

No. 15-1381 (and consolidated cases)

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

NORTH DAKOTA,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

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

Opposition of Respondent-Intervenors States of California, Connecticut,
Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts,
Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island,
Vermont, Virginia, and Washington, the District of Columbia, and the City of
New York and Environmental and Public Health Groups
to December 16 Motions to Extend Briefing Schedule

Kamala D. Harris
Attorney General of California
Gavin G. McCabe
David A. Zonana
Supervising Deputy Attorneys
General
Timothy E. Sullivan
Jonathan Wiener
Elizabeth B. Rumsey
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-0987

David Doniger
Selena Kyle
Jared Knicley
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
(202) 513-6256

Additional Counsel on Signature
Pages

December 20, 2016

The Court should deny, as unnecessary and prejudicial to the Court and Respondents, Petitioners' and Petitioner-Intervenors' (collectively, "Petitioners'") premature, speculative motions to extend their January 19 deadline for reply briefs and the parties' subsequent deadlines for a deferred appendix and final briefs.

Extension motions are "disfavored" and "granted only for extraordinarily compelling reasons." D.C. Cir. Rule 28(e)(1). There is no compelling reason to grant Petitioners' motions. When the new administration takes office, it may consider and advise the Court of whatever it chooses. Respondent-Intervenors—many of whom sued EPA a decade ago to force EPA to adopt the challenged Rule—will continue defending the Rule. Movants' speculation about possible future changes is not an "extraordinarily compelling reason" to grant unilateral and prejudicial extensions to the schedule they agreed to and the Court entered in August. *See* Aug. 4 Joint Mot. of All Parties 4 *and* Aug. 30 Scheduling Order 2 (deadlines of January 19 for replies, January 30 for appendix, and February 6 for final briefs).

Movants assert that the requested extensions are needed to "allow the parties the opportunity to determine whether an alternative resolution of the petition[s] can be accomplished in the new administration," Pet'r and Pet'r-Intervenors' Mot. 1-2, and "to allow the new administration to consider

whether it wishes to advise the Court [that] it is reviewing the [Rule] for possible reconsideration, or . . . intends to take other action that will significantly affect this litigation,” North Dakota Mot. 1. But it remains a matter of speculation whether the new administration will propose, let alone finalize, any changes to the Rule.¹ Scheduling decisions should not be informed by Movants’ speculation about the forthcoming administration.

Movants’ requested extensions are not only speculative and unnecessary, but prejudicial to the Court and Respondent-Intervenors. Extensions could hamper the Court’s preparation for the April 17 argument: final briefs in this record-intensive case would not be available until March 10, and the appendix would not be available until March 3, more than a month later than the Court has ordered.² The requested extensions would also prejudice EPA and Respondent-Intervenors, whose briefing deadlines have passed or are

¹ Any changes would also be subject to the Clean Air Act’s notice-and-comment rulemaking requirements. *See* 42 U.S.C. § 7607(d).

² *Compare* Aug. 4 Joint Mot. of All Parties 4, *and* Aug. 30 Scheduling Order 2 (deadlines of December 14 for EPA’s briefs, December 21 for Respondent-Intervenors’ briefs, January 19 for Petitioners’ replies, January 30 for appendix, and February 6 for final briefs), *with* Pet’r and Pet’r-Intervenors’ Mot. to Extend 1 & n.1, *and* North Dakota Mot. 1 & n.1 (seeking extensions to February 24 for Petitioners’ replies, March 3 for appendix, and March 10 for final briefs).

imminent, by giving Petitioners at least *double* the response time the parties agreed to and the Court ordered.³

Contrary to North Dakota's suggestion, Movants have not cited a single case in which this Court has recognized an impending change in administration alone as an "extraordinarily compelling reason" to grant an opposed extension motion. *Cf.* North Dakota Mot. 2-3 (citing D.C. Cir. Rule 28(e)(1) and *EPA v. New Jersey*, 129 S. Ct. 1313 (Feb. 23, 2009 dismissal order)).⁴

The unpublished procedural orders Movants cite also do not help them.⁵ None of them involved facts analogous to this case, where both the existing administration and non-federal intervenors have objected to interrupting litigation. Movants rely instead on cases where the federal government was the only party opponent, where the interruption request came from the existing

³ The current response intervals are 36 and 29 days (December 14 and 21 to January 19); Movant's proposed intervals are 72 and 65 days (December 14 and 21 to February 24).

