

1 Joshua Arce, Esq. (State Bar No. 218563)  
2 [josh@brightlinedefense.org](mailto:josh@brightlinedefense.org)  
3 BRIGHTLINE DEFENSE PROJECT  
4 240 Golden Gate Avenue, Ste. 102  
5 San Francisco, CA 94102  
6 415-837-0600  
7 Fax 415-837-0660

8 Martin Homec (State Bar No. 085798)  
9 [martinhomec@gmail.com](mailto:martinhomec@gmail.com)  
10 P. O. Box 4471  
11 Davis, CA 95617  
12 530-867-1850

13 Attorneys for Plaintiffs  
14 SAN FRANCISCO CHAPTER OF THE  
15 A. PHILIP RANDOLPH INSTITUTE,  
16 CALIFORNIANS FOR RENEWABLE ENERGY,  
17 LYNNE BROWN, REGINA HOLLINS

18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

20 SAN FRANCISCO CHAPTER OF THE  
21 A. PHILIP RANDOLPH INSTITUTE,  
22 CALIFORNIANS FOR RENEWABLE  
23 ENERGY, LYNNE BROWN, REGINA  
24 HOLLINS,

25 on behalf of themselves, all others similarly  
26 situated, and the general public,

27 Plaintiffs,

28 vs.

29 UNITED STATES ENVIRONMENTAL  
30 PROTECTION AGENCY, STEPHEN  
31 JOHNSON, BAY AREA AIR QUALITY  
32 MANAGEMENT DISTRICT, CITY AND  
33 COUNTY OF SAN FRANCISCO,

34 Defendants.

Case No.: C-07-4936-CRB

MEMORANDUM IN OPPOSITION TO  
EPA'S MOTION TO DISMISS

Date: Friday, March 21, 2008

Time: 10:00 a.m.

Place: 450 Golden Gate Avenue  
Courtroom 8, 19th Floor  
San Francisco, California

1 **INTRODUCTION**

2 Defendants United States Environmental Protection Agency (“EPA”) and EPA  
3 Administrator Stephen L. Johnson (“Johnson,” collectively known as the “EPA Defendants”)  
4 have moved this court for an order dismissing plaintiffs’ first claim for relief, for mandamus, and  
5 second claim for relief, under the Administrative Procedure Act (“APA”), as to EPA Defendants.

6 In arguing that a citizen suit under the Clean Air Act, 42 U.S.C. § 7604, is the proper  
7 remedy for plaintiff’s allegations EPA Defendants ignore the entire purpose of this litigation:  
8 plaintiffs require the relief requested precisely because, despite the order of the United States  
9 Supreme Court, there is no remedy under the Clean Air Act to combat the life-threatening and  
10 devastating effects of global warming caused by greenhouse gas emissions.

11 Plaintiffs’ allegations of EPA and Johnson inaction do not exist in a vacuum; one month  
12 ago California Attorney General Jerry Brown wrote to defendant Johnson in a letter signed by  
13 seventeen other state attorneys general that “the Arctic is melting faster than ever before, yet the  
14 EPA stubbornly refuses to do its job...the EPA should obey the Supreme Court’s landmark  
15 decision and issue regulations to curb greenhouse gas pollutants without further delay.” See  
16 January 23, 2008 Attorney General Letter, attached as Exhibit A of Declaration of Michael Boyd.

17 There is no preclusion in this instance for the reason that Johnson has failed to take the  
18 steps necessary, steps demanded of him by the highest court in this nation, to allow citizens to  
19 address global warming through the Clean Air Act. EPA Defendants’ motion fails because it  
20 seeks to fault plaintiffs for failure to employ a remedy that, because of EPA Defendants’ own  
21 failure to act, does not exist.

22 **BACKGROUND**

23 This case is as much about two proposed power plants to be built in and around San  
24 Francisco as it is about the EPA’s failure to address global warming in a way that endangers  
25 every citizen of this country, including plaintiffs. In fact, the EPA’s longstanding refusal to  
26 regulate greenhouse gas emissions under the Clean Air Act has led to the recent intervention of  
27 the United States Supreme Court in the landmark case of Massachusetts v. EPA, 127 S. Ct. 1438  
28 (2007).

