**ORAL ARGUMENT NOT YET SCHEDULED**

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

| | |
|---|---|
| EME HOMER CITY GENERATION, L.P., *et al*.<br>*Petitioners*,<br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*.,<br>*Respondents*. | No. 11-1302 (and consolidated cases) |

# RESPONSE OF INTERVENORS AMERICAN LUNG ASSOCIATION, CLEAN AIR COUNCIL, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL AND THE SIERRA CLUB TO REMAINING MOTIONS TO STAY THE TRANSPORT RULE

Vickie L. Patton
Pamela A. Campos
David T. Lifland
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7215
vpatton@edf.org

Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 30036
(202) 277-7085
sean@donahuegoldberg.com

David Marshall
Clean Air Task Force
41 Liberty Hill Road
Building 2, Suite 205
Henniker, NH 03242
(603) 428-8114
dmarshall@catf.us

Josh Stebbins
The Sierra Club
50 F Street NW, Suite 800
Washington, DC 20001
(202) 675-6273
josh.stebbins@sierraclub.org

George E. Hays
236 West Portal Avenue #110
San Francisco, CA 94127
(415) 566-5414
georgehays@mindspring.com

John D. Walke
Natural Resources Defense Council
1152 15th St. NW, Suite 300
Washington, DC 20005
(202) 289-6868
jwalke@nrdc.org

Intervenors American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and the Sierra Club ("Environmental Intervenors") submit their response to 10 pending motions seeking a full or partial stay of the Cross-State Air Pollution Rule, 76 Fed. Reg. 48208 (Aug. 8, 2011) ("Transport Rule" or "Rule").

The Transport Rule implements a vital Clean Air Act provision addressing interstate air pollution, 42 U.S.C. § 7410(a)(2)(D), and is designed to safeguard downwind states' ability to attain health-based air quality standards. Movants ask this Court to prolong the effect of the Clean Air Interstate Rule (CAIR), which this Court, more than three years ago, held to have "more than several fatal flaws," *North Carolina v. EPA*, 531 F.3d 896, 901, *remedy modified on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008), including its failure to reduce interstate pollution quickly enough to fulfill the statutory mandate, 531 F.3d at 930, and which this Court instructed the EPA to replace expeditiously, 550 F.3d at 1178.

Like the nine motions that have already been fully briefed, none of the 10 instant motions satisfies the stringent prerequisites for the "extraordinary remedy" of a stay. *See Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985). Many reprise arguments we have addressed, such as challenges to EPA's statutory authority to

issue the Federal Implementation Plans in the Transport Rule,[1] or claims of inadequate notice.[2] Others argue the Rule should not apply to a particular state or that budgets are too stringent –arguments identical or similar to those we have addressed in prior responses.[3]

Here, Environmental Intervenors focus on the public interest component of the stay standard – a consideration that "necessarily becomes crucial" in cases, like this one, involving "the administration of regulatory statutes designed to promote the public interest." *Va. Petr. Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). A stay here would be contrary to the public interest because it would sacrifice the significant public health, environmental, and economic benefits the Rule will immediately provide and would come at a great cost to downwind States seeking to meet their Clean Air Act responsibilities.

---

[1] *See*, *e.g.*, Doc. 1328647 at 6-12 (EPA's response to EME Homer City); Doc. 1328817 at 9-11 (Environmental Intervenors' response to EME Homer City); Doc. 1339060 at 4-11 (response of downwind states Maryland, *et al.*, to Kansas).

[2] For example, Movants Ames, Dairyland, FCG, MEAG, and Ohio all complain because the final allowance budgets differed from the budgets in the proposal – arguments rebutted in our prior responses, *see* Doc. 1334068 at 8-10; Doc. 1335316 at 7-11; Doc. 1339081 at 10-12, which explained that EPA provided all of the information necessary for affected entities to provide meaningful comment. *See also* EPA's responses, *e.g.*, Doc. 1333987 at 6-10; Doc. 1335282 at 10-18; Doc. 1337434 at 4-6; and Doc. 1339022 at 11-13.

[3] *See*, *e.g.*, Doc. 1334068 at 10-12 (response to Texas on inclusion); Doc. 1340509 at 7-10 (response to Louisiana on inclusion); Doc. 1333987 at 10-13 (response to Luminant on budget); Doc. 1337447 at 9-14 (response to WPS on budget).

