

Message

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**From:** mark.hamlin@bakerbotts.com [mark.hamlin@bakerbotts.com]  
**Sent:** 5/25/2018 9:03:24 PM  
**To:** alan.greenberg@usdoj.gov [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=usercbd2f880]  
**CC:** Aaron.Streett@BakerBotts.com; matthew.kuryla@bakerbotts.com [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0f258c275a5c45119dd6a95a93f7b41e-matthew.kuryla@bakerbotts.com]; Ting, Kaytrue [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=65b5a3451a7347b585ced174b38948ad-Ting, Kaytrue]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; austin.echols@bakerbotts.com  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18  
**Attachments:** Sierra Club de Puerto Rico\_MTD.PDF; Sierra Club de Puerto Rico\_Response to MTD.PDF; Sierra Club de Puerto Rico\_Opinion.pdf; Sierra Club de Puerto Rico v EPA (Petitioner Final Brief).pdf; Sierra Club de Puerto Rico v EPA (Respondent Final Brief).pdf

Alan,

Following up on our conversation this afternoon, please find attached the final briefs, motion to dismiss and response, and the D.C. Circuit's opinion in *Sierra Club de Puerto Rico v. EPA*.

Regards,  
Mark

Mark Hamlin  
Baker Botts LLP

**Ex. 6**

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**From:** Greenberg, Alan (ENRD) <Alan.Greenberg@usdoj.gov>  
**Sent:** Thursday, May 24, 2018 10:04 AM  
**To:** Hamlin, Mark <mark.hamlin@bakerbotts.com>  
**Cc:** Streett, Aaron <Aaron.Streett@BakerBotts.com>; Kuryla, Matthew <matthew.kuryla@bakerbotts.com>; Ting.Kaytrue@epa.gov  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Mark:

I am available for a call any time after 11:30 am central time tomorrow.

Alan

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**From:** [mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com) <[mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com)>  
**Sent:** Thursday, May 24, 2018 8:52 AM  
**To:** Greenberg, Alan (ENRD) <[AGreenberg@ENRD.USDOJ.GOV](mailto:AGreenberg@ENRD.USDOJ.GOV)>  
**Cc:** [Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com); [matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com); [Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Alan,

Apologies for the delayed response to your email. Would you be available to participate in a call after 11:00 am central time tomorrow (5/25)? We would like Aaron to be able to participate, but he is unable to make a call today.

Regards,  
Mark

Mark Hamlin  
Baker Botts L.L.P

**Ex. 6**

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**From:** Greenberg, Alan (ENRD) <[Alan.Greenberg@usdoj.gov](mailto:Alan.Greenberg@usdoj.gov)>  
**Sent:** Wednesday, May 23, 2018 1:37 PM  
**To:** Hamlin, Mark <[mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com)>  
**Cc:** Streett, Aaron <[Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com)>; Kuryla, Matthew <[matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Mark:

I could participate in a call at 10:00 am or 1:00 pm central time tomorrow.

Thanks.

Alan

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**From:** [mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com) <[mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com)>  
**Sent:** Tuesday, May 22, 2018 4:29 PM  
**To:** Greenberg, Alan (ENRD) <[AGreenberg@ENRD.USDOJ.GOV](mailto:AGreenberg@ENRD.USDOJ.GOV)>  
**Cc:** [Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com); [matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com)  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

#### **JDG Communication - Subject to Join Defense Privilege**

Alan,

Following up on conversations from yesterday and this morning, the BCCA Appeal Group had targeted May 29 as the deadline for filing a motion to dismiss or, in the alternative, to hold the matter in abeyance. This target date is not based upon a specific deadline requirement for motions under the Federal Rules of Appellate Procedure or the Circuit Rules. Instead, we targeted this date as it represents that latest date by which EPA must file the administrative record with the court, after which briefing schedules will be set. See FRAP 17.

With respect to the content of the motion, the BCCA Appeal Group still anticipates requesting a dismissal on the grounds that the Petitioners' claim is not based solely on after-arising grounds and is, therefore, time-barred. Included below is a provisional outline of our intended argument for dismissal.