1 In Massachusetts the Supreme Court wrote that “greenhouse gases fit well within the  
2 Clean Air Act’s capacious definition of ‘air pollutant’” (Massachusetts v. EPA, 127 S. Ct. at  
3 1462) and ordered the agency to “ground its reasons for action or inaction in the statute,”  
4 referring to the Clean Air Act. Id. at 1463.

5 Nearly one year later, the EPA Defendants have taken no action in response to the  
6 Supreme Court as alleged in ¶¶ 12, 92, and 103 of plaintiffs’ First Amended Complaint. By the  
7 time this motion will be heard by this court, six months shall have passed since the  
8 Massachusetts case was remanded to the EPA, and this motion shall be heard over two months  
9 since eighteen state attorneys general called upon the EPA Defendants to act. See Mem. In  
10 Support of Mot. To Dismiss, p. 3, ln. 13-14; Jan. 28 Letter, attached as Ex. A of Decl. of Boyd.

11 EPA Defendants do not dispute that plaintiffs have successfully pled standing and  
12 damages in their first and second claims, as alleged in ¶¶ 81-83 and ¶¶ 84-88. Instead, EPA  
13 Defendants advance the argument that plaintiffs’ requested relief is too remote in light of the  
14 holding in the Massachusetts case. In actuality, the relief plaintiffs require flows naturally from  
15 the Supreme Court’s directive.

16 Plaintiffs’ requested relief will result from Johnson’s finding of “endangerment,” that  
17 emissions of greenhouse gases such as carbon dioxide in “[Johnson’s] judgment cause, or  
18 contribute to, air pollution which may reasonably be anticipated to endanger public health or  
19 welfare.” 42 U.S.C. Section 202.

20 In Massachusetts the Supreme Court noted that “we need not and do not reach the  
21 question whether on remand EPA must make an endangerment finding,” but dictated that the  
22 EPA “must ground its reasons for action or inaction in the statute.” Massachusetts at 1463.  
23 After noting that “the harms associated with climate change are serious and well recognized” (Id.  
24 at 1455) the Supreme Court next suggested that an endangerment finding is inevitable, stating,  
25 “EPA can avoid taking further action only if it determines that greenhouse gases do not  
26 contribute to climate change or if it provides some reasonable explanation as to why it cannot or  
27 will not exercise its discretion to determine whether they do.” Id. at 1462.

1 EPA Defendants suggest that Johnson’s endangerment finding under Clean Air Act  
2 section 202, which applies to emissions from motor vehicles, will not enable plaintiffs’ requested  
3 relief from greenhouse gas emissions from power plants. While defendants do not challenge  
4 plaintiffs’ standing as victims of carbon emissions from motor vehicles defendants do suggest  
5 that Johnson’s section 202 endangerment finding will not affect power plants.

6 However, section 111 of the Clean Air Act, which applies to “stationary sources” such as  
7 power plants, employs the exact same “endangerment” language as section 202 and regulates  
8 emissions that “may reasonably be anticipated to endanger public health or welfare.” Therefore,  
9 once EPA begins regulating greenhouse gas emissions under section 202 it must necessarily  
10 began regulating the same emissions under section 111. See First Amen. Complaint, ¶¶ 60-64.

11 That same endangerment finding will result in carbon dioxide and other greenhouse gases  
12 being placed on a list of air pollutants that “endanger public health and welfare,” pursuant to  
13 section 108, and lead to simultaneous changes in the EPA’s National Ambient Air Quality  
14 Standards under Clean Air Act section 109, forcing states to develop State Implementation Plans  
15 for metropolitan areas to meet the new standard as required by section 110. ¶¶ 65-67.

16 An entirely new scheme of regulation of greenhouse gas sources ranging from cars to  
17 power plants results from EPA Defendants’ compliance with the Supreme Court’s directive in  
18 Massachusetts v. EPA and EPA compliance is plaintiffs’ requested relief.

