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

ENVIRONMENTAL DEFENSE FUND, et al.,	
Petitioners,	No. 18-1190, consolidated with No. 18-1192
v.	
ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

REPLY IN SUPPORT OF
RESPONDENTS' MOTION TO DISMISS

Although EPA's Acting Administrator has withdrawn the July 6 No Action Assurance regarding gliders and has stated that EPA "will not offer any other" such assurance, Environmental Petitioners and State Petitioners claim that its effects have not been completely eradicated. Petitioners' arguments rely on speculation, and the cases they cite are not on point. EPA's Withdrawal Notice meets the test for mootness based on an agency's voluntary cessation of an action, and the Court should dismiss the petitions for lack of jurisdiction.

ARGUMENT

State Petitioners and Environmental Petitioners both argue that this case is not moot because the Court (or EPA itself) could reinstate the No Action Assurance in response to some future lawsuit. State Pet. Resp. at 3, Envt'l Pet. Resp. at 3. These hypotheticals are nothing more than speculation, and are not a basis to litigate the merits of an action that is moot. EPA has expressly disclaimed any intention of re-issuing the No Action Assurance. Environmental Petitioners suggest that if the Withdrawal Notice were challenged in court, EPA might deem that challenge "new information" sufficient to reverse course. Envt'l Pet. Resp. at 3. But EPA based the Withdrawal Notice on long-standing agency guidance, among other things, and future litigation over the Withdrawal Notice would not change that. No party has intervened in this case in support of the No Action Assurance, and there is no indication that anyone will seek judicial review of the Withdrawal Notice.

Similarly, State Petitioners raise the "possibility" that the Court could invalidate the Withdrawal Notice and reinstate the No Action Assurance. State Pet. Resp. at 1. Even if such a challenge were brought, Petitioners would have the right to seek to intervene and present their arguments on the merits of either the No Action Assurance or the Withdrawal Notice. Petitioners could also address the

appropriate remedy if the Court in a future action were to find a flaw in the Withdrawal Notice. For example, State Petitioners could argue that the Withdrawal Notice should not immediately be vacated, which would prevent the No Action Assurance from coming back into force. Because the Court can readily address Petitioners' interests in any future litigation over the Withdrawal Notice, the mere possibility of such litigation is no basis to reach the merits in this case.

Environmental Petitioners make two additional arguments, neither of which has merit. Environmental Petitioners argue that the Withdrawal Notice does not completely eradicate the effects of the No Action Assurance because EPA has not made a binding commitment to take enforcement action in the future. Envt'l Pet. Resp. at 3-5. But the decision whether or not to prosecute on a case-by-case basis is the quintessential example of a discretionary function. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

Not surprisingly, none of the cases cited by Environmental Petitioners supports their argument that EPA must affirmatively commit to file enforcement actions. In *Kifafi v. Hilton Hotels Retirement Plan*, 701 F.3d 178 (D.C. Cir. 2012), plaintiff claimed that his employer violated ERISA by "backloading," *i.e.*,

improperly calculating retirement benefits. *Id.* at 722. The employer amended its retirement plan and argued that backloading would not recur because it would be illogical, irrational, and absurd to "further violate the anti-backloading provision because doing so would subject [the employer] to further litigation" and possible tax consequences. *Id*. at 735. That promise, based on the employer's self-interest, is what the court found "is insufficient." *Id*. Similarly, the court in *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968), found that a party's "own statement that it would be uneconomical" to continue the challenged activity, "standing alone, cannot suffice." 393 U.S. at 203. In other words, in both these cases the courts simply found insufficient informal statements and promises offered by the parties in question, but the courts did not require the parties to take the type of affirmative action advocated by Environmental Petitioners here.

Environmental Petitioners also cite *Los Angeles Cnty. v. Davis*, 440 U.S. 625 (1979), but that case actually supports dismissal. In *Davis*, the Supreme Court *dismissed* as moot a challenge to an unused, "unvalidated" written hiring exam. The Court found there was no reason to believe the agency would alter its hiring practices in order to use the unvalidated exam, and that the agency's proposal to use the unvalidated exam had neither excluded any minority from employment nor deterred any minority from applying. 440 U.S. at 362-63. No "affirmative

commitment" was required, much less an affirmative commitment "to enforce the law." Envt'l Pet. Resp. at 5.[1]

None of Environmental Petitioners' cited cases stand for the proposition that EPA must commit to take enforcement actions, or establish a new general policy on when EPA would take enforcement actions. At most, they hold that a promise not to violate the law, by itself, is not a voluntary cessation. This is nothing more than a reiteration of the well-established test for when voluntary cessation moots a case: there must be no reasonable expectation that the alleged violation will recur, and there must be interim relief or events that completely eradicate the effects of the violation. *Kifafi*, 701 F.3d at 725. Both are present here. As we explained in our opening brief, the Withdrawal Notice completely nullifies and eradicates the effects of the No Action Assurance, and precludes its reissuance beyond any reasonable expectation.

