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DECIDED APRIL 15, 2014

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

White Stallion Energy Center, LLC, et al., Petitioners, v. United States Environmental Protection Agency, Respondent.	No. 12-1100 (and consolidated cases)

EPA'S RESPONSE TO PETITIONERS' MOTIONS TO GOVERN FUTURE PROCEEDINGS

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INTRODUCTION

Twenty-one state petitioners and four industry petitioners ("Joint Petitioners") seek vacatur of EPA's Mercury and Air Toxics Standards (the "Rule") in a Joint Motion to Govern Further Proceedings ("Joint Motion"). Tri-State Generation and Transmission Association Inc. ("Tri-State") joins their request and also seeks, in the alternative, relief in the form of a stay of the Rule's requirements for all power plants similarly situated to its Nucla Station power plant ("Tri-State Motion").[1] Neither motion acknowledges this Court's tradition of remanding deficient rules without vacatur when vacatur would have significant adverse consequences for public health and the environment, or offers evidence of any significant disruptive consequences for industry of maintaining the status quo under the Rule through remand without vacatur.[2]

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[1] No other companies joined Tri-State's motion or filed their own motions for such relief. Thus, there is no justification for such a broad request. *See infra* 16, n.7.

[2] Notably, many petitioners, including most industry petitioners, did not join the Joint Motion or file their own motion to govern further proceedings. The petitioners who elected not to file a motion to govern include the Utility Air Regulatory Group; Peabody Energy Corporation; Sunflower Electric Power Corporation; the American Public Power Association; FirstEnergy Generation Corporation; Chase Power Development, LLC; Edgecombe Genco, LLC; ARIPPA; Wolverine Power Supply Cooperative, Inc.; Julander Energy Group; Deseret Power Electric Cooperative; Tenaska Trailblazer Partners, LLC; the West Virginia Chamber of Commerce; the National Black Chamber of Commerce; the Institute for Liberty; the Midwest Ozone Group; the United Mine Workers of America; Power4Georgians; Kansas City Board of Public Utilities; and the Puerto Rico Electric Power Authority. Thus, these petitioners have also failed to identify any significant consequences for industry of remand without vacatur.

For the reasons provided in EPA's Motion to Govern Future Proceedings ("EPA Motion"), the Joint Motion of State, Local Government, and Public Health Respondent-Intervenors ("State and Public Health Motion"), and the Motion of Industry Respondent-Intervenors ("Industry Respondent-Intervenors Motion"), vacatur would have profound adverse consequences for public health and the environment, and significant adverse regulatory consequences for states that have relied on or are relying on the Rule for implementation of other EPA programs, and will also cause disruption for the electric generation sector. Weighing these significant disruptive consequences against the failure of Joint Petitioners and Tri-State to identify any significant consequences for industry of maintaining the status quo under the Rule, this Court's choice of remedy is plain: remand without vacatur is the appropriate remedy here. This is so particularly in light of the limited nature of the deficiency identified by the Supreme Court, EPA's well-supported belief that it will likely find on remand that it "chose correctly," and EPA's commitment to an ambitious remand schedule.

STANDARD OF REVIEW

Joint Petitioners spend the first few pages of their Argument section contending that the Court must vacate the Rule under section 706 of the Administrative Procedure Act ("APA"). *See* Joint Motion 8-11; *see also* Tri-State Motion 10. The APA does not apply to this case. Because the Rule was promulgated under 42 U.S.C. § 7412(d), *see* 77 Fed. Reg. 9304, 9307-08 (Feb. 16, 2012), Clean Air

Act ("CAA") section 7607(d) applies. *See* 42 U.S.C. § 7607(d)(1)(C) (stating that section 7607(d) applies to emission standards promulgated under section 7412(d)). Section 7607(d) explicitly states that section 706 of the APA does not apply to actions listed in CAA section 7607(d)(1) except as expressly provided. *See id.* § 7607(d)(1) (last paragraph).

Instead, CAA section 7607(d)(9) provides the applicable standard of review for actions listed in 7607(d)(1), stating that "the court *may reverse* any [] action found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *Id.* § 7607(d)(9) (emphasis added). Importantly, APA section 706's language that courts "shall set aside" such agency action is not present in CAA section 7607(d). Accordingly, regardless of whether or not vacatur without remand is a proper remedy in APA cases, this Court plainly has "remedial discretion" under CAA section 7607(d). *NRDC v. EPA*, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J. concurring).[3]

Indeed, this Court has frequently granted remand without vacatur in CAA cases. *See EME Homer City Generation, L.P. v. EPA,* 795 F.3d 118, 132 (D.C. Cir.

