

No. 15-1363 & Consolidated Cases

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

WEST VIRGINIA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

UNOPPOSED MOTION OF AMERICAN LUNG ASSOCIATION,
CENTER FOR BIOLOGICAL DIVERSITY, CLEAN AIR COUNCIL,
CLEAN WISCONSIN, CONSERVATION LAW FOUNDATION,
ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES
DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND
SIERRA CLUB FOR LEAVE TO INTERVENE IN SUPPORT OF
RESPONDENT

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue NW,
Suite 950
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

David Doniger
Benjamin Longstreth
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
(202) 513-6256
ddoniger@nrdc.org
blongstreth@nrdc.org
*Counsel for Natural Resources
Defense Council*

October 27, 2015

Additional Counsel Listed on Next
Page

Tomás Carbonell
Vickie Patton
Martha Roberts
Peter Zalzal
Environmental Defense Fund
1875 Connecticut Avenue NW,
Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org
vpatton@edf.org
mroberts@edf.org
pzalzal@edf.org
Counsel for Environmental Defense Fund

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us
jduffy@catf.us
*Counsel for American Lung Association,
Clean Air Council, Clean Wisconsin,
Conservation Law Foundation, and Ohio
Environmental Council*

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org
Counsel for Center for Biological Diversity

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org
andres.restrepo@sierraclub.org
alejandra.nunez@sierraclub.org
Counsel for Sierra Club

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Massachusetts Avenue NW,
Suite 702
Washington, DC 20036
(202) 667-4500
hfox@earthjustice.org
dbaron@earthjustice.org
tballo@earthjustice.org
Counsel for Sierra Club

Not-for-profit environmental and public-health advocacy organizations American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club (collectively, the “Organizations”) move to intervene in support of respondent Environmental Protection Agency in the above-captioned consolidated petitions challenging EPA’s final carbon-pollution emission guidelines for existing power plants (the “Clean Power Plan”). *See* 80 Fed. Reg. 64,662 (Oct. 23, 2015); Fed. R. App. P. 15(d).

Respondent EPA has indicated that it consents to this motion; counsel for petitioners State of West Virginia et al. (Case No. 15-1363) state that they do not take a position on this motion at this time.¹ Pursuant to D.C. Circuit Rule 15(b), this constitutes a motion to intervene in all petitions for review of the Clean Power Plan.

¹ Organizations’ counsel also sought the position of other petitioners in the cases consolidated with Case No. 15-1363 as of the evening of October 26. Petitioners in Case Nos. 15-1364, -1365, and -1366 have stated they do not oppose this motion. Petitioners in Case Nos. 15-1367, -1368, -1370, -1371, -1373, -1374, -1375, -1376, -1377, -1378, -1379, -1380, -1382, -1383, and -1386 have indicated that they take no position on this motion at this time. Petitioners in Case Nos. 15-1372 and -1375 did not state a position as of the time of this filing.

INTRODUCTION

The Clean Power Plan establishes a framework, pursuant to Clean Air Act section 111(d), 42 U.S.C. § 7411(d), for setting carbon dioxide (“CO₂”) emission standards for existing fossil fuel-fired power plants. Under the Plan, states can choose to develop their own implementation plans establishing CO₂ emission standards for existing fossil fuel-fired power plants. 80 Fed. Reg. at 64,663–64. States that opt to develop such plans have until September 2018 to submit complete plans for EPA review and approval, after a basic, non-binding, initial submittal in September 2016. *Id.* at 64,669. If a state does not submit a timely plan, or submits one that EPA cannot approve, EPA must develop and directly administer a federal plan that establishes CO₂ emission standards for existing power plants in that state. 42 U.S.C. § 7411(d)(2)(A). Emission-reduction standards for power plants will not begin to take effect until 2022, and will be gradually phased in between 2022 and 2030, under either a state- or EPA-implemented plan. *See* 80 Fed. Reg. at 64,743–44.

The Organizations seek to intervene to defend and assure prompt implementation of the Clean Power Plan. Their motion is timely, *see* Fed. R. App. P. 15(d) (allowing thirty days after the filing of a petition to move for intervention), and their participation will not delay these proceedings or prejudice any party.