### 19 **ARGUMENT**

20 EPA Defendants attack plaintiffs’ claims for relief under mandamus and the APA on  
21 three grounds: 1) that failure to comply with a Supreme Court decision is not a cognizable claim  
22 under the APA; 2) that even if a nondiscretionary statutory duty to act existed, plaintiffs’ APA  
23 claim fails; and 3) that this Court lacks jurisdiction over plaintiffs’ federal mandamus claim.

24 The court should note that defendants make no challenge to plaintiffs’ standing in this  
25 case as imminent victims of the immediate danger posed by defendants’ continued failure to  
26 regulate greenhouse gas emissions. See January 3, 2008 Stanford Report, “Study links carbon  
27 dioxide emissions to increased deaths,” attached as Ex. B of Decl. of Boyd. Indeed standing can  
28 be deemed to spring from the hazards caused by motor vehicle emissions discussed in

1 Massachusetts v. EPA as well as from the hazards caused by power plants that will be regulated  
2 under section 111 of the Clean Air Act as equally as motor vehicles under section 202 of the Act.

3 Plaintiffs begin their opposition to this motion by highlighting their first claim for relief  
4 under mandamus, thus responding to the arguments raised in section III of defendants' brief.

5 **I. Despite Defendants' Assertion To The Contrary, Mandamus Can Be Granted To**  
6 **Compel A Discretionary Act From An Official.**

7 Plaintiffs' first claim for relief against the EPA Defendants is for mandamus because  
8 currently the only act of defendants that can be compelled is discretionary.

9 Plaintiffs require relief under mandamus, 28 U.S.C. § 1361, because "Congress left to the  
10 discretion of the Administrator the threshold determination of which substances are hazardous air  
11 pollutants." Natural Resources Defense Council, Inc. v. Thomas, 689 F. Supp. 246, 254

12 (S.D.N.Y 1988). The court in NRDC v. Thomas continued that "a hazardous air pollutant is one  
13 which 'in the judgment of the Administrator causes, or contributes to, air pollution which may  
14 reasonably be anticipated to result in an increase in mortality or an increase in serious  
15 irreversible, or incapacitating reversible, illness.' 42 U.S.C. § 7412(a)(1) (emphasis added)." Id.

16 Mandamus provides that the district court shall have original jurisdiction over any action  
17 "to compel an officer or employee of the United States or any agency thereof to perform a duty  
18 owed to the plaintiff." 28 U.S.C. § 1361. EPA Defendants argue that the statutory phrase "a  
19 duty owed to the plaintiff" requires the presence of a "nondiscretionary" duty in order for  
20 plaintiff to state a claim for mandamus, citing Stang v. IRS, 788 F.2d 564, 565 (9th Cir. 1986).

21 Yet defendants' argument would operate to insulate defendant Johnson from judicial  
22 review of his indefinite disregard of the Supreme Court's directive in Massachusetts v. EPA  
23 simply because the first threshold finding of endangerment is defined by the courts as a  
24 "discretionary" duty. See NRDC v. Thomas at 254.

25 In advancing its rigid interpretation of the phrase "duty owed to the plaintiff" EPA  
26 Defendants ignore the long-standing rule that mandamus is appropriate even where an official's  
27 responsibility may be discretionary. See Carpet Linoleum and Resilient Tile Layers, Local  
28 Union No. 419 v. Brown, 656 F.2d 564, 566 (10th Cir. 1981).

1 In Carpet, the Court held that:

2 “it is the court's duty in a mandamus action to measure the allegations in the  
3 complaint against the statutory and constitutional framework to determine  
4 whether the particular official actions complained of fall within the scope of the  
5 discretion which Congress accorded the administrators.... In other words, even in  
6 an area generally left to agency discretion, there may well exist statutory or  
7 regulatory standards delimiting the scope or manner in which such discretion can  
8 be exercised. In these situations, mandamus will lie when the standards have been  
9 ignored or violated.” Carpet, 656 F.2d at 566.

10 The recent case of Huli v. Way, 393 F. Supp.2d, 266, 270 (S.D.N.Y 2005) highlights the  
11 contrast between the “orthodox” view that “mandamus relief is limited to compelling  
12 nondiscretionary actions” and the “reformed” view that “mandamus provides jurisdiction to  
13 review for abuse of discretion.”

