ORAL ARGUMENT HELD SEPTEMBER 27, 2016

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

STATE OF WEST VIRGINIA, ET AL., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., Respondents.	No. 15-1363 (and consolidated cases)

REPLY IN SUPPORT OF EPA'S MOTION TO HOLD CASES IN ABEYANCE

INTRODUCTION

Two months after his inauguration, the President of the United States issued an Executive Order directing the Environmental Protection Agency (EPA) to immediately take all steps necessary to review the Clean Power Plan, the Rule at issue in these cases. The Executive Order also instructs EPA to, if appropriate and as soon as practicable, publish for notice and comment a proposed rule suspending, revising, or rescinding the Clean Power Plan.

EPA immediately followed the direction of the Executive Order, as it must, by announcing its initiation of review of the Clean Power Plan and potential forthcoming

rulemaking. As a result of these very consequential developments, further judicial proceedings are unwarranted at this time. Therefore, EPA immediately requested that these cases be held in abeyance to avoid unnecessary adjudication or interference with the current administrative process.

Respondent-Intervenors request that this Court "resolve legal issues that will define certain boundaries of any new rulemaking." State and Municipal Respondent-Intervenors' Opposition ("State Opp.") at 12. But it is not the proper role of this Court to try to shape a potential forthcoming rulemaking through an advisory opinion, particularly where doing so would intrude upon EPA's authority to interpret and implement a statute it administers and upon a new Administration's authority to change legal and policy positions. Abeyance will thus avoid an advisory opinion on issues that may become moot, preserve the integrity of the administrative process, and conserve judicial resources.

ARGUMENT

I. The Executive Order and Current Review of the Clean Power Plan Warrant Abeyance.

The Executive Order and EPA's current review of the Clean Power Plan and advanced notice of potential forthcoming rulemaking provide compelling grounds for abeyance. Intervenors offer no persuasive reasons for denying the motion.

To begin with, Intervenors misconstrue the Executive Order and EPA's notice in asserting that EPA has presented this Court with "nothing more than [a] vague intent to review the Clean Power Plan," without providing "any indication of the contours of this review" or its speed. State Opp. at 4-10. The Executive Order specifically directs EPA to "*immediately* take all steps necessary to review" the Clean Power Plan. Executive Order § 4 (emphasis added). And EPA followed this directive posthaste, announcing hours after the issuance of the Executive Order that "*it is reviewing* the Clean Power Plan" and described "the review of the [Rule] that EPA *is initiating today*." 82 Fed. Reg. 16,329, 16,329, 16,330 (Apr. 4, 2017) (emphasis added). EPA has been directed to review the Clean Power Plan for consistency with the policies set forth in the Executive Order. Executive Order § 4; 82 Fed. Reg. at 16,329-30. Accordingly, EPA has made clear that its review "will follow each of the principles and policies set forth in the Executive Order, as consistent with EPA's statutory authority" and has articulated the factors that will guide its review. 82 Fed. Reg. at 16,330. Thus, EPA's review is not tentative or equivocal, and the review is being conducted within the confines of the Executive Order and in accordance with the Clean Air Act.

Intervenors' suggestion that EPA's abeyance motion is untimely because it follows briefing and oral argument is likewise misplaced. See State Opp. at 1-2. A new administration is perfectly entitled to consider a change in policy course, even if there is pending litigation over the particular policy matter. See Motor Vehicle Mfrs.

Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.") (Rehnquist, J., concurring in part and dissenting in part). Here, the Executive Order and concomitant required review process constitute transformative developments rendering the present claims unfit for further judicial proceedings at this time.