Environmental Petitioners insist on more. According to them, EPA must make an affirmative commitment to take future enforcement actions against any future glider vehicle production that violates the Clean Air Act. Envt'l Pet. Resp.

[1] Environmental Petitioners' citation to *True the Vote, Inc. v. IRS*, 831 F.3d 551 (D.C. Cir. 2016), fares no better. Envt'l Pet. Resp. at 4. In that case, the Court found that the agency had not even stopped the challenged conduct. 831 F.3d at 563 (two applications remain pending, and the agency had only "suspended" the challenged policy "until further notice"). Here, EPA has unequivocally withdrawn and affirmatively stated it will not re-issue the No Action Assurance, instead of merely suspending it.

at 5. Requiring such a commitment would go well beyond the Court's well-established test for mootness and would undermine *Heckler*'s recognition of enforcement discretion.

Environmental Petitioners' requirement would also be impractical to frame and impossible to enforce. Environmental Petitioners do not explain what type of "affirmative commitment" would satisfy them. Envt'l Pet. Resp. at 5. Would EPA have to initiate an enforcement proceeding before the Court could dismiss these petitions as moot? Environmental Petitioners acknowledge the problem by seeking a commitment to file prosecutions only "where appropriate." *Id*. But they cannot and do not explain how to evaluate where a prosecution is "appropriate." This tacit acknowledgement of prosecutorial discretion further undermines their insistence that the Withdrawal Notice is insufficient. The Withdrawal Notice completely removes any question that current requirements are enforceable and enforcement actions will be undertaken on a case-by-case basis in the Agency's discretion.

Environmental Petitioners also argue that adjudicating the merits of the No Action Assurance would be "meaningful" because the Court could find the No Action Assurance was void *ab initio*. Envt'l Pet. Resp. at 6. This argument relies on a chain of speculation that ultimately leads nowhere. According to Environmental Petitioners, if an enforcement action were filed for violations that

occurred after EPA issued the No Action Assurance but before EPA withdrew it, a glider manufacturer "could" theoretically plead for a lower civil penalty by claiming it relied on the No Action Assurance. *Id*. Environmental Petitioners' argument depends on three speculative events: that a glider manufacturer actually produced gliders in excess of the amount allowed under the interim provisions during the 20-day lifespan of the No Action Assurance; that the glider manufacturer will be sued for that production; and that the manufacturer will make this equitable argument to reduce a penalty.

But even if such a situation comes to pass, a decision from this Court, issued *after* the manufacturer relied on the No Action Assurance, would not be relevant. A court weighing the appropriate penalty to impose on a glider manufacturer would consider whether that manufacturer reasonably relied on the No Action Assurance at the time it produced the hypothetical additional gliders, between July 6 and July 26, 2018. Later developments, such as a decision vacating the No Action Assurance, would have no bearing on whether it was reasonable to rely on that document while it was in effect. It will make no difference in a penalty proceeding whether EPA withdraws the No Action Assurance prospectively, or whether the Court voids it retroactively.

Finally, Petitioners mischaracterize the nature of EPA's argument. State Petitioners assert that EPA's motion to dismiss is a concession of error, and Environmental Petitioners frame EPA's motion as a default on the merits. State Pet. Resp. at 2, Envt'l Pet. Resp. at 2. Neither characterization is correct. EPA promptly informed the Court of the Withdrawal Notice and explained why that action moots these petitions. Because the Court lacks subject matter jurisdiction to adjudicate a mooted controversy, the underlying merits are simply no longer at issue. If the Court disagrees, EPA requests an opportunity to brief the merits in full.

CONCLUSION

For all the foregoing reasons, the petitions for review should be dismissed, and Petitioners' motions should be denied.

Dated: August 9, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

JONATHAN D. BRIGHTBILL
Deputy Assistant Attorney General

/s/ Daniel R. Dertke
DANIEL R. DERTKE, Sr. Attorney
U.S. Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611

Washington, D.C. 20044--7611
(202) 514-0994

OF COUNSEL:

ANDREA CARRILLO
Office of General Counsel, U.S. EPA
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify that the forgoing Reply in Support of Respondents' Motion to Dismiss complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains **1680 words**, according to the count of Microsoft Word. I further certify that this document complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced font using Microsoft Word 2013, in 14-point Times New Roman.

s/ Daniel R. Dertke
ATTORNEY FOR RESPONDENTS
AUGUST 9, 2018

CERTIFICATE OF SERVICE

I certify that on this 9th day of August, 2018, the foregoing REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS was served electronically via the Court's CM/ECF system upon counsel of record.

/s/ Daniel R. Dertke
DANIEL R. DERTKE