

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY)
 1212 Broadway, Suite 800)
 Oakland, CA 94612)
 FRIENDS OF THE EARTH)
 1717 Massachusetts Avenue, N.W., Suite 600)
 Washington, DC 20036)
 Plaintiffs,)
 v.)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY and GINA MCCARTHY,)
 Administrator, United States Environmental)
 Protection Agency)
 1200 Pennsylvania Avenue, N.W.)
 Washington, DC 20460)
 Defendants.)

Civ. No. 1:16-cv-00681 (ABJ)

**PLAINTIFFS’ RESPONSE TO
ORDER TO SHOW CAUSE WHY
THIS MATTER SHOULD NOT BE
DISMISSED PURSUANT TO RULE
12(b)(1), IN WHOLE OR IN PART,
FOR LACK OF SUBJECT MATTER
JURISDICTION**

Plaintiffs, the Center for Biological Diversity and Friends of the Earth (collectively, “Plaintiffs”), hereby file their response to this Court’s July 27, 2016 Order to Show Cause and respectfully request, for the reasons stated herein, that this matter not be dismissed for lack of subject matter jurisdiction. Plaintiffs agree that EPA’s publication on July 25, 2016 of a final endangerment finding for aircraft¹ satisfies and renders moot Count I of their Complaint. However, nine years after Plaintiffs first petitioned EPA to promulgate emission standards to control greenhouse gas pollution from aircraft pursuant to section 231(a) of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. § 7571(a), EPA has neither proposed nor finalized such

¹ EPA, *Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare*, Final Rule (July 25, 2016), available at <https://www3.epa.gov/otaq/documents/aviation/aircraft-ghg-fr-2016-07-25.pdf> (“Final Rule”).

standards. This continued failure to act constitutes unreasonable delay under section 304 of the Act, 42 U.S.C. § 7604(a). Therefore Count II remains a live controversy over which the Court can grant effectual relief, and should not be dismissed for lack of subject matter jurisdiction. EPA does not oppose Plaintiffs' assertion that the July 25, 2016 endangerment finding does not moot Plaintiffs' second claim.²

BACKGROUND

On December 5, 2007, Plaintiffs submitted a petition for rulemaking requesting that EPA, pursuant to its authority under section 231 of the CAA: (1) find that greenhouse gas emissions from aircraft endanger human health and welfare; and (2) set standards for greenhouse gas emissions from aircraft. In July 2011, the D.C. District Court held that section 231 imposes a mandatory duty on EPA to issue an endangerment finding determining whether greenhouse gas emissions from aircraft contribute to dangerous air pollution. *Center for Biological Diversity v. EPA*, 794 F. Supp. 2d 151 (D.D.C. 2011).

On June 10, 2015, four years after the D.C. District Court's ruling, EPA issued a Proposed Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare and Advance Notice of Proposed Rulemaking. 80 Fed. Reg. 37,758 (July 1, 2015) ("Proposed

² In an email to Plaintiffs' counsel on August 2, 2016, Lisa Bell, counsel for Defendants EPA and Gina McCarthy, communicated the following:

EPA agrees that the July 25, 2016 endangerment finding moots Plaintiffs' first claim and that that claim should therefore be dismissed for lack of subject matter jurisdiction. EPA does not oppose Plaintiffs' statement that the July 25, 2016 endangerment finding does not moot Plaintiffs' second claim. However, EPA believes that all of Plaintiffs' claims should be dismissed, and intends to file a motion to dismiss under Fed. R. Civ. P. 12 on the August 19, 2016 deadline for EPA's answer or other response to Plaintiffs' Complaint.

E-mail from Lisa Bell, Trial Attorney, United States Department of Justice, to Sarah Burt, Attorney, Earthjustice (Aug. 2, 2016, 10:27 a.m. PST).

Endangerment Finding and ANPR”). The ANPR did not propose standards for regulating greenhouse gas emissions from aircraft engines or provide a timetable for doing so.