EPA filed its abeyance motion at the earliest opportunity, and the fact that this litigation may be at a relatively advanced stage is immaterial. Abeyance would "protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interest in avoiding unnecessary adjudication." Am. Petroleum Inst. v. EPA, 683 F.3d 382, 387 (internal quotation marks and citation omitted) (D.C. Cir. 2012). See also Devia v. Nuclear Regulatory Commission, 492 F.3d 421, 423-28 (D.C. Cir. 2007) (dismissing challenge to agency action following merits briefing and supplemental briefing).[1] Here, the Agency's policy with respect to the Clean Power Plan is under review and issues concerning the Rule are unfit for

[1] As Devia demonstrates, Intervenor States' contention that there is "no precedent for holding a case in abeyance for such a lengthy and open-ended period at such a late stage in the Court's proceedings" is incorrect. States' Opp. at 9. In Devia this Court—following full briefing—placed a challenge to a Nuclear Regulatory Commission licensing decision in open-ended abeyance, fully recognizing that such abeyance period could last a period of years. 492 F.3d at 424; see also Case No. 05-1419, ECF No. 1667424 (reflecting that Devia remains in abeyance 10 years later).

further judicial proceedings.[2]

Intervenors' insinuation that EPA's motion has been submitted for the inappropriate purpose of "staving off" judicial review is unfounded. See State Opp. at 7. EPA has moved for abeyance in good faith, recognizing that the Executive Order, ongoing review of the Rule, and advanced notice of potential rulemaking proceedings are significant developments that render Petitioners' present claims unfit for adjudication at this time. EPA's request for a deferral of further proceedings is appropriate and should be granted.

II. Abeyance Will Conserve Judicial Resources.

There should also be no doubt that postponing judicial review will conserve judicial resources of this Court as well as the Supreme Court. Contrary to Intervenors' assertions, the present litigation is far from any end point, even if it were to proceed. See, Public Health and Environmental Organizations' Opposition ("Envtl. Opp.") at 10 (asserting that the abeyance motion was filed at the "latest possible moment in this case."). Many Petitioners have requested supplemental briefing for the purpose of addressing EPA's denial of their reconsideration petitions. Moreover, any decision by this Court would almost certainly generate substantial

[2] EPA appreciates a case may sometimes become unfit for further review after the expenditure of party and court resources, but sunk costs, no matter how large, do not warrant an unnecessary judicial adjudication which may interfere with ongoing administrative proceedings and needlessly result in the further expenditure of resources.

additional briefing in the form of possible petitions for reconsideration and almost-certain petitions for writ of certiorari. In this circumstance, EPA would likely be compelled to take a position on the Clean Power Plan while the Rule is being reviewed by the Agency. Abeyance would avoid compelling the United States to represent the current Administration's position on substantive questions that are being considered in an ongoing administrative process. Proceeding with the litigation would prejudice EPA as it would likely be unable to represent the Administration's conclusive position, and could call into question the integrity of the administrative proceedings.

Intervenors speculate that if certain issues "are not decided now, the Court will face them again in the future." Envtl. Opp. at 13. Whether any given issue will remain relevant will depend upon exactly what EPA does following its current administrative review, the basis for that action, and how that action affects interested parties. If the Court does face some of the same issues in the future, those issues might well be presented in a completely different context and posture, with potentially different administrative interpretations supporting EPA's legal judgments and a different administrative record supporting revised scientific conclusions.

Intervenors suggest this Court should "resolve legal issues that will define certain boundaries of any new rulemaking." State Opp. at 12. However, it is not the proper role of this Court to try to shape forthcoming potential rulemaking through an advisory opinion. Nor is it the proper role of this Court to weigh in on issues

prematurely just because it might face them again in a different context. Cf. Chamber of Commerce v. EPA, 642 F.3d 192, 199 (D.C. Cir. 2011) (noting that federal courts are "without authority to render advisory opinions" (internal quotation marks and citation omitted)). Further, as this Court has acknowledged, because EPA's interpretations of the Clean Air Act are afforded significant deference, "[i]t is more consistent with the conservation of judicial resources to make that deference-bound review after the agency has finalized its application of the relevant statutory text," which here will occur following the conclusion of EPA's review of the Rule, and, if appropriate, further administrative proceedings. Am. Petroleum Inst., 683 F.3d at 389.