STATEMENT OF INTERESTS AND GROUNDS FOR INTERVENTION

Federal Rule of Appellate Procedure 15(d) “requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

The Organizations are committed to protecting their members and others from the impacts of dangerous air pollution from existing power plants, including climate change and other harms to public health and welfare.² This Court granted several of the Organizations leave to intervene in premature challenges to the Clean Power Plan in *In re West Virginia*, D.C. Cir. No. 15-1277, *In re Peabody Energy Corp.*, D.C. Cir. No. 15-1284, and *In re Murray Energy Corp.*, D.C. Cir. No. 14-1112. The Court has repeatedly allowed the movant Organizations to intervene in challenges to EPA Clean Air Act regulations that address greenhouse-gas pollution and climate change.³ The

² See Ex. A, Decl. of Harold Wimmer (American Lung Association) ¶¶ 2–3; Ex. B, Decl. of Kassia R. Siegel (Center for Biological Diversity) ¶¶ 2–11; Ex. C, Decl. of Joseph O. Minott (Clean Air Council) ¶¶ 3–5, 23; Ex. D, Decl. of Keith A. Reopelle (Clean Wisconsin) ¶¶ 3, 5; Ex. E, Decl. of Douglas I. Foy (Conservation Law Foundation) ¶¶ 2–4; Ex. F, Decl. of John Stith (Environmental Defense Fund) ¶¶ 3–6; Ex. G, Decl. of Gina Trujillo (Natural Resources Defense Council) ¶¶ 5–7; Ex. H, Decl. of Heather Taylor-Miesle (Ohio Environmental Council) ¶¶ 2–4, 6, 8–10, 13–18; Ex. I, Decl. of Mary Anne Hitt (Sierra Club) ¶¶ 3, 5–6, 9–12.

³ See, e.g., *West Virginia v. EPA*, D.C. Cir. No. 14-1146; *Plant Oil Powered Diesel Fuel Sys., Inc. v. EPA*, D.C. Cir. No. 12-1428; *Perry v. EPA*, D.C. Cir. No.

Court's practice of granting intervention in such cases demonstrates that groups like the Organizations have a right to defend government actions that protect their concrete interests, and that such groups can offer a distinct perspective on those actions.

The Organizations have significant interests in reducing CO₂ and other dangerous air pollution from power plants, to protect the health, welfare, economic, recreational, and aesthetic interests of their members.⁴ EPA has determined that emissions of greenhouse gases including CO₂ threaten public health and welfare. *See* Endangerment Finding, 74 Fed. Reg. 66,496, 66,497-98 (Dec. 15, 2009); *see also* *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 117-126 (D.C. Cir. 2012), *aff'd in part, rev'd in part on other grounds*, *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (upholding Endangerment

11-1128 (consolidated with *Texas v. EPA*, D.C. Cir. No. 10-1425); *Las Brisas Energy Ctr., LLC v. EPA, et al.*, D.C. Cir. No. 12-1248; *Southeastern Legal Found. v. EPA*, D.C. Cir. No. 10-1131; and *Coal. for Responsible Regulation, Inc. v. EPA*, D.C. Cir. No. 10-1073.

⁴ *See, e.g.*, Ex. C, Minott Decl. ¶¶ 5, 7-12, 16-23; Ex. D, Reopelle Decl. ¶¶ 4-5, 8-19; Ex. E, Foy Decl. ¶¶ 4, 6-10, 13-16; Ex. H, Taylor-Miesle Decl. ¶¶ 4-18; Ex. J, Decl. of Jane Reardon (American Lung Association) ¶¶ 2-3, 6-9, 11-15, 17-19; Ex. K, Decl. of Jenny E. Ross (Center for Biological Diversity) ¶¶ 3, 5, 10-34; Ex. L, Decl. of Sara Molyneaux (Conservation Law Foundation) ¶¶ 6-10, 13-16; Ex. M, Decl. of Art Cooley (Environmental Defense Fund) ¶¶ 2-15; Ex. N, Decl. of Denise Fort (Environmental Defense Fund) ¶¶ 1, 10-15; Ex. O, Decl. of Marilyn Marsh-Robinson (Environmental Defense Fund) ¶¶ 1, 5, 9-11; Ex. P, Decl. of Elizabeth Coplon (Natural Resources Defense Council) ¶¶ 4-6; Ex. Q, Decl. of Dolores V. Leonard (Sierra Club) ¶¶ 4, 10-20; Ex. R, Decl. of Joanne Pannone (Sierra Club) ¶¶ 3, 5-21.

