROSH  
Attorney General of Maryland

*/s/ Roberta R. James*

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

JOHN B. HOWARD, JR.  
JOSHUA M. SEGAL  
STEVEN J. GOLDSTEIN  
Special Assistant Attorneys General  
Office of the Attorney General  
200 St. Paul Place  
Baltimore, MD 21202  
Telephone: (410) 576-6300

*Attorneys for Petitioner State of Maryland*

FOR THE COMMONWEALTH OF  
MASSACHUSETTS

MAURA HEALEY  
Attorney General

CHRISTOPHE COURCHESNE  
Assistant Attorney General  
Chief, Environmental Protection  
Division

CAROL IANCU  
Assistant Attorney General  
MEGAN M. HERZOG  
Special Assistant Attorney General

*/s/ Matthew Ireland*

MATTHEW IRELAND  
Assistant Attorney General  
Office of the Attorney General  
Environmental Protection Division  
One Ashburton Place, 18th Floor  
Boston, MA 02108  
Telephone: (617) 727-2200  
matthew.ireland@mass.gov

*Attorneys for Petitioner Commonwealth of  
Massachusetts*

FOR THE PEOPLE OF THE STATE OF  
MICHIGAN

DANA NESSEL  
Attorney General of Michigan

*/s/ Neil D. Gordon*

NEIL D. GORDON  
GILLIAN E. WENER  
Assistant Attorneys General  
Michigan Department of Attorney  
General  
Environment, Natural Resources  
and Agriculture Division  
P.O. Box 30755  
Lansing, MI 48909  
Telephone: (517) 335-7664  
gordonn1@michigan.gov

*Attorneys for Petitioner People of the State of  
Michigan*

FOR THE STATE OF MINNESOTA

KEITH ELLISON  
Attorney General of Minnesota

/s/ Peter N. Surdo

PETER N. SURDO  
Special Assistant Attorney General  
445 Minnesota Street, Suite 900  
St. Paul, MN, 55101  
Telephone: (651) 757-1061  
Peter.Surdo@ag.state.mn.us

*Attorneys for Petitioner State of Minnesota*

FOR THE STATE OF NEVADA

AARON D. FORD  
Attorney General of Nevada

/s/ Heidi Parry Stern

HEIDI PARRY STERN  
Solicitor General  
DANIEL P. NUBEL  
Deputy Attorney General  
Office of the Nevada Attorney General  
100 N. Carson Street  
Carson City, NV 89701  
HStern@ag.nv.gov

*Attorneys for Petitioner State of Nevada*

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL  
Attorney General of New Jersey

/s/ Lisa J. Morelli

LISA J. MORELLI  
Deputy Attorney General  
25 Market St., PO Box 093  
Trenton, NJ 08625-0093  
Telephone: (609) 376-2745  
lisa.morelli@law.njoag.gov

*Attorneys for Petitioner State of New Jersey*

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS  
Attorney General of New Mexico

/s/ William Grantham

WILLIAM GRANTHAM  
Assistant Attorney General  
State of New Mexico Office of the  
Attorney General  
Consumer & Environmental Protection  
Division  
201 Third Street NW, Suite 300  
Albuquerque, NM 87102  
Telephone: (505) 717-3520  
wgrantham@nmag.gov

*Attorneys for Petitioner State of New Mexico*

## FOR THE STATE OF NEW YORK

LETTIA JAMES  
Attorney General of New York  
YUEH-RU CHU  
Chief, Affirmative Litigation Section  
Environmental Protection Bureau  
AUSTIN THOMPSON  
Assistant Attorney General

/s/ Gavin G. McCabe

GAVIN G. MCCABE  
Assistant Attorney General  
28 Liberty Street, 19th Floor  
New York, NY 10005  
Telephone: (212) 416-8469  
gavin.mccabe@ag.ny.gov

*Attorneys for Petitioner State of New York*

## FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM  
Attorney General of Oregon

/s/ Paul Garrahan

PAUL GARRAHAN  
Attorney-in-Charge  
STEVE NOVICK  
Special Assistant Attorney General  
Natural Resources Section  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Telephone: (503) 947-4593  
Paul.Garrahan@doj.state.or.us  
Steve.Novick@doj.state.or.us

*Attorneys for Petitioner State of Oregon*

## FOR THE STATE OF NORTH CAROLINA

JOSHUA H. STEIN  
Attorney General  
DANIEL S. HIRSCHMAN  
Senior Deputy Attorney General  
FRANCISCO BENZONI  
Special Deputy Attorney General

/s/ Asher P. Spiller

ASHER P. SPILLER  
TAYLOR CRABTREE  
Assistant Attorneys General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602  
Telephone: (919) 716-6400

