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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Defendants.

Case No.: 6:15-cv-01517-TC

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY PENDING RESOLUTION OF OBJECTIONS

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INTRODUCTION

Plaintiffs hereby oppose Defendants' Motion to Stay Discovery Pending Resolution of Objections, ECF No. 216 ("Defendants' Stay Motion"). Defendants move, yet again, to stay all discovery, advancing the same recycled contention that Plaintiffs' case should be dismissed. Judge Coffin's Order denying Defendants' motion for a protective order and stay of discovery rejected all of Defendants' arguments, finding that "defendants' motion for a protective order and stay is simply a recasting of their position that the plaintiffs' claims should all be dismissed and the District Court should revisit its previous ruling to the contrary." ECF No. 212 at 2. Defendant's Stay Motion presents no new evidence to justify a stay of all discovery and is another attempt to delay and avoid trial. Defendants continue to rely on statements from the Ninth Circuit to justify their motion for a stay of all discovery, but the Ninth Circuit did not advise Defendants to seek to stay *all* discovery when it said that Defendants "may seek protective orders, as appropriate, under Federal Rule of Civil Procedure 26(c)." *In re United States*, 884 F.3d 830, 835 (9th Cir. 2018). As the Ninth Circuit stated:

> **If a specific discovery dispute arises**, the defendants can challenge that **specific discovery request** on the basis of privilege or relevance. *See McDaniel v. U.S. Dist. Ct.*, 127 F.3d 886, 888–89 (9th Cir. 1997) (per curiam) (holding that mandamus "is not the State's only adequate means of relief" from burdensome discovery because, "as discovery proceeds, the State is not foreclosed from making routine challenges to specific discovery requests on the basis of privilege or relevance"). In addition, the defendants can seek protective orders, as appropriate, under Federal Rule of Civil Procedure 26(c). . . .
>
> The defendants will have ample remedies if they believe **a specific discovery request** from the plaintiffs is too broad or burdensome.

In re United States, 884 F.3d at 835 (emphases added). Defendants challenge nothing on the basis of privilege or relevance grounds.

The parties should proceed with full discovery and pre-trial preparations, in accordance with the Court's existing scheduling orders while the District Court reviews Judge Coffin's Order.

STANDARD OF REVIEW

There is no automatic or blanket stay pending resolution of an objection to a discovery order. *See NML Capital, Ltd. v. Republic of Argentina*, No. 2:14-CV-492-RFB-VCF, 2015 WL 3489684, at *3 (D. Nev. June 3, 2015). Rather, the moving party must show: "(1) it is likely it will succeed on the merits of the appeal, (2) it will suffer irreparable injury in the absence of a stay, (3) other parties will not be substantially injured by a stay, and (4) the stay will not harm the public interest." *Id.* at 3. Relatedly, the Ninth Circuit, in setting out the standard for stays of a case pending appeal, has stated that there are two interrelated tests. "At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* (citations omitted).

To obtain a protective order, Defendants are required to show "good cause" by proffering evidence that they will be subject to "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Defendants' burden of showing why any and all discovery should be prohibited is a heavy one requiring a strong showing. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

ARGUMENT[1]

I. Defendants Have Not Shown They Are Likely To Prevail On The Merits.

Defendants restate their unsuccessful arguments raised previously before Magistrate Judge Coffin, ECF. No. 196, and fail to demonstrate that they are likely to succeed on the merits of their objections to Magistrate Judge Coffin's Order under the clearly erroneous standard of review by the District Court. As an initial matter, the District Court reviews Magistrate Judge Coffin's Order under a highly deferential standard of review. Under the Magistrate Act, 28 U.S.C. § 636(b)(1), upon a party's objection, "a magistrate's decision on a nondispositive issue will be reviewed by the district judge under the clearly erroneous [or contrary to law] standard." *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991) (citing *United States v. Raddatz*, 447 U.S. 667, 673 (1980)); *see also* Fed. R. Civ. P. 72(a). Discovery motions are nondispositive. *Trustees of N. Nevada Operating Engineers Health & Welfare, Tr. Fund v. Mach 4 Const., LLC*, No. 3:08CV00578LRH(RAM), 2009 WL 1940087, at *1 (D. Nev. July 7, 2009) (citing *Rockwell Int'l, Inc. v. Pos–A–Traction Indus. Inc.,* 712 F.2d 1324, 1325 (9th Cir.1983) (per curiam)). As such, the "deferential 'clearly erroneous or contrary to law standard'" governs this Court's review of Judge Coffin's Order. *Shin v. United States*, No. 15-00377 SOM-RLP, 2016 WL 4385837, at * 12 (D. Haw. Apr. 15, 2016). Clear error is only present when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "[A] magistrate judge's decision is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Morgal v. Maricopa Cnty. Bd. of*

[1] Plaintiffs incorporate by reference the arguments and supporting materials from Plaintiffs' Response in Opposition for Defendants' Motion for a Protective Order and for a Stay of All Discovery, including the Declaration of Julia A. Olson. ECF No. 208, 209, 209-1, and 209-2.