Would you be available for a follow-up call this Thursday, May 24? We can be available at 9:00 am, 10:00 am, or 1:00 pm CT. Please let me know if you can make any of these times and I will get the call on everyone's calendar.

#### **Statutory Background**

- A petition for judicial review of an EPA rulemaking must be filed within 60 days of the notice of the rulemaking *unless* the grounds for the petition are based *solely* on grounds arising after the sixtieth day. CAA §307(b)(1) (emphasis added).
- Petitioners do not contest that their petition falls outside the 60-day limitations period. Instead, Petitioners assert that the decision in *South Coast Air Quality Management District v. EPA*, 882 F.3d 1138 (D.C. Cir. 2018), establishes after-arising grounds that permit judicial review.

#### **Caselaw Analyzing After-Arising Grounds**

- As explained by the D.C. Circuit, it takes more than a new factual development to establish after-arising grounds. *Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 27 (D.C. Cir. 2016). Instead, the court looks to whether the petitioners' claimed injuries would have been speculative and deprived the court of jurisdiction under Article III if brought within the 60-day limitations period. *Id.*
- Stated more simply, the court looks to whether the petitioners could have raised their merits argument prior to the asserted after-arising grounds. *Honeywell International, Inc. v. EPA*, 705 F.3d 470 (D.C. Cir. 2013). If the claim was ripe for review within the 60-day limitations period, it is time-barred if brought thereafter.

#### **Petitioners' Prior Challenges to the Redesignation Substitute**

- Petitioners' brief in *South Coast*:
  - In March 2016, Petitioners filed a brief in their challenge to the 2008 ozone NAAQS implementation rule that asserted that the Clean Air Act did not grant EPA the authority to create the redesignation substitute mechanism as an alternative to formal redesignation under the Act.
  - Furthermore, Petitioners alleged that the relaxation of control measures under the revoked standards through the redesignation substitute mechanism "allow[s] weaker protections in communities that violate the new standard and have a history of violating prior standards."
- Petitioners' comments on the Texas redesignation substitute rulemakings:
  - In June 2016, Petitioners raised similar objections to the Texas redesignation substitutes as were made in their brief in *South Coast*, discussed above. Indeed, Sierra Club's comments specifically state that "[t]he 'redesignation substitute' is illegal and arbitrary and for all the reasons given in [the Petitioners' *South Coast*] brief, the relevant portions of which are incorporated by reference."
  - Petitioners' comments further allege that "residents in these communities will continue to breathe unsafe air" were EPA to approve the redesignation substitutes.

#### **Petitioners' Claim was Ripe for Review Within the 60-day Limitations Period**

- The Petitioners' prior objections to the redesignation substitute mechanism did not depend upon future or speculative actions or injuries.
- Instead, Petitioners could have petitioned a court to find the redesignation substitutes were inconsistent with the Clean Air Act within the 60-day limitations period.
- Furthermore, any alleged injury in connection with EPA's approval of a redesignation substitute would be realized upon the rulemaking's effective date.
- Accordingly, petitioners were capable of raising their merits argument and establishing Article III standing within the 60-day limitations period.

#### **Petitioners' Claim is Time-Barred**

- As demonstrated above, the Petitioners could have petitioned for judicial review of the Texas redesignation substitutes within the 60-day limitations period.
- Petitioners now assert that the *South Coast* decision represents after-arising grounds, but this decision has not created grounds for a substantive argument that could not have brought within the 60-day limitations period.
- The mere issuance of judicial precedent that bolsters a substantive argument for challenging agency action does not constitute an after-arising ground when the substantive argument itself was available within the statutory timeframe for petitioning for judicial review.
- Accordingly, the *South Coast* decision does not establish after-arising grounds.

- Finally, even if the *South Coast* decision could establish after-arising grounds—which we dispute—it certainly could not do so before the mandate issues and the decision has become effective.
- Accordingly, Petitioners’ claim is not based upon after-arising grounds and should be dismissed as time-barred.

