ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

MARCH 28, 2017 EXECUTIVE ORDER

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

Finally, EPA's concern that it "would likely be unable to represent the current Administration's conclusive position" until review of the Supplemental Finding is complete in no way constitutes an "extraordinary cause" justifying an unlimited continuance of oral argument. Mot. at 7. Again, given that EPA lacks the discretion to reverse its determination under the Supplemental Finding that regulation continues to be "appropriate and necessary," without first meeting the section 112(c)(9) delisting criteria, that concern is of little consequence. Moreover, the only agency positions germane to this litigation are contained in the record supporting the Supplemental Finding, not any speculative, future positions EPA may take. *See* 42 U.S.C. § 7607(d)(7)(A); *Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) ("The court is not bound to accept, and

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

II. Postponing Oral Argument Would Be Extremely Inefficient.

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

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

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

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

CONCLUSION

The motion should be denied.

Respectfully submitted,

Dated: April 21, 2017

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

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

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CERTIFICATE OF COMPLIANCE

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

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

DATED: April 21, 2017

/s/ TRACY L. TRIPLETT
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CERTIFICATE OF SERVICE

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

DATED: April 21, 2017

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