Sup'rs, 284 F.R.D. 452, 459 (D. Ariz. 2012). Defendants have not shown that Judge Coffin's Order was clearly erroneous or contrary to law and thus are not likely to succeed on the merits of their motion.

Defendants' refrain is that Plaintiffs should have pled their case as one under the Administrative Procedure Act ("APA") and should thereby be bound by the discovery rules in an APA case. However, as stated in Plaintiffs' Response in Opposition to Defendants' Motion for a Protective Order and for a Stay of All Discovery, ECF No. 208 at 5-7:

> [T]his is not an APA case and the APA does not govern here. This Court, as affirmed by the Ninth Circuit under the "no clear error" standard of review, already held that Plaintiffs' Fifth Amendment claims can proceed to trial as pled under 28 U.S.C. § 1331. In the context of Plaintiffs' claim under the Federal Public Trust Doctrine, the Court ruled, "it is the Fifth Amendment that provides the right of action." Nov. 10, 2016 Order Denying Defendants' Motion to Dismiss, ECF No. 83 at 51. This Court also specifically referenced *Davis v. Passman* and *Carlson v. Green* in its concluding analysis, holding:
>
> > Plaintiffs' claims rest "directly on the Due Process Clause of the Fifth Amendment." *Davis,* 442 U.S. at 243 (1979); *see also Carlson v. Green,* 446 U.S. 14, 18 (1980) ("[T]he victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.") They may, therefore, be asserted in federal court. . . .
> >
> > Throughout their objections, defendants and intervenors attempt to subject a lawsuit alleging constitutional injuries to case law governing statutory and common-law environmental claims. They are correct that plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws. But that argument misses the point. This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions - whether or not they violate any specific statutory duty - have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty.
>
> *Id.* at 52-53. Moreover, Ninth Circuit precedent is also dispositive on this issue. *See also Navajo Nation v. Dept. of the Interior,* 876 F.3d 1144, 1170 (9th Cir. 2017) ("Claims not grounded in the APA, like the constitutional claims in Presbyterian Church and VCS I, "do[ ] not depend on the cause of action found in

> the first sentence of § 702" and thus "§ 704's limitation does not apply to them.") (citation omitted); *Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518, 524 (9th Cir. 1989) (28 U.S.C. § 1331 gives the court subject matter jurisdiction to hear "claims aris[ing] out of the Constitution"); *see also Franklin v. Massachusetts,* 505 U.S. 788, 796-801, 803-806 (1992) (In a case "rais[ing] claims under both the APA and the Constitution," the Court reached the merits of plaintiffs' constitutional claims separately from its analysis of the plaintiffs' APA claims, which the Court found were not viable for lack of "final agency action.").
>
> Notwithstanding Defendant's efforts to repackage the same basic legal argument in a motion with a new title, they already made these arguments in this Court and in their Writ Petition. The substance of Defendants' arguments on the issue of whether the APA provides the exclusive right of action has already been decided by this Court's rulings that Plaintiffs' non-APA constitutional claims are valid, and the Ninth Circuit found no clear error in allowing Plaintiffs to proceed with discovery toward trial.

See also ECF No. 208 at 8-15 (citing to excerpts from the pleadings, oral arguments, case management conferences, and court orders to further illustrate the point that the APA issue has already been decided by this Court).

Defendants are equally unlikely to succeed on the merits of their objections that discovery writ large, not any specific discovery requests,[2] would conflict with the decision-making procedures set forth in the APA. While Defendants' arguments on pages 5-6 of their Stay Motion are dependent on their false perception that this is an APA case, and therefore fail on that basis, they are also without merit. As stated in Plaintiffs' Response in Opposition to Defendants' Motion for a Protective Order and For a Stay of All Discovery, ECF No. 208 at 15:

> Defendants seek a protective order over "discovery envisioned by Plaintiffs," without citing to a single discovery request that is objectionable, let alone presenting actual evidence of undue burden. If Plaintiffs seek discovery from Defendants that is subject to any privilege or other objection, Defendants may object to the discovery on that basis.