[3] In his concurring opinion in *NRDC*, Judge Randolph opposed remand without vacatur in CAA cases for reasons not applicable here; namely, because the remedy is often granted without briefing by the parties on the issue and thus without sufficient information, the remedy provides the Agency with no incentive to act within a reasonable time, and the remedy may deprive the parties of Supreme Court review. *See id.* at 1262-63. Here, the Motions to Govern will provide this Court with the requisite information, the Agency has already committed to an expeditious schedule for remand, and the Supreme Court has already reviewed this Court's *White Stallion* decision.

2015); *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1161 (D.C. Cir. 2013); *Mississippi v. EPA*, 744 F.3d 1334, 1362 (D.C. Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014); *NRDC v. EPA*, 571 F.3d 1245, 1276 (D.C. Cir. 2009) (vacating part of CAA rule but remanding without vacatur two other parts of the rule); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999).

These cases are not, as Joint Petitioners suggest, merely limited to when the Court "cannot tell whether the challenged rule is unlawful." Joint Motion 13. This Court has applied the remand without vacatur remedy even when the Court has found the rule at issue to be "fundamental[ly] flaw[ed.]" *North Carolina*, 550 at 1178 (granting remand without vacatur on rehearing to "at least temporarily preserve the environmental values of [the rule]" notwithstanding the "fundamental flaws" identified by the court.); *see also EME Homer City Generation, L.P.*, 795 at 132 (finding the Transport Rule's emissions budgets "invalid" but remanding without vacatur in light of the "substantial disruption" vacatur would have for emissions trading markets).

As EPA and Respondent-Intervenors identified in their motions to govern, the applicable standard for determining whether to grant remand without vacatur is the two-factor *Allied-Signal* standard. Under that standard, the Court considers: (1) "the seriousness of the . . . deficiencies (and thus the extent of doubt whether the agency chose correctly)," and (2) "the disruptive consequences of an interim change that may

itself be changed." *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

ARGUMENT

As EPA explained in its Motion to Govern, and as discussed further below, both *Allied-Signal* factors support remand without vacatur of the Rule, and therefore there is no reason for this Court to depart from its "traditional position" of granting remand without vacatur "where vacating would have serious adverse implications for public health and the environment." *North Carolina*, 550 F.3d at 1178; *see also NRDC*, 489 F.3d at 1265 (Rogers, J., concurring in part and dissenting in part) (explaining that "[w]here the court has concluded that a final rule is deficient, the court has traditionally not vacated the rule if doing so would have serious adverse implications for public health and the environment").

I. EPA CAN ADDRESS THE RULE'S LIMITED DEFICIENCY ON AN AMBITIOUS SCHEDULE.

As an initial matter, Joint Petitioners overstate the Supreme Court's holding in *Michigan v. EPA* by repeatedly arguing that EPA lacked authority to promulgate the Rule and that the Rule is invalid in its entirety. *See* Joint Motion 1, 2, 3, 8, 9, 10, 11, 15; *see also* Tri-State Motion 10-11. As EPA described in its Motion to Govern, the *Michigan* decision is extremely limited in nature. *See* EPA Motion 9; *see also Michigan v. EPA*, 135 S. Ct. 2699 (June 29, 2015). CAA section 7412(n) imposed on EPA a Congressional mandate—as opposed to discretionary authority—to study the hazards

to public health resulting from emissions of hazardous air pollutants from power plants that would reasonably be anticipated to occur after implementation of the Act, and a further mandate to regulate power plants under section 7412 if EPA finds that such regulation is "appropriate and necessary," after considering the study. *See* 42 U.S.C. § 7412(n). Thus, there is no question that EPA had the authority to study public health hazards from power plant emissions of hazardous air pollutants, make the "appropriate and necessary" finding, and promulgate emission standards for power plants after making the affirmative finding. *Id.* *Michigan* simply held that EPA erred at the "finding" stage by failing to consider a single factor—the cost of compliance—that it should have considered at that stage. *See Michigan*, 135 S. Ct. at 2707, 2712. The Supreme Court did not otherwise opine on EPA's authority to promulgate the Rule or disturb this Court's decision rejecting a host of technical and legal challenges to the substance of the Rule. *See generally id.* at 2699-2712.