## A STAY WOULD BE CONTRARY TO THE PUBLIC INTEREST

### A. The Transport Rule Offers Enormous and Immediate Public Health and Environmental Benefits.

Time is of the essence when it comes to reducing interstate air pollution. *See North Carolina*, 531 F.3d at 930; 76 Fed. Reg. at 48277 (explaining that Rule is designed to accord with downwind states' compliance schedules, and noting importance of pollution reductions expected in 2012). The Rule will provide *immediate* public health and environmental benefits in downwind States, and will help those States comply with health-based federal air quality standards, thus serving the core statutory objective, *see* 42 U.S.C. § 7410(a)(2)(D).

When fully implemented, the Transport Rule will save tens of thousands of lives per year, avoid hundreds of thousands of serious illnesses, and improve air quality for 240 million Americans. 76 Fed. Reg. at 48309, 48313-14; EPA, Cross-State Air Pollution Rule, http://www.epa.gov/airtransport/.

Implementation of the Transport Rule also "is expected to provide society with a substantial net gain in social welfare based on economic efficiency criteria." 76 Fed. Reg. 48314. Assessing the Transport Rule against a no-CAIR baseline,[4]

[4] EPA developed the Transport Rule using a baseline that did not include reductions required only by CAIR in order to account for the fact that under *North Carolina*, emission reductions required for compliance with CAIR, unless also required for compliance with CAIR's replacement rule (or some other statute, regulation, permit, or court order), will be legally unenforceable once the

EPA determined that "the annual net benefit (social benefits minus social costs)" in 2014 will be $110 to $280 billion. *Id*. at 48313-14. While most of these monetized benefits relate to premature deaths avoided, the Rule's annual monetary benefits also include $4.1 billion from improving visibility in "Class I" areas such as National Parks. *Id*. at 48311. EPA further enumerated and discussed a wide variety of significant benefits from the Rule for which the agency did not assign a monetary value. *See* 76 Fed. Reg. at 48316 (noting that such unmonetized benefits include "[r]educed acidification and, in the case of NOx, eutrophication of water bodies"); *see also* Aburn Dec. ¶ 10 (Exh. 1 to States and Cities Response (Doc. 1345103)); Shaw Dec. ¶¶ 20-24 (Exh. 3 to States and Cities Response).

The Rule will provide a wide range of health benefits. EPA determined that the $PM_{2.5}$ improvements under the Transport Rule will, starting in 2014,

> annually reduce between 13,000 and 34,000 $PM_{2.5}$-related premature deaths, 15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma while also reducing 10 million days of restricted activity due to respiratory illness and approximately 1.7 million work-loss days. We also estimate substantial health improvements for children from fewer cases of upper and lower respiratory illness and acute bronchitis.

---

replacement rule is implemented. 76 Fed. Reg. at 48223-24. While EPA's modeling acknowledges the existence of controls constructed since CAIR was promulgated, it does not assume such controls will be operated if there is no incentive or legal requirement to do so.

76 Fed. Reg. at 48309. Because EPA projects $SO_2$ reductions attributable to the Rule as against the baseline in 2012 will be greater than in 2014, the agency "expects correspondingly greater reductions in harmful effects to accrue in 2012 compared to 2014." *Id*. at 48313.

B. Movants' Contentions that the Rule Would Not Produce Benefits to the Public in 2012 Are Demonstrably False.

While not disputing EPA's findings that the Rule when fully implemented in 2014 will provide massive public benefits, Movants contend that a stay would cause no significant harm to public health, the environment, or downwind states' Clean Air Act compliance, because CAIR would remain in place pursuant to the remand-without-vacatur order in *North Carolina*. *E.g*., Doc. 1342027 at 19 (Ohio Mot.). But, as the Environmental Intervenors have pointed out in response to numerous prior stay motions, *e.g*., Doc. 1340509 at 18 (response to Louisiana motion), that proposition is simply false (and in obvious tension with Movants' own repeated claims that the Transport Rule is onerous and unduly expedited). In fact, the Transport Rule will reduce pollution loadings as soon as it comes into effect, and, as a result, major public health benefits will occur during its first year of operation. Those benefits would be lost if a stay were to be granted.

Contrary to Movants' assertions, the Transport Rule will immediately have significant benefits *when compared to CAIR* – so that a stay preventing the Rule from taking effect in early 2012 would significantly harm public health and the

environment. Relative to a baseline that includes CAIR, in 2012 alone the Rule is projected to prevent between 2,550 and 6,560 premature deaths and provide health benefits between $20 and $49.3 billion. Schoengold Decl. ¶¶ 13-14 (Exh. A).[5] These benefits arise mainly from the incremental reductions in $SO_2$ emissions (and attendant reductions in $PM_{2.5}$ concentrations) that the Transport Rule will cause relative to CAIR, estimated at 1.5 million tons in 2012. Schoengold Decl. ¶¶ 11-15.[6] They, and the wider range of benefits from reduced interstate air pollution, would be sacrificed if the Rule were stayed.

