

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 12-4316 Caption [use short title]

Motion for: Removing Case From Abeyance National Parks Conservation Association v. EPA

Set forth below precise, complete statement of relief sought:

Petitioners request this case be removed from abeyance. Both parties stipulate to proceed by joint appendix.

MOVING PARTY: NPCA and Sierra Club OPPOSING PARTY: EPA

Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Charles McPhedran OPPOSING ATTORNEY: Laurel A. Bedig

[name of attorney, with firm, address, phone number and e-mail]

Earthjustice 1617 John F. Kennedy Boulevard Suite 1675 Philadelphia, PA 19103 T: (215) 717-4521 cmcphedran@earthjustice.org

Court-Judge/Agency appealed from: EPA

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Has this relief been previously sought in this Court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: s/ Charles McPhedran Date: 12/4/2013 Service by: CM/ECF Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT: CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NATIONAL PARKS CONSERVATION )  
ASSOCIATION and SIERRA CLUB, )

Petitioners, )

v. )

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, and GINA MCCARTHY<sup>1</sup> )  
Administrator, United States Environmental )  
Protection Agency, )

Respondents. )

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No. 12-4316

OPPOSED MOTION TO REMOVE CASE FROM ABEYANCE AND  
STIPULATION TO PROCEED BY JOINT APPENDIX

Petitioners National Parks Conservation Association and Sierra Club hereby request that this case be removed from abeyance. Respondents United States Environmental Protection Agency and Gina McCarthy (collectively, “EPA”) oppose this request. Regardless of the ruling on this motion, at such time as this matter proceeds, the parties stipulate to proceed by deferred appendix.

1. Petitioners filed their Petition for Review in this matter on October 29, 2012. Doc. 1.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Gina McCarthy, the current Administrator of the United States Environmental Protection Agency, is substituted for Lisa P. Jackson, the former Administrator.

2. The petition requested review of the final action of EPA published at 77 Fed. Reg. 51,915 (Aug. 28, 2012), titled “Approval and Promulgation of Air Quality Implementation Plans; State of New York; Regional Haze State Implementation Plan and Federal Implementation Plan.” In particular, Petitioners sought review of the application of the “best available retrofit technology” to reduce air pollution at the Danskammer Generating Station (Danskammer Plant). Petitioners’ Addenda to Pre-Argument Statement at 2 (Nov. 12, 2012).

3. As part of a bankruptcy proceeding for Dynegy Holdings, Inc., and affiliated companies, ICS NY Holdings, LLC had successfully bid for the Danskammer Plant. *In re Dynegy Holdings LLC et al.*, No. 11-38111 (Bankr. S.D.N.Y.). According to news reports in fall of 2012, ICS NY Holdings planned to demolish the plant after the sale was complete.

4. On December 17, 2012, EPA filed its certified index to the administrative record. Doc. 19-1.

5. On December 21, 2012, the parties sought an abeyance in proceedings to allow the parties time to determine the disposition of the Danskammer Plant. Doc. 20.

6. On January 4, 2013, the Court granted a stay in this matter until July 3, 2013. Doc. 26. Following a second joint motion, Doc. 29, the Court extended this

stay until January 8, 2014. Doc. 34.

7. On October 28, 2013, the New York Public Service Commission issued an order noting a new purchaser of the Danskammer Plant, describing possible advantages from the continued operation of the plant, and extending the time for effectuating the retirement of the plant. Dynegy Danskammer LLC – Petition for Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief, Order Modifying Prior Order and Establishing Further Procedures, Case No. 13-E-0012, New York Public Service Comm’n (Oct. 28, 2013) (Ex. A). Thus, instead of the likely demolition of the plant (which motivated the current stay in the case), Petitioners face the prospect of renewed generation and harmful emissions at the Danskammer Plant.

8. Renewed operation of the Danskammer Plant raises the air pollution and “best available retrofit technology” issues at the heart of this proceeding. Therefore, Petitioners request that this Court lift the abeyance so that they may brief the case for decision on the merits.

9. The parties stipulate to proceed by deferred appendix under Fed. R. App. P. 30(c) and Local Rule 30.1(c).

10. In accordance with Local Rule 31.2(a)(1)(A), and following the abeyance in this matter, Petitioners propose a deadline for their brief of 91 days from

the date of any order removing the abeyance in this matter, with a deadline in accordance with Local Rule 31.2(a)(1)(B) for Respondents' brief of 91 days from the date Petitioners' brief is actually filed.

11. Petitioners have notified counsel for Respondents, and provided counsel with a copy of this Motion in draft form. Respondents oppose this motion and plan to file a response.

WHEREFORE, Petitioners respectfully request that the Court remove this matter from abeyance. The parties stipulate to proceed by deferred appendix.

Respectfully submitted,

For Petitioners:

**s/ Charles McPhedran**

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Dated: December 4, 2013