Joint Petitioners also overstate *Michigan's* holding by suggesting that the Supreme Court "fully examined" EPA's choice to regulate power plants and concluded that its action was unlawful. *See* Joint Motion 13-14, 15. The Supreme Court did not examine the *merits* of EPA's choice to regulate power plants. Instead, the Court's decision was limited to EPA's statutory interpretation that CAA section 7412(n)(1)(A) did not require a consideration of costs for the "appropriate and necessary" finding, and the Court explicitly declined to look beyond the Agency's interpretation to evaluate the cost-related facts in the record. *See Michigan*, 135 S. Ct.

at 2711. Thus, as EPA argued in its Motion to Govern, EPA's only task on remand should be to consider cost as part of the "appropriate and necessary" finding in light of the *Michigan* decision. If EPA reaffirms its finding, as the "vast amount of cost information" and "economic modeling" already in the record suggest it will, *see* EPA Motion 10-12; McCabe Decl., Att. A-C, there is no reason for EPA to revisit the remainder of the Rule on remand.

Both Joint Petitioners and Tri-State suggest that EPA will drag its feet on remand. *See* Joint Motion 19-20; Tri-State Motion 15. The McCabe Declaration plainly refutes that suggestion. As Ms. McCabe, the Acting Assistant Administrator for the Office of Air and Radiation (the office responsible for handling remand of the Rule) stated, "EPA has already begun the process of reviewing available information relevant to cost . . . in response to the Supreme Court's decision in *Michigan v. EPA*." McCabe Decl. ¶ 19. "Relevant staff have been assigned to the project, and [EPA] has established a detailed internal schedule with the goal of completing the proposed consideration in the next few months." *Id.* "The Agency is committed to completing this process on an expedited basis, and intends to finalize [its] analysis of cost considerations . . . as close to April 15, 2016, as possible." *Id.*[4]

[4] In any event, this Court has previously explained that the appropriate way to address unreasonable agency delay on remand is either by filing suit under the CAA's citizen suit provision, *see EME Homer City*, 795 F.3d at 132 (citing 42 U.S.C. § 7604(a)(2)), *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 194 (D.C. Cir. 2011) (same), or by seeking a writ of mandamus, *see North Carolina*, 550 F.3d at 1178.

The "vast amount of cost information" and "economic modeling" in the record supports EPA's belief that it can achieve this ambitious schedule and that it will likely find that the Agency "chose correctly" from the outset. *See* EPA Motion 10-12. Thus, EPA has established that it can address the limited deficiency identified in *Michigan* and act quickly to remedy the error on remand, satisfying the first *Allied-Signal* factor.

II. VACATUR WOULD ERODE THE RULE'S SIGNIFICANT PUBLIC HEALTH AND ENVIRONMENTAL BENEFITS, WHILE MAINTAINING THE STATUS QUO WOULD NOT SIGNIFICANTLY HARM INDUSTRY.

Joint Petitioners make three arguments under the second *Allied-Signal* factor: (1) that "vacating [the Rule] would not be disruptive because it would not eliminate many of the Rule's beneficial effects," Joint Motion 16; (2) that vacatur "will not result in disruptive consequences beyond the scope of the Rule itself," *id.* at 16; and (3) that the $158 million that EPA estimated the Rule's monitoring, reporting, and recordkeeping requirements would cost annually during the first three years, plus unquantified "ongoing costs of complying," should not be imposed during the few months in which EPA intends to take action, especially in light of the "$4-6 million in health benefits EPA calculated would result from reducing power plants' emissions of hazardous air pollutants." *Id.* at 18-19. All three arguments are without merit. As EPA argued in its Motion to Govern, vacatur would erode the Rule's significant public health and environmental benefits, while maintaining the status quo through

remand without vacatur would not significantly harm industry. Thus, the second *Allied-Signal* factor also supports remand without vacatur.