Thus, the Transport Rule will, in 2012, provide health benefits far in excess of CAIR. Dr. Albert Rizzo, a pulmonary specialist and chair of American Lung Association's board of directors, conveys some of the human dimensions:

> Particulate matter and ozone can cause coughing, wheezing, difficulty breathing and increase the risk of exacerbations of disease and make it more likely that people with lung diseases, such as asthma and [chronic obstructive pulmonary disease], will need increased medical care (unscheduled clinic visits, emergency visits, and additional medications) and

[5] *See also* Declaration of Dr. Elena Craft ¶ 16 (Doc. 1328729, Exh. J) ("In 2012, the [Rule] will achieve extensive emission reductions, particularly for sulfur dioxide, that provide for greater public health protections relative to CAIR. * * * These protections would be halted in the event the [Rule] were stayed, resulting in serious adverse impacts on public health.").

[6] Environmental Intervenors have demonstrated the Rule's incremental benefits over CAIR in eight prior stay responses; none of the prior movants questioned that demonstration, and the current Movants ignore it, instead repeating the plainly false claim that the continued operation of CAIR would prevent a stay from significantly harming public health and the environment.

> at times hospitalizations…. The scientific evidence warns that particulate matter and ozone can even cause premature death.

Rizzo Decl. ¶ 7 (Exh. B). Dr. Rizzo's deposition highlights the dramatic improvements in both the quality and duration of life that the Rule's air quality improvements will bring his patients. *See id*. ¶¶ 13-14.

Movants' suggestions that further delay in implementing the Transport Rule would not harm the public interest ignore the time-sensitive nature of the Transport Rule. As EPA explained, "[t]he compliance dates in [the Rule] are aligned with the attainment deadlines for the relevant NAAQS and consistent with the charges given to EPA by the Court in *North Carolina*." 76 Fed. Reg. at 48277. EPA was "mindful of the court's instruction to 'decide what date, whether 2015 or earlier, is as expeditious as practicable for states to eliminate their significant contributions to downwind nonattainment.'" *Id*. (*citing North Carolina*, 531 F.3d at 930). The emissions reductions that the Rule will effectuate in 2012 "will help many areas attain in a more expeditious manner." *Id*.; *see also id*. (passing of 2010 deadlines for 1997 $PM_{2.5}$ NAAQS "emphasizes the importance of obtaining reductions as expeditiously as practicable."); *id*. at 48278 (noting that first-phase reductions in 2012 will help areas confronting June 2013 8-hour ozone deadlines) .

Movants' other arguments that a stay will not harm the public health or the environment are equally groundless. MEAG argues (Doc. 1335586 at 19-20) that state law would "ensure continued air quality improvements," but provides no

evidence or even assertion that such "improvements" would provide timely or equivalent reductions. The statutory provision EPA must fulfill here, 42 U.S.C. § 7410(a)(2)(D), is based on the recognition that states cannot always be relied upon to control interstate air pollution. Second, FCG and MEAG argue (Doc. 1335573 at 19; Doc. 1335586 at 18-19) that no harm would result from a stay because the downwind areas to which their sources are "linked" for significant contribution purposes under the Rule are presently in attainment.[7] This argument has been rebutted in responses to previous stay motions, *e.g.*, Doc. 1333987 at 14-16 (EPA response to Luminant) and Doc.1338428 at 7-8 (Environmental Intervenors' response to SPSC). In determining linkages, EPA was justified in using modeled projections of air quality in 2012 and 2014 in affected downwind areas.[8]

---

[7] In fact, the downwind areas linked to Florida and Georgia sources remain classified as nonattainment for ozone and $PM_{2.5}$ respectively. *See* http://www.epa.gov/oaqps001/greenbk/gnc.html; http://www.epa.gov/oaqps001/greenbk/qnca.html#1000; http://www.epa.gov/oaqps001/greenbk/rnca.html#1000. Harris County, Texas (Houston area) has been reclassified as a severe nonattainment area for ozone. Although recent monitored $PM_{2.5}$ values for Jefferson County, Alabama (Birmingham area) have been less than the NAAQS, the area remains designated nonattainment and, in any event, even if redesignated to attainment, would be subject to maintenance requirements, *see North Carolina*, 531 F.3d at 912.

[8] Recent actual monitoring data would likely have included emissions reductions that may not continue in the absence of CAIR or the Transport Rule, should operators not continue to utilize their already-installed pollution control equipment. Furthermore, upwind states may be linked not only to downwind areas projected to be in nonattainment under EPA's base cases for 2012 or 2014, but also to areas projected to have maintenance problems.