#### Abeyance as an Alternative to Dismissal

- Were the court to deny a request for dismissal, the BCCA Appeal Group would support a request to hold the case in abeyance pending either (1) resolution of the petition for rehearing in the D.C. Circuit and any subsequent appeal or (2) resolution of the administrative petition for reconsideration of the redesignation substitutes.

Mark Hamlin  
Baker Botts LLP

## Ex. 6

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**From:** Kuryla, Matthew  
**Sent:** Tuesday, May 22, 2018 9:53 AM  
**To:** Greenberg, Alan (ENRD) <[Alan.Greenberg@usdoj.gov](mailto:Alan.Greenberg@usdoj.gov)>  
**Cc:** Hamlin, Mark <[mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com)>; Streett, Aaron <[Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com)>  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Yes. Apologies – we identified no deadline, but just your administrative record date, which is on the same timeframe.

We will outline our additional thoughts shortly about **Exemption 5**

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**From:** Greenberg, Alan (ENRD) <[Alan.Greenberg@usdoj.gov](mailto:Alan.Greenberg@usdoj.gov)>  
**Sent:** Tuesday, May 22, 2018 9:28 AM  
**To:** Kuryla, Matthew <[matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com)>  
**Cc:** Hamlin, Mark <[mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com)>; Streett, Aaron <[Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com)>  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Matt:

Did you have a chance to confer with your colleagues about the source of any potential deadline for a motion to dismiss?

Thanks. Alan

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**From:** [matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com) <[matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com)>  
**Sent:** Wednesday, May 16, 2018 2:20 PM  
**To:** Greenberg, Alan (ENRD) <[AGreenberg@ENRD.USDOJ.GOV](mailto:AGreenberg@ENRD.USDOJ.GOV)>  
**Cc:** [mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com); [Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com)  
**Subject:** Re: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Thanks, Alan. We would also like to discuss a motion to dismiss on the basis of untimeliness. Can we set a call early next week on that?

Sent from my iPhone

On May 16, 2018, at 11:36 AM, Greenberg, Alan (ENRD) <[Alan.Greenberg@usdoj.gov](mailto:Alan.Greenberg@usdoj.gov)> wrote:

Matt:

You can represent that EPA will not oppose your clients' motion to intervene.

Alan

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**From:** [matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com) <[matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com)>  
**Sent:** Wednesday, May 16, 2018 9:20 AM  
**To:** [mark.hamlin@bakerbotts.com](mailto:mark.hamlin@bakerbotts.com); Greenberg, Alan (ENRD) <[AGreenberg@ENRD.USDOJ.GOV](mailto:AGreenberg@ENRD.USDOJ.GOV)>  
**Cc:** [Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com)  
**Subject:** RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Alan, just following up. We intend to file a motion for leave to intervene in this case on behalf of the BCCA Appeal Group, the Texas Chemical Council and the Texas Oil and Gas Association. Will EPA take a position on it?

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**From:** Hamlin, Mark  
**Sent:** Monday, May 14, 2018 1:24 PM  
**To:** '[alan.greenberg@usdoj.gov](mailto:alan.greenberg@usdoj.gov)' <[alan.greenberg@usdoj.gov](mailto:alan.greenberg@usdoj.gov)>  
**Cc:** Kuryla, Matthew <[matthew.kuryla@bakerbotts.com](mailto:matthew.kuryla@bakerbotts.com)>; Streett, Aaron <[Aaron.Streett@BakerBotts.com](mailto:Aaron.Streett@BakerBotts.com)>  
**Subject:** Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Alan,

We represent an industry coalition that anticipates filing a motion intervene in support of Respondent EPA in *Downwinders at Risk v. EPA*, No. 18-60290 (5th Cir.). This case represents the challenge to EPA's rulemakings approving "redesignation substitutes" for the Dallas-Fort Worth and Houston-Galveston-Brazoria areas. At your earliest convenience, can you please let me know your client's position on this motion so it can be included in the motion.

Thank you,  
Mark

**Mark Hamlin** | *Associate* | Baker Botts LLP  
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