ORAL ARGUMENT REMOVED FROM CALENDAR

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

State of North Dakota, Petitioners, **v.** **United States Environmental Protection Agency,** Respondent.	Case No. 15-1381 (and consolidated cases)

On Petition for Review of Final Action of the
United States Environmental Protection Agency

OPPOSITION OF STATE INTERVENORS
TO EPA'S MOTION TO HOLD CASES IN ABEYANCE

The undersigned Respondent-Intervenor States and Municipalities ("State Intervenors") oppose the U.S. Environmental Protection Agency's (EPA) March 28, 2017, Motion to Hold Case in Abeyance. Delaying resolution of Petitioners' challenges to EPA's Clean Air Act section 111(b) rule limiting carbon dioxide (CO_2) emissions from new, modified, and reconstructed power plants ("the Rule") would be inefficient and contrary to the public interest.

The Rule represents an important step in the battle against climate change—a step that State Intervenors have sought for years, and which EPA,

following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), correctly determined is required by the Clean Air Act. The emissions limits at the heart of the Rule remain in force unless and until EPA lawfully changes them. Although EPA says it will be reviewing the Rule, any lawful review will take considerable time. And the extent to which that process will result in changes (if any) to the Rule cannot be predetermined.

Accordingly, the Petitioners' claims are neither moot nor unripe. Even if EPA eventually does repeal and replace the Rule, at least some of the issues Petitioners raise in their briefs will return to this Court. Resolution of these issues—which are fully briefed, and, in some cases, submitted—will remove a cloud of uncertainty from the Rule and provide clarity to EPA should it in fact seek to revise the Rule in the future. To the extent any question exists about EPA's continuing commitment to defend the Rule, State Intervenors stand ready to provide a robust defense of the Rule.

BACKGROUND ON CO_2 EMISSIONS STANDARDS

State Intervenors have litigated for years to compel EPA to fulfill its Clean Air Act duty to limit CO_2 emissions from power plants, which it is now finally doing. Ten years ago, the Supreme Court ruled that EPA was obliged to regulate greenhouse gas emissions if it found that they endanger

public health or welfare. *Massachusetts v. EPA*, 549 U.S. at 528-29, 533. In response, over seven years ago, EPA found that greenhouse gases, including CO_2, endanger public health and welfare in a number of ways.[1] Six years ago, in another case brought by several State Intervenors, the Supreme Court held that the Clean Air Act "directly" authorizes EPA to regulate CO_2 from power plants under section 111. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"). Section 111(b) directs EPA to establish "standards of performance" for air pollutants emitted from new sources, and this includes CO_2 emitted by power plants. *See id.* Thus, EPA is required to set performance standards for those emissions under section 111. *See* 42 U.S.C. § 7411(b); *see also AEP*, 564 U.S. at 424 (discussing listing sources and establishing standards under section 111).

EPA proposed CO_2 performance standards for new fossil-fuel power plants in 2012, but did not finalize that rule. In 2014, EPA withdrew the

[1] Specifically, EPA found that greenhouse gas emissions cause more intense, frequent, and long-lasting heat waves; worse smog in cities; longer and more severe droughts; more intense storms, hurricanes, and floods; the spread of disease; and a rise in sea levels. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497, 66,524-25, 66,532-33 (Dec. 15, 2009). This Court rejected a legal challenge to this Endangerment Finding. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 120 (D.C. Cir. 2012), *rev'd, in part, on other grounds*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

previously proposed standards and proposed new CO_2 performance standards for new, modified, and reconstructed power plants. 79 Fed. Reg. 1430 (Jan. 8, 2014) (new sources); 79 Fed. Reg. 34,960 (June 18, 2014) (modified and reconstructed sources). After an extensive notice-and-comment process, the Rule at issue in this case was published on October 23, 2015. The Rule sets numerical limits on CO_2 emissions from fossil-fuel fired power plants newly constructed after January 8, 2014, or modified or reconstructed after June 18, 2014. "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,510.[2] The Rule is in effect and continues to apply to this source category.

MARCH 28, 2017 EXECUTIVE ORDER

While the Rule remains in effect, EPA plans to review it in light of a March 28, 2017 Executive Order. The Executive Order directs the agency to review the Rule "for consistency with" five policies to promote "energy independence and economic growth." Mot., attach. 1, § 1 ("the Executive

[2] The final standards were less stringent in some respects than those EPA had originally proposed and that many commenters, including many State Intervenors, had supported. *See* Comment of New York, Connecticut, Delaware, Maine, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Washington, District of Columbia, and New York City, docket no. EPA-HQ-OAR-2013-0495-9660, p. 7-10.