[2] Plaintiffs note that Defendants have filed a motion for a protective order as to specific discovery requests, thereby rendering this global protective order duplicative and unnecessary. ECF 217.

Defendants' objection that the separation of powers doctrine bars all discovery is also unlikely to succeed on the merits. As stated in Plaintiffs' Response in Opposition to Defendants' Motion for a Protective Order and For a Stay of All Discovery, ECF No. 208 at 16-18:

> Defendants have not established *any* undue burden to the separation of powers in allowing discovery to proceed. Plaintiffs are not conducting and will not conduct any discovery targeted at the President.[3] Further, as this Court has recognized, it is premature to determine whether the Court will face any difficulties in fashioning relief so as to avoid separation of powers concerns. ECF No. 83 at 17 ("[S]peculation about the difficulty of crafting a remedy could not support dismissal at this early stage.") (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962); *see also*, *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.") (citing *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 16 (1971)). Finally, in reviewing Defendants' Petition for Writ of Mandamus, the Ninth Circuit has already rejected Defendants' argument that they would be prejudiced by engaging in discovery: "To the extent that the defendants are arguing that executive branch officials and agencies in general should not be burdened by this lawsuit, Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them." *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018).
>
> Defendants mischaracterize Plaintiffs' request for relief by suggesting that Plaintiffs seek a remedy "*without regard to the agencies' existing statutory authorities.*" Defs.' Mot. at 17. Plaintiffs are well aware of the agency defendants' existing statutory authorities and the systemic, aggregate manner in which they have used their authorities to infringe the rights of these young Plaintiffs and, conversely, how such authorities could be lawfully used to remediate the harm. As Plaintiffs have long argued, Defendants have discretion regarding how they come into constitutional compliance, within their constitutional and statutory authority, but whether they are infringing fundamental rights and whether they

[3] The President is, and historically has been, a named party in suit after suit challenging official Presidential actions on statutory and constitutional grounds, even if no relief is ultimately ordered. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788 (1992) ("[T]he President's actions may still be reviewed for constitutionality" in case declining to issue relief against the President); *Clinton v. City of New York*, 524 U.S. 417 (1998) (Affirming declaratory relief that President Clinton's use of line-item veto was unconstitutional); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (Upholding injunctive relief in constitutional challenge to official Presidential action); *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464316, at *1 (W.D. Wash. Apr. 13, 2018) (Denying dismissal of President from case challenging constitutionality of transgender military ban).

> must come into compliance are issues that must be tried beginning October 29, 2018 with a fully developed factual record.
>
> There is no precedent or supporting rationale for Defendants' contention that *all* discovery in a Fifth Amendment substantive due process case, which has made it past a motion to dismiss, is barred due to the Opinion Clause, the Recommendations Clause, or some generalized argument about separation of powers, which seems to hinge largely on Defendants' speculation about the remedy that the Court might issue, which is a fact-intensive inquiry. Defendants have failed to come forward with any evidence that having to respond to narrow discovery requests somehow threatens the opinions, recommendations, or other work of the federal government or the President.

Finally, Defendants are not likely to succeed on the merits simply because they have two motions pending before this Court. Defendants do not make the requisite showing that their Rule 12(c) Motion or Motion for Summary Judgement are obviously meritorious. As stated in Plaintiffs' Response in Opposition to Defendants' Motion for a Protective Order and For a Stay of All Discovery, ECF No. 208 at 19-20:

> [A] court may "stay discovery when it is *convinced* that the plaintiff will be unable to state a claim for relief." *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (emphasis added). Many district courts applying this "convinced" standard have concluded that it demands even "more than an apparently meritorious" dispositive motion. *See, e.g., Ministerio Roca Solida v. United States Dep't of Fish & Wildlife*, 288 F.R.D. 500, 502 (D. Nev. 2013); *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989); *Trzaska v. Int'l Game Tech.*, No. 2:10-CV-02268-JCM, 2011 WL 1233298, at *3 (D. Nev. Mar. 29, 2011) ("Generally, there must be *no question* in the court's mind that the dispositive motion will prevail, and therefore, discovery is a waste of effort." (emphasis in original)). Discovery stays have been ordered when a dispositive motion is obviously meritorious, such as "where the complaint was utterly frivolous, or filed merely in order to conduct a 'fishing expedition' or for settlement value." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990).
>
> Given the Ninth Circuit's requirement that the dispositive motion be obviously meritorious, Defendants would not be entitled to a stay *even if* the relative harms tipped in their favor, which they do not. In surviving Defendants' motion to dismiss and petition for writ of mandamus, Plaintiffs' First Amended Complaint is clearly not frivolous. Thus, Defendants are not entitled to their requested discovery stay. Indeed, "[t]he intention of a party to move for judgment on the