14 Though defendants cite cases from 1986 and 1993 to stand for the proposition that an act  
15 must be “nondiscretionary” to support a mandamus action, the most recent cases from within the  
16 9th Circuit suggest that federal courts in California follow the “reformed” view. The Court in  
17 Blackman v. Taxdahl, 2007 WL 613862 (E.D. Cal. 2007) held that “even where an official's  
18 responsibilities are in some respects discretionary, mandamus is appropriate if ‘statutory or  
19 regulatory standards delimiting the scope or manner in which such discretion can be exercised ...  
20 have been ignored or violated.’ Carpet, Linoleum and resilient Tile Layers, Local Union No.  
21 419 v. Brown, 656 F.2d 564, 566 (10th Cir.1981) (citation omitted); see, also, Work v. United  
22 States ex rel Rives, 267 U.S. 175, 177, 45 S.Ct. 252, 253 91925, 69 L.Ed. 561) (mandamus is  
23 appropriate if an official transgresses the limits of her discretion).” Blackman at 3.

24 The Court in Reeves v. Shalala, 1998 WL 289312 (N.D. Cal. 1998) wrote “even if the  
25 duty is in some respects discretionary, mandamus is appropriate if statutory standards limiting  
26 the scope of discretion are ignored or violated. See Silveyra v. Moschorak, 989 F.2d 1012, 1014-  
27 15 (9th Cir.1992).” Reeves at 7.

28 Mandamus was also a proper claim to review discretionary acts in Carlson v. Schlesinger,  
364 F. Supp. 626, 631 fn. 10 (D.C.D.C. 1973) (“mere categorization of a duty as discretionary  
does not, in and of itself foreclose judicial inquiry”) and Davis Associates, Inc. v. Secretary,  
Dept. of Housing and Urban Development, 498 F.2d 385, 389 fn. 5 (C.A.N.H. 1974) (“even in

1 an area generally left to agency discretion there may well exist statutory or regulatory standards  
2 delimiting scope or manner in which such discretion can be exercised, and mandamus will lie in  
3 such situations when standards have been ignored or violated”).

4 Perhaps the key element in mandamus review of a discretionary duty is laid out in  
5 Abbruzzese v. Berzak, 412 F. Supp. 201,203 (D.C.N.J. 1976), and has been followed by  
6 plaintiffs in the drafting of their complaint: “mandamus...is a proper remedy to compel an  
7 official to act, even where the performance of the act involves discretion, so long as it does not  
8 direct him how to exercise it.”

9 Plaintiffs have therefore not prayed for an “endangerment finding” itself, but merely for  
10 EPA Defendants to follow the Supreme Court’s directive in Massachusetts v. EPA to “ground  
11 [their] reasons for action or inaction in the statute.” Massachusetts, 127 S. Ct. at 1463. That  
12 Johnson’s endangerment finding will seemingly result from EPA Defendants’ compelled action  
13 is but an ancillary benefit to plaintiffs.

14 Another case from the 1970’s involving Natural Resources Defense Council, Natural  
15 Resources Defense Council, Inc. v. Train, 545 F.3d 320 (C.A.N.Y 1976) contained a very similar  
16 prayer for relief and compelled action by the EPA Administrator, at that time in regard to lead  
17 emissions. The court ruled that once the EPA Administrator determines that a particular  
18 pollutant has an adverse effect on public health or welfare and originates from one or more  
19 numerous or diverse mobile or stationary sources then “provisions of Clean Air Act  
20 Amendments of 1970 are to be automatically invoked, and promulgation of national air quality  
21 standards and implementation thereof by states within a limited, fixed time schedule becomes  
22 mandatory.” Id. at 325.

23 The Court is similarly asked to grant plaintiffs’ relief in mandamus and simultaneously  
24 generate the same wealth of protective regulations for carbon dioxide and greenhouse gases that  
25 were prompted by the NRDC v. Train ruling in regard to lead. See id. at 328 (stating “the  
26 Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging. Once  
27 the conditions of [Clean Air Act] ss 108(a) (1)(A) and (B) have been met, the listing of lead and  
28 the issuance of air quality standards for lead become mandatory.”)