A. Vacatur Would in Fact Erode the Significant Public Health and Environmental Benefits Obtained by the Rule.

In the Regulatory Impact Analysis for the Rule, EPA estimated the total annual monetized benefits from implementing the Rule would be $33 to 90 billion, and the total annual costs would be $9.6 billion, resulting in total annual net benefits of $24 to $80 billion, *see* McCabe Decl. ¶ 15, and leading EPA to conclude that "the benefits of [the Rule] . . . are substantial and far outweigh the costs." 77 Fed. Reg. at 9306. The $4-6 million in health benefits that Joint Petitioners cite only represents the *quantifiable* benefits directly related to reducing mercury emissions from power plants, and does not account for any of the benefits associated with reducing other hazardous air pollutants or many of the mercury-associated benefits that could not be quantified but are nonetheless very important. *See* 77 Fed. Reg. at 9306; McCabe Decl., Att. A at 11-15; ¶¶ 15-16 (noting, for example, unquantifiable benefits such as reducing adverse effects from mercury on brain development and memory functions aside from IQ loss and reducing the incidence of cancer from other hazardous air pollutants). The number cited by Joint Petitioners also excludes all of the quantifiable co-benefits associated with reductions of emissions of fine particulate matter and sulfur dioxide, which EPA found would necessarily result from installing controls to reduce emissions of hazardous air pollutants under the Rule. *See* 77 Fed. Reg. at 9305-06.

The total quantifiable benefits are estimated to be *three to nine times* the total cost of the Rule.[5]

Moreover, EPA's cost estimate, which was conducted several years ago, likely overestimates compliance costs. *See* McCabe Decl., Att. A at 47-48 (explaining a "historic pattern of overestimated regulatory cost," citing the acid rain program as an example where EPA overestimated costs by 83 percent, and conceding that the Regulatory Impact Analysis "may overstate costs" given the technology innovations that may result because of the Rule); *see also* Industry Respondent-Intervenors Motion 8-9; Staudt Decl. ¶¶ 5-14 (calculating costs of compliance to be $2 billion based on actual costs incurred by industry to date).

Contrary to Joint Petitioners' first argument, the Rule's significant benefits will not continue unimpaired if the Rule is vacated. As EPA explained in its Motion to Govern, full compliance with the Rule was projected to result in an 88 percent reduction in hydrogen chloride emissions, a 75 percent reduction in mercury emissions, a 41 percent reduction in sulfur dioxide emissions, and a 19 percent

[5] In light of these figures, Joint Petitioners' suggestion that EPA has gone to great lengths to avoid considering costs is utterly without merit. *See* Joint Motion 14. This is not to say that EPA will rely on a cost-benefit approach to considering costs on remand. The Supreme Court explicitly declined to limit EPA's discretion as to how to consider costs on remand, *see Michigan*, 135 S. Ct. at 2711, and there are many reasonable approaches for doing so, *see Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217-218 (2009). Joint Petitioners will have an opportunity to comment on EPA's approach and to challenge the final determination in this Court if EPA concludes that regulation of power plants remains appropriate after considering costs. Any attempt to challenge EPA's consideration of costs is not properly before this Court at this time.

reduction in particulate matter emissions from coal-fired units greater than 25 MW in 2015 alone. *See* 77 Fed. Reg. at 9424. These figures do not include the additional reductions that would be obtained through the installation of controls on oil-fired power plants. *See id.* As EPA described at length in its Motion to Govern, each of these air pollutants is associated with serious public health and environmental effects, such as delayed development and learning disabilities in children, cancer, lung irritation and damage to kidneys, reproductive problems in fish and fish-eating mammals and birds, and environmental degradation due to acidification. *See* EPA Motion 13-15.

Furthermore, as EPA also pointed out in its Motion to Govern, compliance with the Rule will render significant co-benefits from reductions in particulate matter exposure in 2016 alone; namely, up to 11,000 fewer premature deaths from respiratory and cardiovascular illness; 3,100 fewer emergency room visits for children with asthma; over 250,000 fewer cases of respiratory symptoms and asthma exacerbation in children; and 4,700 fewer non-fatal heart attacks. *See id.* 15-16. Thus, continued compliance with the Rule is very important for maintaining significant direct benefits and co-benefits even in the short term.

Joint Petitioners' argument that "many" of these benefits would continue unimpaired if the Rule is vacated, *see* Joint Motion 16, is belied by its own Motion and Tri-State's Motion, and refuted by EPA's Motion and the State and Public Health Motion. First, sources that have already installed controls will likely turn the controls

off in the event of vacatur in order to avoid operating costs. *See* Joint Motion 19 (arguing that ongoing operating costs should not be imposed during remand); *see also* McCabe Decl. ¶ 22 (stating that sources could choose not to operate installed controls). Second, while some plant retirements will not be reversed, those plants that are scheduled for retirement or have been taken offline but not physically deconstructed could continue or resume operation in the event of vacatur. *See* Tri-State Motion 14 n.3 (stating that Tri-State may take Nucla out of service in April 2016 and resume operation sometime thereafter).