> pleadings is not ordinarily sufficient to justify a stay of discovery." *Id.* (citing 4 J. Moore, *Federal Practice* § 26.70[2] (2d ed. 1989).

Whether or not the District Court certifies its order on Defendants' motion for a protective order and stay is speculative, and it is even more speculative as to whether the Ninth Circuit would accept the appeal. Moreover, regardless of what happens on any hypothetical interlocutory appeal, that future decision has no bearing on the standard of review before this Court as it reviews Defendants' objections to Judge Coffin's Order.

II. Defendants Will Not Suffer Any Irreparable Injury But Plaintiffs And The Public Interest Will Be Substantially Injured By A Stay.

Taking the same position that was rejected by the Ninth Circuit, Defendants again present no evidence of how responding to discovery would constitute an "irreparable injury," and instead state vaguely that "responding to the unlawful discovery . . . will waste public resources." Defs. Mot. at 9. Defendants' failure to present ***any*** evidence is fatal to their Stay Motion. Responding to discovery is a normal part of litigation and does not constitute irreparable harm. *See Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (citing *Petroleum Expl., Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938)); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991) (defendant would not be irreparably harmed if forced to participate in discovery pending appeal). Moreover, Defendants again undercut their argument about the undue burden of Plaintiffs' discovery by asserting that "[o]nly modest discovery has occurred to date." Def. Mot. at 9. By Plaintiffs' standard, a significant amount of discovery they intend to conduct has already been propounded, and if that is "modest" in Defendants' view, then they surely will not suffer "irreparable injury" in the absence of a stay. Defendants have proffered no evidence of irreparable injury absent a stay because none exists.

Contrary to Defendants' disingenuous claim that a stay of discovery "will not prejudice Plaintiffs," Defs.' Mot. at 9, Plaintiffs, and the public interest, would be substantially injured by any additional delay in this case.[4] As stated in Plaintiffs' Response in Opposition to Defendants' Motion for a Protective Order and For a Stay of All Discovery, ECF No. 208 at 22-24:

> A stay of discovery would further delay trial and exacerbate the dangerous climate emergency that is already harming Plaintiffs. Given these dangerous conditions, Dr. Harold R. Wanless, a highly-respected geologist and climate expert, has concluded in his declaration submitted with Plaintiffs' Answer to Defendants' Petition for Writ of Mandamus in the Ninth Circuit that it is reasonably scientifically certain that any stay would worsen Plaintiffs' ongoing injuries. Declaration of Dr. Harold Wanless, ¶¶ 55-60, Dkt. Entry 14-3 in *In re United States*, No. 17-71692 (9th Cir.) (submitted August 28, 2018) . . . . As explained by Dr. Wanless, given the urgency of the climate emergency, even a short delay in resolving Plaintiffs' claims causes them harm. *Id.* at ¶¶ 1-5, 18-19, 22, 25-63. The climate change harms Plaintiffs are suffering are intensifying as greenhouse gas emissions in the United States continue unabated. For example, atmospheric carbon dioxide temperatures exceeded 410 ppm for the entire month of April 2018, a phenomenon never seen before in recorded history.[5] The town of Hanalei on the island of Kauai, Hawaii, where Plaintiff Journey resides, recorded 49.69 inches of rainfall in 24 hours during April 15-16, 2018. Once verified by officials, this will be the new United States record for rainfall in a 24-hour period, shattering the record of 43 inches that fell in Alvin, Texas in July, 1979.[6] The climate change impacts being felt in Alaska, where Plaintiff Nathan lives, are similarly unprecedented. In April 2018, Arctic sea ice extent was the second lowest on record,[7] with the Bering Sea losing a third of its ice in just eight

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[4] Plaintiffs find it remarkable that Defendants make this claim after having reviewed seventeen expert reports describing, in great detail, the harm currently being inflicted upon Plaintiffs in this case.