1 Plaintiffs should be permitted to have their claim for mandamus heard on the merits, to  
2 determine whether standards governing Johnson’s discretion to deem greenhouse gases  
3 hazardous “have been ignored or violated” as those terms are used in the Carpet case. See  
4 Carpet, 656 F.2d at 566.

5 Because the Court in ruling on this motion must accept all factual allegations in the  
6 complaint as true, and must construe them and draw all reasonable inferences from them in favor  
7 of the nonmoving party (Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336-337-38 (9th Cir. 1996)), the  
8 Court must accept plaintiffs’ allegation that EPA Defendants’ failure to respond to the Supreme  
9 Court is a failure to “perform a duty owed to plaintiffs.” First Amen. Complaint ¶¶ 29, 92.

10 Defendants’ assertion that plaintiffs have an adequate remedy in the citizen suit provision  
11 of the Clean Air Act (Mem. In Support of Mot. to Dismiss, p. 8, ln. 22-p. 9, ln. 5) is misguided  
12 because citizen suits are authorized only to challenge the “failure of the Administrator to perform  
13 any act or duty under this chapter which is not discretionary.” 42 U.S.C. § 7604(a)(2) (emphasis  
14 added).

15 Johnson’s inaction on the subject of greenhouse gas emissions has been shielded by this  
16 nuanced “loophole” in the Clean Air Act, leaving mandamus as the only possible relief available  
17 to force Johnson to make a discretionary decision with respect to the endangerment posed by  
18 greenhouse gas emissions.

19 **II. EPA Defendants Ignore Their Statutory Duty To Regulate Emissions That “May Be**  
20 **Reasonably Anticipated To Endanger Public Health Or Welfare.”**

21 Plaintiffs’ second claim for relief under the APA flows from the Court’s granting of relief  
22 under plaintiffs’ first claim for mandamus. As discussed above, Johnson’s duty to declare air  
23 pollutants “hazardous” is discretionary and his decision regarding whether or not greenhouse  
24 gases endanger public health must be prompted under plaintiffs’ mandamus claim.

25 However, defendant Johnson’s duty “to list pollutants under section 108 [of the Clean Air  
26 Act] is mandatory, once it is determined by the Administrator that a pollutant ‘has an adverse  
27 effect on public health or welfare’ and comes from the requisite numerous or diverse sources.”  
28 Natural Resources Defense Council, Inc. v. Train, 411 F. Supp 864, 867 (D.C.N.Y. 1976).

1 Defendants argue in section I of their legal argument that the Supreme Court’s directive  
2 in Massachusetts v. EPA does not meet the requirement that an APA claim must be based on a  
3 duty owed by statute. Mem. in Support of Mot. To Dismiss, p. 5, ln. 14-15. Defendants are  
4 correct that under the APA, “for a claim of unreasonably delay to survive, the agency must have  
5 a statutory duty in the first place.” San Francisco BayKeeper v. Whitman, 297 F.3d 877, 885  
6 (9th Cir. 2002).

7 Once Johnson makes his initial endangerment finding as requested in the First Amended  
8 Complaint, EPA Defendants then have a statutory duty under several sections of the Clean Air  
9 Act (sections 108-110, 111, 202) to regulate sources of emissions “which may reasonably be  
10 anticipated to endanger public health or welfare.” 42 U.S.C. sections 108-110, 111, 202.

11 Defendants’ citation to Madison-Hughes v. Shalala, 80 F.3d 1121 (6th Cir. 1996) is  
12 therefore misplaced. EPA Defendants’ statutory duty to regulate sources of emissions that  
13 “endanger” under the Clean Air Act constitutes a “mandatory legal requirement” as the term is  
14 used in Madison-Hughes, 80 F.3d at 1125. Plaintiffs first require relief under their claim for  
15 mandamus to vest Johnson with the nondiscretionary duty to regulate greenhouse gas emissions  
16 once these pollutants are deemed to endanger.

17 Subsequently, the EPA Defendants must be ordered to comply with their statutory duty  
18 under the Clean Air Act sections 202, 111, and 108-110 to regulate greenhouse gas emissions  
19 from cars and power plants, and to establish new National Ambient Air Quality Standards. See  
20 First Amen. Complaint ¶¶ 60-67.