Perhaps *some* benefits of the Rule would continue based on reduced emissions from power plants that have converted to natural gas, but certainly vacatur would significantly diminish emission reductions that have already started since the Rule's original compliance deadline of April 2015, and would further delay additional reductions that could be achieved once all regulated sources come into compliance. *See* McCabe Decl. ¶ 21 (stating that power plants representing 180 GW of capacity have installed mercury controls, power plants representing 50 GW of capacity have updated existing controls or installed new controls that reduce acid gases and sulfur dioxide, and power plants representing 19 GW of capacity have updated or installed particulate matter controls, while power plants representing *only 2 GW of capacity* have switched to burning natural gas); Sahu Decl. ¶¶ 3, 7, 8 (estimating that vacatur would result in significant loss of expected emission-reduction benefits that would have been obtained by compliance by coal-fired power plants not expected to be shut down in

2016 or converted to natural gas); Grandjean Decl. ¶ 30 (stating that "a short term increase in atmospheric mercury load, like that associated with a change in mercury control requirements for coal-fired power plants, will produce increases in atmospheric and deposited mercury that will remain within critical environmental reservoirs, available for uptake by fish and eventual consumption by humans, for decades").

Given that the Rule is already long overdue, *see* EPA Motion 12-14, that power plants are the largest anthropogenic source of mercury and acid gas hazardous air pollutants and a significant source of hazardous metals, *see id.* at 3, and that power plants would not be subject to any federally enforceable hazardous pollutant emission standards absent the Rule, *see id.* at 13, 17-18, this Court should not allow a further delay or reduction of the significant benefits achieved by the Rule.

B. Vacatur Would Complicate State Implementation of Other EPA Programs.

Additionally, contrary to Joint Petitioners' and Tri-State's contentions, vacatur of the Rule would have disruptive consequences beyond the scope of the Rule. *See* Joint Motion 16-17; Tri-State Motion 11-12. As EPA and the State and Public Health Respondent-Intervenors pointed out, states have already relied on and are continuing to rely on reductions obtained by the Rule for implementation of a number of other EPA programs, including the creation of state-wide mercury "pollution budgets" for waterbodies, attainment of national ambient air quality standards, and the

demonstration of reasonable progress under the CAA's regional haze program. *See* EPA Motion 17; State and Public Health Motion 18-20, and n.15 & 16. Given the ongoing nature of states' regulatory planning, vacatur would significantly complicate states' implementation of these programs. McCabe Decl. ¶ 30. Accordingly, vacatur would have significant disruptive consequences for public health and the environment that reach far beyond the Rule itself.

C. Remand Without Vacatur Would Not Significantly Harm Industry and Would Actually Avoid Disruption for Regulated Sources.

Finally, remand without vacatur—*i.e.*, maintaining the status quo for an additional six months—will not significantly harm industry and would actually avoid disruption for regulated sources. Neither Joint Petitioners nor Tri-State present any factual showing to demonstrate that the relatively small amount of monitoring, reporting, and recordkeeping costs that will be incurred over the next six months,[6] and unspecified operating costs, amount to significant disruptive consequences for industry of maintaining the status quo under the Rule. And tellingly, most industry petitioners did not file their own motions describing any undue burden that would result from maintaining the status quo. This is likely because most sources have

[6] Joint Petitioners cite EPA's estimated $158 million in annual costs. Half of that—six months worth—is $79 million, which is a small number when compared to the billions in quantifiable benefits that the Rule is estimated to obtain. Indeed, $79 million divided among the 600 plants affected by the Rule is only $130,000 per plant—a small amount for companies that report over a billion dollars in annual operating revenues. *See* McCabe Dec. ¶ 22; *see also* Tri-State Annual Report at 4, *available at* http://www.tristategt.org/Financials/documents/Tri-State-2014-1-annual-report.pdf (reporting an operating revenue of $1.4 billion for 2014).