*Attorneys for Petitioner State of North Carolina*

FOR THE COMMONWEALTH OF  
PENNSYLVANIA

JOSH SHAPIRO  
Attorney General of Pennsylvania

/s/ Michael J. Fischer

MICHAEL J. FISCHER  
Chief Deputy Attorney General  
JACOB B. BOYER  
Deputy Attorney General  
Office of Attorney General  
1600 Arch St. Suite 300  
Philadelphia, PA 19103  
Telephone: (215) 560-2171  
mfischer@attorneygeneral.gov

*Attorneys for Petitioner Commonwealth of  
Pennsylvania*

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA  
Attorney General of Rhode Island

/s/ Gregory S. Schultz  
GREGORY S. SCHULTZ  
Special Assistant Attorney General  
Office of Attorney General  
150 South Main Street  
Providence, RI 02903  
Telephone: (401) 274-4400  
gschultz@riag.ri.gov

*Attorneys for Petitioner State of Rhode Island*

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.  
Attorney General

/s/ Nicholas F. Persampieri  
NICHOLAS F. PERSAMPIERI  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609  
Telephone: (802) 828-3171  
nick.persampieri@vermont.gov

*Attorneys for Petitioner State of Vermont*

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING  
Attorney General  
PAUL KUGELMAN, JR.  
Senior Assistant Attorney General  
Chief, Environmental Section

/s/ Caitlin C. G. O'Dwyer  
CAITLIN C. G. O'DWYER  
Assistant Attorney General  
Office of the Attorney General  
Commonwealth of Virginia  
202 North 9th Street  
Richmond, VA 23219  
Telephone: (804) 786-1780  
godwyer@oag.state.va.us

*Attorneys for Petitioner Commonwealth of Virginia*

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON  
Attorney General

/s/ Emily C. Nelson  
EMILY C. NELSON  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, WA 98504  
Telephone: (360) 586-4607  
emily.nelson@atg.wa.gov

*Attorneys for Petitioner State of Washington*

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL  
Attorney General of Wisconsin

/s/ Jennifer L. Vandermeuse

JENNIFER L. VANDERMEUSE  
Assistant Attorney General  
Wisconsin Department of Justice  
Post Office Box 7857  
Madison, WI 53702-7857  
Telephone: (608) 266-7741  
Fax: (608) 267-2223  
vandermeusejl@doj.state.wi.us

*Attorneys for Petitioner State of Wisconsin*

FOR THE CITY OF NEW YORK

JAMES E. JOHNSON  
New York City Corporation Counsel  
CHRISTOPHER G. KING  
ROBERT L. MARTIN  
Senior Counsel  
SHIVA PRAKASH  
Assistant Corporation Counsel

/s/ Christopher G. King

CHRISTOPHER G. KING  
Senior Counsel  
New York City Law Department  
100 Church Street  
New York, New York  
Telephone: (212) 356-2074  
Fax: (212) 356-2084  
cking@law.nyc.gov

*Attorneys for Petitioner City of New York*

FOR THE CITY OF LOS ANGELES

MICHAEL N. FEUER  
Los Angeles City Attorney  
MICHAEL J. BOSTROM  
Assistant City Attorney

/s/ Michael J. Bostrom

MICHAEL J. BOSTROM  
Assistant City Attorney  
200 N. Spring Street, 14<sup>th</sup> Floor  
Los Angeles, CA 90012  
Telephone: (213) 978-1882  
Fax: (213) 978-2286  
Michael.Bostrom@lacity.org

*Attorneys for Petitioner City of Los Angeles*

FOR THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA  
City Attorney

/s/ Robb Kapla

ROBB KAPLA  
Deputy City Attorney  
Office of the City Attorney  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102  
Telephone: (415) 554-4647  
robb.kapla@sfcityatty.org

*Attorneys for Petitioner City and County of San Francisco*

*For Petitioners in Cases No. 19-1230, 19-1243:*

*/s/ Matthew Littleton*

MATTHEW LITTLETON

SEAN H. DONAHUE

Donahue, Goldberg, Weaver & Littleton

1008 Pennsylvania Avenue SE

Washington, DC 20003

(202) 683-6895

matt@donahuegoldberg.com

VICKIE L. PATTON

PETER M. ZALZAL

ALICE HENDERSON

Environmental Defense Fund

2060 Broadway, Suite 300

Boulder, CO 80302

(303) 447-7215

vpatton@edf.org

*Counsel for Environmental Defense Fund*

ANCHUN JEAN SU

Center For Biological Diversity

1411 K Street NW, Suite 1300

Washington, DC 20005

(202) 849-8399

jsu@biologicaldiversity.org

MAYA GOLDEN-KRASNER

Center For Biological Diversity

660 South Figueroa Street, Suite 1000

Los Angeles, CA 90017

(213) 785-5402

mgoldenkrasner@biologicaldiversity.org

*Counsel for Center For Biological Diversity*

ARIEL SOLASKI

JON A. MUELLER

Chesapeake Bay Foundation, Inc.