21 **III. Having Demonstrated A Statutory Duty To Act, Plaintiffs Prevail Over Defendants’**  
22 **Claim Of Sovereign Immunity Because No Adequate Remedies are Elsewhere**  
23 **Available.**

24 Defendants in Part II of their legal argument suggest that even if EPA Defendants are  
25 held to be under a nondiscretionary duty to act by virtue of plaintiffs’ claim for mandamus,  
26 plaintiffs’ claims are invalidated by the rule that plaintiffs’ APA claim must instead be brought  
27 pursuant to the Clean Air Act. Mem. in Support of Mot. to Dismiss, p. 6, ln. 25-p. 7, ln. 14.

28

1 This argument assumes that the Clean Air Act is an “adequate remedy” that precludes  
2 plaintiffs’ APA claim by virtue of 5 U.S.C. § 704. As discussed above, however, Johnson’s  
3 decision to declare greenhouse gas emissions hazardous is discretionary and renders unavailable  
4 any citizen suit, in any venue, under the Clean Air Act, 42 U.S.C. § 7604(a).

5 Plaintiffs admittedly require their relief under mandamus to finally charge Johnson with a  
6 nondiscretionary duty to move his agency, the EPA, to begin regulating greenhouse gas  
7 emissions from sources such as motor vehicles and power plants, assuming that the Supreme  
8 Court is correct and an endangerment finding is inevitable.

9 Yet relief under plaintiffs’ first claim for mandamus simultaneously warrants plaintiffs’  
10 relief under their APA claim. The Court will be able to link plaintiff’s relief under the APA with  
11 Johnson’s compelled order to ground his action or inaction in the Clean Air Act. Johnson’s  
12 decision that greenhouse gas emissions “endanger public health and welfare” necessarily creates  
13 plaintiffs’ relief under the APA for Johnson’s nondiscretionary duty to promulgate greenhouse  
14 gas regulations from a broad range of sources, as described herein.

15 **CONCLUSION**

16 EPA Defendants’ failure to act is prolonged by the fact that defendant Johnson’s  
17 discretionary power to determine which substances are hazardous renders him immune from a  
18 citizen suit under the Clean Air Act. As discussed above, relief under the Administrative  
19 Procedure Act is available as soon as the Court places Johnson and the EPA under a  
20 nondiscretionary duty to promulgate regulations for greenhouse gases that have been deemed to  
21 “endanger health and welfare” as that phrase is used throughout the Clean Air Act, 42 U.S.C.  
22 7401 et. seq.

23 Until Johnson’s endangerment finding, mandamus provides the only claim for relief for  
24 these plaintiffs, or for any plaintiffs anywhere in the country. The 9th Circuit allows plaintiffs to  
25 state a claim for mandamus because Johnson has ignored his duty to determine hazardous air  
26 pollutants, in defiance of the Supreme Court, despite the fact that defendant’s stated duty is  
27 discretionary.

28 //

1 At a minimum plaintiffs must be allowed to pursue their mandamus claim against EPA  
2 Defendants because plaintiffs' inability to access the right to a citizen suit under the Clean Air  
3 Act prevents any judicial review of Johnson and the EPA for their failure to act swiftly to protect  
4 our people and our environment from the hazards of global warming caused by greenhouse gas  
5 emissions.

6  
7 Dated: February 29, 2007


Respectfully submitted,

BRIGHTLINE DEFENSE PROJECT

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9 

10 Joshua Arce, Esq.  
11 Attorney for Plaintiffs  
12 San Francisco Chapter of the A. Philip  
13 Randolph Institute, Californians for  
14 Renewable Energy, Lynne Brown, Regina  
15 Hollins


CALIFORNIANS FOR RENEWABLE  
ENERGY

16  
17   
18 Attorney for Plaintiff  
19 Californians for Renewable Energy

**CERTIFICATE OF SERVICE**

On February 29, 2008, a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS was served electronically via the Court's e-filing system to Counsel of Record.

BRIGHTLINE DEFENSE PROJECT

  
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Joshua Arce, Esq.

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