Intervenors' reliance on the recent decision of the Supreme Court to continue proceedings in National Ass'n of Manufacturers v. Department of Defense, Case No. 16-299 (Apr. 3, 2017), see States Opp. at 11, is misplaced. That decision does not support the proposition that federal courts should issue advisory opinions on statutory questions for the purpose of shaping future agency proceedings. In that case, the Supreme Court has granted certiorari to decide whether judicial review of an EPA Clean Water Act rule properly resides in the courts of appeals or district courts. Importantly, the merits of EPA's rule are *not* before the Supreme Court, and the Court's decision to proceed with resolving the proper judicial forum under the Clean Water Act judicial review provision has little relevance here. This case presents no such judicial forum question.

Intervenors' reliance on Chlorine Chemistry Council v. EPA, 206 F.3d 1286, 1290 (D.C. Cir. 2000) is likewise misplaced. See State Opp. at 13. That case did not involve an "analogous situation": it did not even involve a request for abeyance. There, EPA conceded a challenged action was defective and moved for vacatur. The Court then denied that request because vacatur would not provide the petitioners with an adequate remedy.

III. The Supreme Court's Stay Did Not Deprive This Court of Authority to Manage This Docket Efficiently and Resolved the Balance of Hardships.

Contrary to Intervenors' argument, Envtl. Opp. at 5-10; State Opp. at 7, the Supreme Court's decision to stay the Rule did not in any way deprive this Court of its inherent authority to efficiently manage its docket by holding the claims in abeyance. The "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). Nothing in the Supreme Court's stay order withdrew this power from this Court. The Supreme Court's stay order precluded *EPA* from enforcing its Rule; it did not restrict this Court's discretion to manage its docket.

Nor does section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, provide Intervenors with any credible argument for opposing a stay. See Envtl. Opp. at 7-8. Section 705 broadly authorizes courts to stay an action pending judicial review (and consistent with that authority the Supreme Court stayed the Rule), but in

providing such authorization, section 705 contains no restrictions on the Court's docket management power, nor preclude the ability of this Court to hold in abeyance challenges to an agency rule previously stayed by the Supreme Court. Cf. Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 562 (D.C. Cir. 2015) (noting that section 705 of the APA authorizes courts to stay agency rules pending judicial review without any time limit on the duration of the stay) (Kavanaugh, J., dissenting in part); Portland Cement Ass'n v. EPA, 665 F.3d 177, 189 (D.C. Cir. 2011) (staying CAA requirements applicable to clinker storage piles pending EPA reconsideration).

Intervenors also mischaracterize the nature of the Supreme Court's stay decision. See Envtl. Opp. at 5-8. The Supreme Court entered a stay after applying the traditional stay factors, including evaluating Petitioners' likelihood of success on the merits, the balance of hardships and the public interest. Thus, there is no reason to conclude the Supreme Court would be troubled by the stay remaining in place pending EPA Rule reconsideration. Furthermore, because the balance of hardships was considered by the Supreme Court in considering whether a stay should be entered, the Supreme Court's decision to enter a stay has resolved that inquiry in favor of Petitioners.[3]

[3] As this Court has explained, the inquiry into hardship largely relates to "the degree and nature of the regulation's present effect on *those seeking relief*." Devia, 492 F.3d at 427 (quoting Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967)) (emphasis in original). And here, Petitioners support abeyance.

CONCLUSION

Wherefore, for the reasons set forth above and in EPA's opening motion, EPA's Motion to Hold Cases in Abeyance should be granted.

Respectfully submitted,

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DATED: April 12, 2017 BY: */s/ Eric G. Hostetler*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains approximately 2,134 words according to the count of Microsoft Word and therefore is within the word limit of 2,600 words.

Dated: April 12, 2017

/s/ *Eric G. Hostetler*
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in Support of EPA's Motion to Hold Case in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 12th day of April, 2017.

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