Finding); 80 Fed. Reg. 64,683–88 (concluding that more recent scientific assessments confirm the Endangerment Finding).

Power plants are responsible for approximately forty percent of the nation’s anthropogenic CO₂ emissions—more than any other type of air-pollution source.⁵ Emissions of CO₂ from power plants contribute to climate change immediately and continue to do so for as long as they remain and accumulate in the atmosphere—up to several centuries after their release. 74 Fed. Reg. at 66,518–19; *see also* 80 Fed. Reg. at 64,682. The Clean Power Plan will help to reduce the growth of atmospheric CO₂ concentrations and thereby reduce the threats that climate change poses to the Organizations’ members.⁶ Delay, weakening, or invalidation of the Clean Power Plan would harm the Organizations’ members by exacerbating the impacts of climate change.

The Clean Power Plan also will reduce existing power plants’ emissions of smog- and soot-forming pollutants such as sulfur dioxide, nitrogen oxides,

⁵ *See* EPA, EPA 430-R-14-003, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2012*, at 2-4 tbl. 2-1 (2014), *available at* <http://www3.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2014-Main-Text.pdf> (38% of total 2012 emissions attributable to Electricity Generation, a subcategory of Fossil Fuel Combustion).

⁶ *See, e.g.*, Ex. C, Minott Decl. ¶¶ 7–23; Ex. D, Reopelle Decl. ¶¶ 15–19; Ex. E, Foy Decl. ¶¶ 6–17; Ex. H, Taylor-Miesle Decl. ¶¶ 4, 6–18; Ex. J, Reardon Decl. ¶¶ 3–20; Ex. K, Ross Decl. ¶¶ 3-5, 10–34; Ex. L, Molyneaux Decl. ¶¶ 11–19; Ex. M, Cooley Decl. ¶¶ 10–15; Ex. N, Fort Decl. ¶¶ 8–15; Ex. O, Marsh-Robinson Decl. ¶¶ 9–11; Ex. P, Coplon Decl. ¶¶ 4–6; Ex. Q, Leonard Decl. ¶¶ 10–20; Ex. R, Pannone Decl. ¶¶ 6–18, 20–21.

and fine particles. *See* 80 Fed. Reg. at 64,670, 64,680–81. These pollution reductions will lower the rates of asthma attacks, respiratory disease, heart attacks, and premature death that occur each year as a result of exposure to such pollutants,⁷ reducing the risks these serious illnesses pose to the Organizations’ members and their families.⁸

For years, the Organizations have advocated for federal control of greenhouse-gas pollution. They participated extensively in the regulatory and legal proceedings leading up to EPA’s issuance of the Clean Power Plan. For example, several of the Organizations were petitioners in *Massachusetts v. EPA*, in which the Supreme Court held that greenhouse gases are air pollutants subject to control under the Clean Air Act. *See* 549 U.S. 497, 532 (2007). Several of the Organizations also challenged EPA’s 2006 refusal to set CO₂ emission standards for power plants, which this Court remanded to EPA for

⁷ EPA has cited estimates that by 2030, the benefits attributable to the Clean Power Plan will include 90,000 fewer asthma attacks (also known as “asthma exacerbations”) in children and teens, 160,000 fewer lost work days, and more than 3,500 avoided premature deaths. *See* EPA, EPA-452/R-15-003, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, at 4-31 tbl. 4-24 (Aug. 2015), available at <http://www.epa.gov/airquality/cpp/cpp-final-rule-ria.pdf> (summarizing health benefits associated with anticipated reductions in ozone and fine-particle pollution). EPA also valued the climate and health benefits of implementing the Plan in the tens of billions of dollars. *See id.* at 4-45 tbl. 4-31.

⁸ *See, e.g.*, Ex. C, Minott Decl. ¶¶ 11, 19; Ex. H, Taylor-Miesle Decl. ¶¶ 8–14, 18; Ex. J, Reardon Decl. ¶¶ 6–19; Ex. L, Molyneaux Decl. ¶¶ 9–10, 16–17; Ex. M, Cooley Decl. ¶ 13; Ex. N, Fort Decl. ¶ 11; Ex. Q, Leonard Decl. ¶¶ 10–11, 13–17, 19; Ex. R, Pannone Decl. ¶¶ 5–6, 10–18, 20–21.

action consistent with *Massachusetts*. See *New York v. EPA*, No. 06-1322, Order on Motion to Govern (D.C. Cir. Sept. 24, 2007). The Organizations also participated in EPA's rulemaking process for the Clean Power Plan.⁹ The Organizations' long history of advocacy in favor of CO₂ emission standards for power plants underscores their interests in intervening to defend the Plan.