Order"). According to EPA, the Executive Order "establish[es] a national policy in favor of energy independence, economic growth, and the rule of law," and its purpose "is to facilitate the development of U.S. energy resources." Mot., attach. 2, p. 2. In addition, EPA says it "will review whether this Rule or alternative approaches appropriately maintain the diversity of reliable energy resources and encourage the production of domestic energy sources to achieve energy independence and security," *id.* p. 4, and assess the current Rule and alternative approaches "to determine whether they will provide benefits that substantially exceed their costs," *id.* If EPA determines that the Rule is inconsistent with these policies, then it will "publish for notice and comment proposed rules suspending, revising, or rescinding" the Rule. Executive Order § 4(a).

ARGUMENT

EPA fails to squarely address why this Court should hold this case in abeyance. Instead, the agency suggests the Court should treat the Rule as if EPA has already repealed and replaced it. EPA attempts to create the impression that the review called for by the Executive Order renders the Rule inoperative, such that the issues in the case are now moot. EPA Mot. 6.

This is wrong. Neither the Rule nor EPA's duty to regulate can be repealed by executive order. In fact, any change to the Rule is merely

speculative at this time. As a matter of law, EPA cannot predetermine the result of whatever review the agency may undertake. Rather, that result must be driven by the record before EPA. And the record in this case strongly supports the Rule in its present form, making it doubtful that a vastly different or weaker rule could be adequately explained and supported. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) ("[E]ven when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."), *cert. denied sub nom. Alaska v. Organized Vill. of Kake, Alaska*, 136 S. Ct. 1509 (2016).

Even if a significantly changed rule were hypothetically possible, it would first need to go through the notice-and-comment process Congress established in the Clean Air Act. 42 U.S.C. § 7607(d). Engaging in that process to change this Rule would, as EPA recently said, "take a significant period of time, requiring development of a proposal, solicitation of public comment, and preparation and promulgation of a final rule." Respondents' Opposition to Petitioners' and Petitioner-Intervenors' Motions to Extend the Briefing Schedule, Dec. 21, 2016, (ECF No. 1652426) p. 4.

EPA has yet to take—or even propose a schedule for—any of those steps. And whether they would culminate in a lasting change to the Rule is dubious. For example, were EPA to base a new rulemaking on the policies in the Executive Order, rather than on the factors set forth in the Clean Air Act itself, the result of such a rulemaking would be legally deficient, subject to challenge, and very likely blocked by this Court.[3] Alternatively, EPA may decide that the Rule is entirely consistent with the Executive Order's goals, as the record shows it is. *See*, *e.g.*, 80 Fed. Reg. at 64,515-16 (calculating benefits outweighing costs on project-specific basis). Or EPA may abandon its planned review of the Rule, due to lack of resources[4] or any number of other reasons. *See*, *e.g.*, *Mississippi v. EPA*, 744 F.3d 1334, 1341-42 (citing

[3] As described by this Court, in setting a new source performance standard under section 111(b) of the Clean Air Act, EPA first must "identify the emission levels that are 'achievable' with 'adequately demonstrated technology.'" *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). Next, EPA must "choose an achievable emission level which represents the best balance of economic, environmental, and energy considerations." *Id.* This balancing includes "consideration of technological innovation." *Id.* at 346-47. These standards are nowhere reflected in the Executive Order.

[4] To meet President Trump's proposed decrease in EPA's fiscal year 2018 budget by 31 percent from 2017, EPA is seeking to eliminate hundreds of employees working on climate change, including twenty lawyers in the Office of General Counsel who provide support for the Clean Power Plan. *See* EPA Memorandum, FY 2018 President's Budget: Major Policy and Final Resource Decisions (Mar. 21, 2017), *available at* http://www.eenews.net/assets/2017/04/04/document_cw_02.pdf.

agency's abandonment of review process after multiple years of case being held in abeyance).

The Rule therefore may well remain in place. In that event, abeyance of this fully-briefed case would serve no legitimate purpose. But it would delay resolution of the issues already briefed here and potentially make that resolution more costly or difficult with the passage of time.