⁴ In *EPA v. New Jersey*, after a new administration took office, EPA filed and the Supreme Court granted an unopposed motion to dismiss EPA's petition for review of a D.C. Circuit order vacating an EPA regulation on the merits. *See* <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-512.htm> (Supreme Court docket for *EPA v. New Jersey*, No. 08-512, D.C. Cir. No. 05-1097); *see also* *New Jersey v. EPA*, 517 F.3d 574, 583-84 (D.C. Cir. 2008).

⁵ Movants also cite the parties' proposed stay in *Texas v. United States*. The proposal is the outgrowth of a pre-election rehearing denial, district court order, and agreement among the parties. *See* S.D. Tex. Case No. 14-cv-254, ECF No. 430 at 1 (Nov. 18, 2016 motion), ECF No. 422 (Oct. 6, 2016 order).

administration or followed a formal policy change by that administration, and/or where no party opposed the interruption. In *House v. Burwell*, the only defendants are a federal agency and officials. See D.C. Cir. No. 16-5202 (Dec. 5, 2016 order). No one opposed EPA's abeyance requests in *Mississippi v. EPA* and *New Jersey v. EPA*, and the requests were filed after the new administration took office. See D.C. Cir. Nos. 08-1200 (Mar. 19, 2009 order in *Mississippi*), 08-1065 (Feb. 5 and Aug. 5, 2009 orders in *New Jersey*). Petitioners' extension request in *California v. EPA* was filed after President Obama directed EPA to reassess the waiver denial challenged in the litigation, after EPA formally announced it would reconsider the denial and advised Petitioners that it would move to hold the case in abeyance, and after Petitioners consented to the proposed abeyance.⁶

The extension motions should be denied.

Respectfully submitted,

/s/ Selena Kyle (by consent)

Selena Kyle

David Doniger

Jared Knicley

Natural Resources Defense Council

1152 15th Street NW, Suite 300

⁶ See D.C. Cir. No. 08-1178 (Feb. 4, 2009 extension mot., Feb. 5, 2009 extension order, Feb. 11, 2009 mot. to hold case in abeyance & attach. 2 (EPA notice signed Feb. 6, 2009), Feb. 25, 2009 order granting abeyance); 74 Fed. Reg. 4905 (Jan. 26, 2009); 74 Fed. Reg. 7040 (Feb. 12, 2009) (copy of EPA notice signed Feb. 6, 2009).

Sean H. Donahue
Donahue & Goldberg, LLP
1111 14th Street NW, Suite 510A
Washington, D.C. 20005
(202) 277-7085
Counsel for Environmental Defense Fund

Tomás Carbonell
Vickie Patton
Martha Roberts
Benjamin Levitan
Environmental Defense Fund
1875 Connecticut Ave. NW, Suite 600
Washington, D.C. 20009
(202) 572-3610
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
*Counsel for American Lung Association,
Clean Air Council, Clean Wisconsin,
Conservation Law Foundation, and The
Ohio Environmental Council*

Vera P. Pardee
Kevin P. Bundy
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
Counsel for Center for Biological Diversity

//
//
//
//

Washington, D.C. 20005
(202) 513-6256
skyle@nrdc.org
*Counsel for Natural Resources
Defense Council*

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
Counsel for Sierra Club

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Mass. Ave. NW, Suite 702
Washington, D.C. 20036
(202) 667-4500
Counsel for Sierra Club