already complied with the Rule or have taken steps towards complying, and therefore have already made the necessary capital investments to install controls and have incorporated compliance into their business strategies. *See* EPA Motion 19-20; McCabe Decl. ¶¶ 20, 31; *see also* Tri-State Motion 13 ("[T]hese capital investments have already been made and cannot be undone."). To the extent any sources have not done so, and whose continued operation is critical for maintaining reliability, such sources can seek administrative relief through EPA's Enforcement Response Policy. *See* EPA Motion 20. Thus, complying with the Rule for an additional six months will not unduly burden industry, and may in fact avoid the confusion and uncertainty associated with potentially unraveling or delaying contractual commitments and construction plans already made, only to have to reinstate those arrangements if EPA reaffirms the "appropriate and necessary" finding on remand. *See* McCabe Decl. ¶ 23; Industry Respondent-Intervenors Motion 13-18 (arguing that vacatur would have "severe" disruptive consequences for the electric generation sector).

Thus, remand without vacatur would prevent erosion of the significant public health and environmental benefits of the Rule and disruption to state implementation of other EPA programs, and provide regulatory certainty to industry without undue burden. Accordingly, because both *Allied-Signal* factors support remand without vacatur, the Court should grant EPA's and Respondent-Intervenors' motions.

III. TRI-STATE'S ALTERNATIVE RELIEF IS UNWARRANTED.

On September 1, 2015, this Court denied Tri-State's Second Emergency Motion, which asked for the same relief Tri-State now seeks as an alternative to vacatur—a stay of the Rule as it applies to Tri-State's Nucla Station.[7] *See* DN 1570784; Tri-State Motion 12-20. The Court stated that the motion was denied "in light of EPA's representation that it has extended Tri-State's impending deadlines, and because Tri-State may now seek administrative relief during this interim period . . . ." DN 1570784. The Court further stated that the "denial is without prejudice to Tri-State filing a motion should administrative relief be denied." *Id.*

In its Motion, Tri-State makes (for a third time) the same arguments that it made in support of its prior requests for emergency relief, yet fails to establish that administrative relief has been exhausted. *See* Tri-State Motion 9 (failing to address the status of any request for administrative relief at all); 14-15, n.4 (stating only that "Tri-State has met with EPA about [the possibility of obtaining relief under EPA's Enforcement Response Policy] but has not had any success in this regard"). On September 22, Tri-State met with the Regional Administrator for EPA Region 8, the EPA Region in which Nucla Station is located, and on October 14, Tri-State met with

[7] Tri-State requests the same relief for other similarly-situated power plants, but admits that "Nucla may be the only plant in [the] situation" Nucla is in. Tri-State Motion 16. Indeed, no other company joined Tri-State's request for alternative relief or filed its own motion for such relief. This is likely because, unlike Nucla, other plants that obtained extensions have already installed controls or are under contract to install the controls. *See* McCabe Dec. ¶ 23; Staudt Decl. ¶¶ 3, 15; Berg Decl. ¶¶ 4-19. Accordingly, there is no justification for the broad relief Nucla requests.

EPA's Office of Enforcement and Compliance Assurance (the office that administers the Policy) and the Federal Energy Regulatory Commission (the agency on which EPA relies for identification and analysis of reliability risks under the Policy). On October 19, Tri-State submitted a request for temporary relief from the applicable requirement of the Rule, which EPA is in the process of evaluating. Thus, the administrative process is ongoing. Accordingly, for the same reasons Tri-State's first and second emergency motions were denied, Tri-State's request for alternative relief should also be denied.

CONCLUSION

In summary, because EPA intends to act quickly on remand, and remand without vacatur would preserve important public health and environmental protections, prevent significant disruption to state implementation of other EPA programs, and provide regulatory certainty to regulated sources, remand without vacatur is warranted.

DATED: October 21, 2015

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

/s/ Stephanie J. Talbert
ERIC G. HOSTETLER
STEPHANIE J. TALBERT
United States Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
999 18th Street

South Terrace, Suite 370
Denver, CO 80202
303-844-7231
E-mail: stephanie.talbert@usdoj.gov

Counsel for Respondents

OF COUNSEL
SONJA RODMAN
KAYTRUE TING
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of RESPONDENT'S RESPONSE TO MOTIONS TO GOVERN FUTURE PROCEEDINGS via Notice of Docket Activity by the Court's CM/ECF system, on October 21, 2015, on all counsel of record.

DATED: October 21, 2015

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

/s/ Stephanie J. Talbert
ERIC G. HOSTETLER
STEPHANIE J. TALBERT
United States Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
303-844-7231
E-mail: stephanie.talbert@usdoj.gov

Counsel for Respondents