Further, the issues raised by the Rule are likely to return in any future rulemaking and subsequent litigation. *See Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004) ("[D]efendants cannot usually shelter their actions from judicial scrutiny simply by claiming that they will stop the challenged conduct."). This is so even if the agency disclaims its previous position. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) ("The court is not bound to accept, and indeed generally should not uncritically accept, an agency's concession of a significant merits issue.")

Anticipating a situation like this one, this Court has cautioned against abandoning review just because an agency asserts it is reconsidering a challenged rule. As this Court warned in *American Petroleum Institute v. EPA*—the case relied upon in EPA's motion—agencies should not be allowed to "stave off judicial review of a challenged rule simply by initiating

a new proposed rulemaking that would amend the rule in a significant way." 683 F.3d 382, 388 (D.C. Cir. 2012). Otherwise, "a savvy agency could perpetually dodge review." *Id*. And while the *API* court ultimately did hold in abeyance a petition for review of an EPA rule, it did so under very different circumstances. By the time of oral argument in *API*, EPA had already published and taken comment on a proposed replacement rule, and had committed to finalize a rule in the near future. By contrast, in this case EPA has proposed nothing specific and has taken no concrete action toward replacing the Rule. And this Court should not speculate as to when, if ever, EPA might finalize such a replacement.[5]

EPA fails to explain how postponing review at this late stage of the proceeding so the agency can review the Rule with an eye toward the extra-statutory criteria listed in the Executive Order will either conserve judicial resources or "support the integrity of the administrative process," EPA Mot. 2. While EPA argues that abeyance is warranted so that the agency may "be afforded the opportunity to respond to the Executive Order by reviewing the Rule in accordance with the new policies," EPA Mot. 6, nowhere does it

[5] In their March 30, 2017 Response in Support of EPA's Motion to Hold Cases in Abeyance (ECF No. 1668604), Petitioners cite cases relating to what legal effect a previously promulgated rule has when it has been replaced by a final rule. *Id.* 4-6. That is not the situation facing this Court, as any replacement rule here is merely hypothetical.

explain why this litigation and EPA's response and review cannot happen simultaneously. Indeed, a decision by the Court on issues Petitioners are raising here would reduce the burden on both EPA and State Intervenors during this review by settling issues—such as whether EPA must make a new Endangerment Finding every time it regulates an additional pollutant from an existing source—that will otherwise remain the subject of dispute in in this case, in any new rulemaking, and in subsequent challenges to it.

EPA's desire to articulate at oral argument the agency's views on the "review," or its likely outcome, is irrelevant to the merits issues before the Court. EPA Mot. 8. The only question pending before the Court is whether the Rule in its current form is valid, and the new Administration's promises of future action do not bear on that question. EPA need only continue to defend the Rule on the same grounds it has previously. Should EPA decline to continue defense of the Rule at oral argument, State Intervenors will do so. *See, e.g., Envtl. Defense v. Duke Energy Corp.,* 549 U.S. 561 (2007); *Wyoming v. U.S. Dept. of Agriculture,* 662 F.3d 1209, 1225-1226 (10th Cir. 2011); *National Parks Conservation Ass'n v. Salazar*, 660 F.Supp.2d 3, 5 (D.D.C. 2009). Defending the Rule—and the important safeguards it provides—is why State Intervenors obtained party status in this case and

invested significant resources in the case over the past 17 months.[6] Even though EPA *may* alter its position, Petitioners and State Intervenors still hold adversarial positions, and the issues may be fairly litigated.

CONCLUSION

For the foregoing reasons, EPA's motion should be denied and oral argument in the case should be promptly rescheduled.

[6] As indicated in the parties' March 20, 2017 suggestion on oral argument format, the Respondent-Intervenors request additional oral argument time if EPA declines to defend the Rule. Letter from Allison D. Wood to Mark Langer, Clerk, Mar. 20, 2017, (ECF No. 1666889), p. 4.

Dated: April 5, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Opposition of State Intervenors to EPA's Motion to Hold Cases in Abeyance, dated April 5, 2017, complies with the type-volume limitations of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure and this Court's Circuit Rules. I certify that this document contains 2,371 words, as counted by the Microsoft Word software used to produce it, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e).

/s/ Jonathan Wiener
Jonathan Wiener

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed on April 5, 2017, using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Jonathan Wiener
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