On April 12, 2016, eight and a half years after submitting their rulemaking petition, Plaintiffs filed this suit against EPA for unreasonable delay in complying with section 231 of the CAA. Plaintiffs’ complaint includes two distinct claims: Count I asserts that EPA has unreasonably delayed in issuing a final endangerment finding for greenhouse gas emissions from aircraft engines; Count II asserts that EPA has unreasonably delayed in issuing standards to regulate these emissions. Complaint, Doc. 1 at 1.

On July 25, 2016, EPA finalized an endangerment finding, in which “the Administrator finds that emissions of the six well-mixed greenhouse gases (GHGs) from certain classes of aircraft engines ... contribute to air pollution that may reasonably be anticipated to endanger the public health and welfare of current and future generations.” Final Rule at 7. EPA has yet to issue proposed or final standards applicable to these emissions.

On July 27, 2016, the Court ordered that Plaintiffs show cause why this matter should not be dismissed pursuant to Rule 12(b)(1), in whole or in part, for lack of subject matter jurisdiction. Order, Doc. 13 at 2.

ARGUMENT

I. Plaintiffs Voluntarily Dismiss Count I.

Plaintiffs agree that EPA’s July 25, 2016 publication of a final endangerment finding for aircraft satisfies and renders moot Count I of their Complaint. Accordingly, Plaintiffs voluntarily dismiss this claim.

II. Count II Remains “Live” and Should Not Be Dismissed.

“There is ... no case or controversy, and a suit becomes moot, ‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” *Chafin v.*

Chafin, 133 S. Ct. 1017, 1023 (2013) (quoting *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)). But a court may dismiss a case as moot “only when it is impossible ... to grant any effectual relief whatever to the prevailing party.” *Id.* (quoting *Knox v. Service Employees*, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks omitted)). “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Knox*, 132 S. Ct. at 2287 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)).

In Count II, Plaintiffs contend that EPA has delayed unreasonably in promulgating regulations limiting greenhouse gas emissions from aircraft as required by section 231 of the CAA. Complaint, Doc. 1 at 1. Plaintiffs seek an order directing EPA to propose such regulations within 30 days of the Court’s judgment. *Id.* at 18-19. Because EPA has not yet proposed or finalized emission standards for greenhouse gases from aircraft engines, this Court can provide the relief that Plaintiffs request and Plaintiffs’ claim for unreasonable delay in setting such standards is not moot.

Section 304(a) of the Clean Air Act grants this Court subject matter jurisdiction over Count II. Section 304(a) provides that “the district courts of the United States shall have jurisdiction to compel ... agency action unreasonably delayed.” 42 U.S.C. § 7604; *see also* 40 C.F.R. Part 54. This provision provides for judicial review of an agency delay in performing actions for which statutes mandate action but do not provide specific deadlines. *See American Lung Assn. v. Reilly*, 962 F.2d 258, 263 (2nd Cir. 1992) (“When the administrator misses a statutorily-imposed deadline, his failure is not reviewed on a ‘reasonableness’ basis. Only when a statute requires agency action at indefinite intervals, such as ‘from time to time’, can ‘unreasonable delay’ be a meaningful standard for judicial review.”); *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 552 n.3 (D.D.C. 2005) (section 304(a) unreasonable delay provision not proper way to challenge failure to perform nondiscretionary duty with a statutorily-imposed deadline).

On July 5, 2011, this court held that section 231 imposes on EPA a mandatory duty to conduct an endangerment finding and to issue emission standards for dangerous pollutants. *Center for Biological Diversity v. EPA*, 794 F. Supp. 2d 151, 160-62 (D.D.C. 2011). EPA has been on notice since Plaintiffs' 2007 petition of its duty to regulate this source. While "there is no *per se* rule" delineating the parameters of unreasonable delay, *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 2004), "a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). EPA's nine-year delay in fulfilling its mandatory duty to finalize emission standards constitutes reasonable delay under 42 U.S.C. § 7604(a).

CONCLUSION

EPA has an obligation under CAA section 231 to issue emission standards applicable to pollutants that are dangerous to health and public welfare. 42 U.S.C. § 7571(a)(2)(A). Because EPA still has not proposed such standards, Count II of Plaintiffs' Complaint is not moot and should not be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

DATED: August 5, 2016



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