6 Herndon Avenue

Annapolis, MD 21403

(443) 482-2171

asolaski@cbf.org

*Counsel for Chesapeake Bay Foundation, Inc.*

SHANA LAZEROW  
Communities For A Better  
Environment  
6325 Pacific Boulevard, Suite 300  
Huntington Park, CA 90255  
(323) 826-9771  
slazerow@cbeval.org

*Counsel for Communities For A Better  
Environment*

MICHAEL LANDIS  
The Center For Public Interest Research  
1543 Wazee Street, Suite 400  
Denver, CO 80202  
(303) 573-5995 ext. 389  
mlandis@publicinterestnetwork.org

*Counsel for Environment America*

IAN FEIN  
Natural Resources Defense Council  
111 Sutter Street, 21st Floor  
San Francisco, CA 94104  
(415) 875-6100  
ifein@nrdc.org

DAVID D. DONIGER  
Natural Resources Defense Council  
1152 15th Street NW, Suite 300  
Washington, DC 20005  
(202) 289-6868  
ddoniger@nrdc.org

*Counsel for Natural Resources Defense  
Council, Inc.*

EMILY K. GREEN  
Conservation Law Foundation  
53 Exchange Street, Suite 200  
Portland, ME 04102  
(207) 210-6439  
egreen@clf.org

*Counsel for Conservation Law Foundation*

ROBERT MICHAELS  
ANN JAWORSKI  
Environmental Law & Policy Center  
35 East Wacker Drive, Suite 1600  
Chicago, IL 60601  
(312) 795-3713  
rmichaels@elpc.org

*Counsel for Environmental Law & Policy  
Center*

SCOTT L. NELSON  
Public Citizen Litigation Group  
1600 20th Street NW  
Washington, DC 20009  
(202) 588-1000  
snelson@citizen.org

*Counsel for Public Citizen, Inc.*

JOANNE SPALDING  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
(415) 977-5725  
joanne.spalding@sierraclub.org

PAUL CORT  
REGINA HSU  
Earthjustice  
50 California Street, Suite 500  
San Francisco, CA 94111  
(415) 217-2077  
pcort@earthjustice.org

VERA PARDEE  
726 Euclid Avenue  
Berkeley, CA 94708  
(858) 717-1448  
pardeelaw@gmail.com

*Counsel for Sierra Club*

TRAVIS ANNATOYN  
Democracy Forward Foundation  
1333 H Street NW  
Washington, DC 20005  
(202) 601-2483  
tannatoyn@democracyforward.org

*Counsel for Union Of Concerned Scientists*

*For Petitioners in Case No. 19-1241:*

*/s/ Brian Tomasovic*

BARBARA BAIRD, Chief Deputy Counsel

BRIAN TOMASOVIC

KATHRYN ROBERTS

South Coast Air Quality Mgmt. District

21865 Copley Dr.

Diamond Bar, CA 91765

Telephone: (909) 396-3400

Fax: (909) 396-2961

*Counsel for South Coast Air Quality  
Management District*

*/s/ Brian C. Bunger*

BRIAN BUNGER, District Counsel

RANDI WALLACH

Bay Area Air Quality Mgmt. District

375 Beale Street, Suite 600

San Francisco, CA 94105

Telephone: (415) 749-4720

Fax: (415) 749-5103

*Counsel for Bay Area Air Quality Management  
District*

*/s/ Kathrine Pittard*

KATHRINE PITTARD, District Counsel

Sacramento Metropolitan Air Quality

Mgmt. District

777 12<sup>th</sup> Street

Sacramento, CA 95819

Telephone: (916) 874-4907

*Counsel for Sacramento Metropolitan Air Quality  
Management District*

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing **Reply in Support of Motion to Complete Administrative Record** is printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word, it contains 2,426 words.

*/s/ Julia K. Forgie* \_\_\_\_\_  
JULIA K. FORGIE

**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 2020, I caused a copy of the foregoing **Reply in Support of Motion to Complete Administrative Record** to be filed with the Clerk of the Court using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

*/s/ Julia K. Forgie* \_\_\_\_\_  
JULIA K. FORGIE