[5] Scripps Institution of Oceanography, Daily Measurements, Measurement Notes, Carbon Dioxide in the Atmosphere Hits Record High Monthly Average, https://scripps.ucsd.edu/programs/keelingcurve/2018/05/02/carbon-dioxide-in-the-atmosphere-hits-record-high-monthly-average/ (last visited May 16, 2018).

[6] The Weather Channel, Kauai, Hawaii, May Have Set New U.S. Rainfall Record, https://weather.com/news/weather/news/2018-04-26-kauai-hawaii-new-us-rainfall-record (last visited May 16, 2018).

[7] National Snow & Ice Data Center, Arctic Sea Ice News & Analysis, *Arctic winter warms up to a low summer ice season* (May 3, 2018), https://nsidc.org/arcticseaicenews/2018/05/arctic-winter-warms-up-to-a-low-summer-ice-season/

> days in February 2018.[8] The losses are so extreme that the National Weather Service Climate Science and Services Manager said: "As a scientist it's really shocking to see some of this and try to wrap your mind around what's happening and the pace that it's happening."[9] Globally, the impacts are similarly severe, with temperatures in Nawabshah, Pakistan reaching 122.4 degrees in April 2018, the hottest temperature "in modern records for any location on Earth."[10]
> . . .
>
> Moreover, any discovery delay would undermine Plaintiffs' legal position by decreasing the feasibility of their proposed remedy. Nearly one-fifth of the atmospheric CO_2 released during any stay would still be in the atmosphere five hundred years from now. Declaration of Dr. James E. Hansen, ECF No. 7-1, ¶ 28. If injunctive relief is delayed much beyond 2020, Plaintiffs have alleged that it may be impossible to reach 350 ppm, the upper safe limit of CO_2 levels this century, until 2500 or later. Am. Compl. ¶ 258. Therefore, every month of delay materially decreases the likelihood that Defendants will be able to reduce emissions at a pace consistent with a 350 ppm pathway.

Today, June 7, 2018, Scripps Institution of Oceanography reported that peak carbon dioxide levels surpassed 411 parts per million in May for the first time ever and that atmospheric CO_2 levels are rising at a faster pace than ever.[11] Any purported harm to Defendants in

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[8] Sabrina Shankman, Alaska's Bering Sea Lost a Third of its Ice in Just 8 Days, Inside Climate News (Feb. 17, 2018), https://insideclimatenews.org/news/17022018/arctic-sea-ice-record-low-extent-alaska-bering-hunting-whales.

[9] *Id.*

[10] Maggie Astor, *Hottest April Day Ever Was Probably Monday in Pakistan: A Record 122.4°F*, N.Y. Times (May 4, 2018), https://www.nytimes.com/2018/05/04/world/asia/pakistan-heat-record.html.

[11] Scripps Institution of Oceanography, *Another Climate Milestone Falls at Mauna Loa Observatory* (June 7, 2018), https://scripps.ucsd.edu/news/another-climate-milestone-falls-mauna-loa-observatory, stating:

> "Carbon dioxide levels measured at NOAA's Mauna Loa Atmospheric Baseline Observatory exceeded 411 parts per million in May, the highest monthly average ever recorded, scientists from Scripps Institution of Oceanography at the University of California San Diego and NOAA announced today.
>
> Primarily driven by fossil fuel combustion, increasing carbon dioxide levels are tracked closely by the world's scientists as a measure of how human activity is changing the planet's atmosphere. This year, the average for May peaked at 411.31 ppm, according to Scripps researchers. NOAA's reading was 411.25 for the month.
>
> Analysis of NOAA measurements show the growth rate of CO_2 in the atmosphere is accelerating. It averaged about 1.6 ppm per year in the 1980s and

responding to "modest" discovery while this Court addresses their objections to Judge Coffin's order, does not come close to arising to the scale of life-long harm Plaintiffs face to their fundamental constitutional rights with the increasing pace each month of locking in climate destruction.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Stay Discovery Pending Resolution of Objections.

DATED June 07, 2018.

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1.5 ppm per year in the 1990s, but increased to 2.2 ppm per year during the last decade.

From 2016 to 2017, the global CO_2 average increased by 2.3 ppm — the sixth consecutive year-over-year increase greater than 2 ppm. Prior to 2012, back-to-back increases of 2 ppm or greater had occurred only twice."

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