Kamala D. Harris
Attorney General of California
Gavin G. McCabe
David A. Zonana
Supervising Deputy Attorneys
General
Timothy E. Sullivan
Jonathan Wiener
Elizabeth B. Rumsey
Deputy Attorneys General
*Attorneys for the State of California, by
and through Governor Edmund G. Brown
Jr., the California Air Resources Board,
and Attorney General Kamala D. Harris*
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-0987

George Jepsen
Attorney General of Connecticut
Matthew I. Levine
Kirsten S. P. Rigney
Scott N. Koschwitz
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

Matthew P. Denn
Attorney General of Delaware
Valerie S. Edge
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3d Floor
Dover, DE 19904
(302) 739-4636

Douglas S. Chin
Attorney General of Hawai'i
Heidi M. Rian
William F. Cooper
Deputy Attorneys General
333 Queen Street, Rm. 905
Honolulu, HI 96813
(808) 586-4070

Lisa Madigan
Attorney General of Illinois
Matthew J. Dunn
Gerald T. Karr
James P. Gignac
Assistant Attorneys General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

Tom Miller
Attorney General of Iowa
Jacob Larson
Assistant Attorney General
Environmental Law Division
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319
(515) 281-5341

Janet T. Mills
Attorney General of Maine
Gerald D. Reid
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333
(207) 626-8800

Joseph A. Foster
Attorney General of New Hampshire

Brian E. Frosh
Attorney General of Maryland
Thiruvendran Vignarajah
Deputy Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6328
*Attorneys for State of Maryland,
By and through Attorney General
Brian E. Frosh*

Maura Healey
Attorney General of Massachusetts
Melissa A. Hoffer
Christophe Courchesne
Tracy L. Triplett
Jillian M. Riley
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2423

Lori Swanson
Attorney General of Minnesota
Karen D. Olson
Deputy Attorney General
Max Kieley
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1244
*Attorneys for State of Minnesota,
by and through the Minnesota Pollution
Control Agency*

Ellen F. Rosenblum
Attorney General of Oregon
Paul Garrahan
Attorney-in-Charge

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

Hector Balderas
Attorney General of New Mexico
Joseph Yar (admission pending)
Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 827-6000

Eric T. Schneiderman
Attorney General of New York
Barbara Underwood
Solicitor General
Steven C. Wu
Deputy Solicitor General
Bethany A. Davis Noll
Assistant Solicitor General
Michael J. Myers
Andrew G. Frank
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2392

Mark Herring
Attorney General of Virginia
John W. Daniel, II
Deputy Attorney General
Donald D. Anderson
Senior Assistant Attorney General
and Chief

Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

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

William H. Sorrell
Attorney General of Vermont
Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-6902

Zachary W. Carter
Corporation Counsel of the City of
New York
Carrie Noteboom
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319

Matthew L. Gooch
Assistant Attorney General
Environmental Section
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 225-3193

Robert W. Ferguson
Attorney General of Washington
Katharine G. Shirey
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769

Karl A. Racine
Attorney General for the District of
Columbia
James C. McKay, Jr.
Senior Assistant Attorney General
Office of the Attorney General for the
District of Columbia
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

CERTIFICATE OF COMPLIANCE

This document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) and the word limits of Federal Rule of Appellate Procedure 27(d)(2)(A) and D.C. Circuit Rule 27(a)(2). It contains 943 words, as counted by Microsoft Word and excluding parts exempted by Federal Rule of Appellate Procedure 32(f).

Dated: December 20, 2016

/s/ Selena Kyle

CERTIFICATE OF SERVICE

I certify that on December 20, 2016, the foregoing Opposition of Respondent-Intervenors States of California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington, the District of Columbia, and the City of New York and Environmental and Public Health Groups to December 16 Motions to Extend Briefing Schedule was served on counsel of record in Case No. 15-1381 via the Court's ECF system.

Dated: December 20, 2016

/s/ Selena Kyle