The Organizations also have Article III standing. Petitioners have asked this Court to issue an immediate stay of the Clean Power Plan, *see, e.g.*, Oct. 23 Mot. for Stay and for Expedited Consideration, Case No. 15-1363, at 1, and to hold the Plan unlawful and set it aside following expedited judicial review, *see id.*; Oct. 23 Pet. for Review, Case No. 15-1363, at 2. These outcomes would substantially injure the Organizations, which work to curb the harmful effects of climate change, *supra* 2-6, and their members. The Organizations' members use, own, and enjoy property and natural resources that are harmed and

⁹ *See, e.g.*, EPA Docket ID Nos. EPA-HQ-OAR-2013-0602-26818 (Natural Resources Defense Council); EPA-HQ-OAR-2013-0602-23140 (Environmental Defense Fund); EPA-HQ-OAR-2013-0602-24029 (Sierra Club); EPA-HQ-OAR-2013-0602-25292 (Center for Biological Diversity); EPA-HQ-OAR-2013-0602-23044 (American Lung Association); EPA-HQ-OAR-2013-0602-23034 (Clean Air Council); EPA-HQ-OAR-2013-0602-23120 & -22711 (Clean Wisconsin); EPA-HQ-OAR-2013-0602-23369 (Conservation Law Foundation); and EPA-HQ-OAR-2013-0602-35984 (Ohio Environmental Council). Thousands of individual members of the Organizations submitted comments.

threatened by climate change.¹⁰ Some members suffer from and have family members who have suffered from climate-change-related illnesses.¹¹

Invalidation of or delayed implementation of the Plan would negate or diminish its climate-protection benefits and exacerbate climate change's threats to these members' health and their use and enjoyment of their property and natural resources. This is sufficient to establish injury, for standing purposes. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–85 (2000) (disrupted enjoyment of natural resources and decreased property values due to pollution concerns are injuries in fact); *Sierra Club v. EPA*, 129 F.3d 137, 138–39 (D.C. Cir. 1997) (organization had standing to challenge delay in implementation of pollution-control measures that would benefit its members).

The Organizations and their members would similarly be harmed if the reductions in smog- and soot-forming pollutants that will result from implementation of the Clean Power Plan are lost. The Organizations' members suffer from, and have family members and patients who suffer from,

¹⁰ *See, e.g.*, Ex. A, Wimmer Decl. ¶¶ 8–9; Ex. C, Minott Decl. ¶¶ 17–22; Ex. D, Reopelle Decl. ¶¶ 15–18; Ex. E, Foy Decl. ¶¶ 14–15; Ex. H, Taylor-Miesle Decl. ¶¶ 6–14; Ex. J, Reardon Decl. ¶¶ 16, 19; Ex. K, Ross Decl. ¶¶ 3, 5, 10–34; Ex. L, Molyneaux Decl. ¶¶ 13, 15–17; Ex. M, Cooley Decl. ¶¶ 12–13; Ex. N, Fort Decl. ¶¶ 5, 11–13; Ex. O, Marsh-Robinson Decl. ¶¶ 5, 10–11; Ex. P, Coplon Decl. ¶ 4; Ex. R, Pannone Decl. ¶¶ 5–16.

¹¹ *See, e.g.*, Ex. C, Minott Decl. ¶ 21; Ex. H, Taylor-Miesle Decl. ¶ 16.

conditions such as asthma, other respiratory ailments, and heart problems, which are aggravated by these pollutants.¹² See 80 Fed. Reg. at 64,914. The Organizations also have members in low-income communities and communities of color, which are disproportionately affected by environmental harms including air pollution and climate change.¹³ See 80 Fed. Reg. at 64,670, 64,914. This Court has held repeatedly that environmental organizations have standing to sue to protect their members from pollution that threatens and concerns those members. See, e.g., *Natural Res. Def. Council v. EPA*, 755 F.3d 1010, 1016–17 (D.C. Cir. 2014); *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 672–73 (D.C. Cir. 2013).