Dairyland argues (Doc. 1337439 at 19-20) that its inability to install post-combustion emission controls prior to 2013 means that the Transport Rule will not provide any "meaningful environmental benefits beyond those mandated by CAIR." This assertion is baseless because, as EPA explained, there are many emission reduction measures that do not require the installation of post-combustion controls. *See, e.g.*, 76 Fed. Reg. at 48252. Indeed, the Rule's two-stage implementation structure is based on EPA's recognition that many sources could not complete installation of post-combustion pollution control equipment in time to achieve reductions through such means in 2012. Although those more extensive reductions are not required until 2014, EPA "concluded that significant reductions could be achieved by 2012," through means such as "operating existing controls, installing combustion controls, fuel switching, and increased dispatch of lower-emitting generation." *Id*. As noted, those means will provide large emissions reductions, and correspondingly large health and environmental benefits, in 2012.[9]

[9] KCBPU argues (Doc. 1337158 at 20) that since other upwind states are linked to the same downwind areas as Kansas, it is "unclear whether the requested stay would have any incremental effect on the downwind sites' ability to attain or maintain." This speculative assertion is unsupported by any serious analysis or any reason to question EPA's careful analysis. *See, e.g.*, 76 Fed. Reg. at 48236-37.

C. Movants' Arguments Concerning Compliance Costs Fail to Establish that the Public Interest Favors a Stay.

Some Movants invoke compliance costs as a public interest factor supporting a stay. *See*, *e.g.*, Doc. 1342027 at 20 ("costly … methods of compliance") (Ohio); Doc. 1338085 at 20 ("significant costs" to be "born [sic] by the ratepayers") (Entergy); Doc. 1337439 at 19 ("ratepayers … will be forced to pay the costs of compliance") (Dairyland).

These claims are unsupported and exaggerated, *see* Heim Decl. ¶ 14 (Exh. 3 to Industry Intervenors' Stay Response (filed Dec. 1, 2011)), and do not impeach EPA's conclusion (not disputed by Movants) that the public benefits of the Rule exceed the costs by hundreds of billions of dollars annually. *See* 76 Fed. Reg. at 48313-14. Such cost claims are also meaningless without taking into account the countervailing private economic benefits associated with pollution control projects -- benefits that are substantial, as Environmental Intervenors have previously explained. *See*, *e.g.*, Kansas Response (Doc. 1339081 at 18-19).[10]

## CONCLUSION

The motions to stay should be denied.

[10] Some Movants argue that implementation of the Rule would threaten system reliability. In many instances, these arguments resemble or repeat earlier movants' arguments that Intervenors have addressed. *See*, *e.g.*, Doc. 1339081 at 14-16 & Exh. A (Biewald Decl.). The reliability claims are also addressed in the Industry Intervenors' separate response and have been addressed by EPA.

Respectfully submitted,

/s/ *Sean H. Donahue*
Sean H. Donahue

Vickie L. Patton
Pamela A. Campos
David T. Lifland
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7215
vpatton@edf.org

Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 30036
(202) 277-7085
sean@donahuegoldberg.com

*Attorneys for EDF*

David Marshall
Clean Air Task Force
41 Liberty Hill Road
Building 2, Suite 205
Henniker, NH 03242
(603) 428-8114
dmarshall@catf.us

*Attorney for Clean Air Council and American Lung Association*

Josh Stebbins
The Sierra Club
50 F Street NW, Suite 800
Washington, DC 20001
(202) 675-6273
josh.stebbins@sierraclub.org

George E. Hays
236 West Portal Avenue #110
San Francisco, CA 94127
(415) 566-5414
georgehays@mindspring.com

*Attorneys for the Sierra Club*

John D. Walke
Natural Resources Defense Council
1152 15th St. NW, Suite 300
Washington, DC 20005
(202) 289-6868
jwalke@nrdc.org

*Attorney for NRDC*

## CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT

I hereby certify that the foregoing Response, exclusive of the cover, tables, and signature block, is 10 pages long, and that, combined with the separate responses to be filed today by the other respondent-intervenors, it does not exceed the 35 pages specified in the Court's order of November 14, 2011 (Doc. 1341383).

December 1, 2011

*/s/ Sean H. Donahue*
Sean H. Donahue

## CERTIFICATE OF SERVICE

I hereby certify on this 1st day of December, 2011, I served the foregoing Response upon counsel of record by filing it via the Court's CM/ECF system, which will make copies available to counsel of record.

*/s/ Sean H. Donahue*
Sean H. Donahue