Because the Organizations’ and their members’ “injur[ies] suffice[] for standing purposes,” causation and redressability “rationally follow[].” *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015) (movant had standing to intervene and defend challenge to an agency decision favorable to its interests, because invalidation of that decision would expose it to harm). The injuries described above are “directly traceable,” see *id.*, to the

¹² See, e.g., Ex. A, Wimmer Decl. ¶¶ 7–8; Ex. C, Minott Decl. ¶¶ 13, 19–22; Ex. L, Molyneaux Decl. ¶ 13, 16–17; Ex. J, Reardon Decl. ¶¶ 6–14, 17–18; Ex. M, Cooley Decl. ¶ 13; Ex. N, Fort Decl. ¶ 11; Ex. O, Marsh-Robinson Decl. ¶ 10; Ex. Q, Leonard Decl. ¶¶ 10–11, 13–15; Ex. R, Pannone Decl. ¶ 6.

¹³ See, e.g., Ex. Q, Leonard Decl. ¶¶ 2–3, 7–9, 15.

outcome of this proceeding and redressable by a decision of this Court denying Petitioners' requested relief.

CONCLUSION

For the reasons above, the Court should grant the Organizations leave to intervene in support of respondent EPA.

Respectfully submitted,

/s/ Benjamin Longstreth (by consent)

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue NW,
Suite 950
Washington, DC 20036
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

Benjamin Longstreth
David Doniger
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 513-6256
ddoniger@nrdc.org
blongstreth@nrdc.org
*Counsel for Natural Resources
Defense Council*

Tomás Carbonell
Vickie Patton
Martha Roberts
Peter Zalzal
Environmental Defense Fund
1875 Connecticut Avenue NW,
Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org
vpatton@edf.org
mroberts@edf.org
pzalzal@edf.org
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org
andres.restrepo@sierraclub.org
alejandra.nunez@sierraclub.org
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us
jduffy@catf.us
*Counsel for American Lung Association,
Clean Air Council, Clean Wisconsin,
Conservation Law Foundation, and
Ohio Environmental Council*

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org
*Counsel for Center for Biological
Diversity*

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Massachusetts Avenue NW,
Suite 702
Washington, DC 20036
(202) 667-4500
hfox@earthjustice.org
dbaron@earthjustice.org
tballo@earthjustice.org
Counsel for Sierra Club

Dated: October 27, 2015

CERTIFICATE OF SERVICE

I certify that on October 27, 2015, the foregoing UNOPPOSED MOTION OF AMERICAN LUNG ASSOCIATION, CENTER FOR BIOLOGICAL DIVERSITY, CLEAN AIR COUNCIL, CLEAN WISCONSIN, CONSERVATION LAW FOUNDATION, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND SIERRA CLUB FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENT, associated declarations, and RULE 26.1 DISCLOSURE STATEMENT were served on counsel of record for EPA and Petitioners in Case No. 15-1363 and consolidated cases using the Court's ECF system.

/s/ Benjamin Longstreth

Dated: October 27, 2015

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and D.C. Circuit Rule 26.1, movant-intervenors American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club state that they are not-for-profit non-governmental organizations whose missions include protection of public health and the environment and conservation of natural resources. None of the organizations has any outstanding shares or debt securities in the hands of the public, or any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respectfully submitted,

/s/ Benjamin Longstreth (by consent)

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue NW,
Suite 950
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

Benjamin Longstreth
David Doniger
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
(202) 513-6256
ddoniger@nrdc.org
blongstreth@nrdc.org
*Counsel for Natural Resources
Defense Council*

Tomás Carbonell
Vickie Patton
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Peter Zalzal
Environmental Defense Fund
1875 Connecticut Avenue NW,
Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org
vpatton@edf.org
mroberts@edf.org
pzalzal@edf.org
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org
andres.restrepo@sierraclub.org
alejandra.nunez@sierraclub.org
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us
jduffy@catf.us
*Counsel for American Lung Association,
Clean Air Council, Clean Wisconsin,*

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Massachusetts Avenue NW,
Suite 702
Washington, DC 20036
(202) 667-4500
hfox@earthjustice.org
dbaron@earthjustice.org

*Conservation Law Foundation, and Ohio
Environmental Council*

tballo@earthjustice.org
Counsel for Sierra Club

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org
Counsel for Center for Biological Diversity

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