

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN PETROLEUM
INSTITUTE, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY

Respondent.

No. 13-1108
(and consolidated cases)

**RESPONDENT-INTERVENORS ENVIRONMENTAL GROUPS'
OPPOSITION TO EPA'S MOTION TO HOLD CASES IN ABEYANCE**

Respondent-Intervenors Clean Air Council, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Group Against Smog and Pollution, Natural Resources Defense Council, and Sierra Club oppose the Environmental Protection Agency's ("EPA") motion to hold these cases in abeyance indefinitely until it completes a newly announced agency "review" of one of the several actions here under judicial review, the 2016 Oil & Gas New Source Performance Standards ("2016 Rule"). The 2016 Rule limits emissions of methane, a highly potent greenhouse gas that contributes significantly to dangerous climate change, from certain sources in the oil and gas sector. EPA provides no time period for completing the review, but states that it may be followed by a

rulemaking to suspend, revise, or rescind the Rule. Mot. at 3, ECF No. 1670157 (Apr. 7, 2017).

EPA's decision to undertake a review of unknown length and uncertain outcome does not justify an indefinite abeyance of these cases. Respondent-Intervenors would not oppose, however, a 90-day extension of time to submit briefing schedules to provide a reasonable period for EPA to determine its course of conduct.

BACKGROUND

The oil and natural gas sector is the largest industrial source of methane emissions in the U.S., as well as a significant source of smog- and soot-forming volatile organic compounds ("VOC"). 81 Fed. Reg. 35,824, 35,840 (June 3, 2016). In June 2016, EPA finalized standards to limit harmful emissions of methane and VOCs from new and modified equipment in this industry ("2016 Rule").¹ The 2016 Rule followed a rule promulgated in 2012 ("2012 Rule")² that addressed only VOC and sulfur dioxide emissions from a narrower set of facilities, as well as

¹ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016). The Rule addresses emissions from sources in the production, processing, and transmission and storage segments of the oil and natural gas sector.

² Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012).

several additional actions taken upon reconsideration of the 2012 Rule.³ The 2016 Rule is the first of these actions to directly regulate methane emissions.

The 2016 Rule will deliver major climate protection and public health benefits at a favorable benefit-cost ratio. In 2025, the 2016 Rule is estimated to reduce 510,000 tons of methane, 210,000 tons of VOCs, and 3,900 tons of hazardous air pollutants, such as benzene, a known human carcinogen, resulting in net monetized benefits over \$170 million annually. 81 Fed. Reg. at 35,828, 35,886, 35,889. The 2016 Rule will have a negligible effect on oil and gas production or prices.⁴

Until now, upon unopposed motions, the Court has periodically extended the deadline for filing motions to govern briefing in the challenges to the these rules. Throughout this period, the promulgated rules—the 2012 Rule, amendments issued in 2013, 2014, and 2015, and the 2016 Rule—have remained in effect.

³ Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards, 78 Fed. Reg. 58,416 (Sept. 23, 2013) (finalizing amendments related to implementation of storage vessel provisions of 2012 Rule); Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards, 79 Fed. Reg. 79,018 (Dec. 31, 2014) (amending well completion and storage vessel provisions of 2012 Rule); Oil and Natural Gas Sector: Definitions of Low Pressure Gas Well and Storage Vessel, 80 Fed. Reg. 48,262 (Aug. 12, 2015) (finalizing definition of “low pressure gas well” and amendments to storage vessel provisions of 2012 Rule).

⁴ EPA, Regulatory Impact Analysis of the Final Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources 6-8 to -10, Doc. No. EPA-HQ-OAR-2010-0505-7630 (May 2016).

Respondent-Intervenors agreed to various extensions of the deadline for motions to govern briefing because these extensions were granted for discrete periods of time while the agency took concrete steps forward to address specific technical issues related to the 2012 Rule and towards regulation of methane from this sector in the 2016 Rule. All of these extensions were granted for limited time periods ranging from 17 days to 6.5 months. *See, e.g.*, Order, ECF No. 1636488 (Sep. 19, 2016); Order, ECF No. 1495013 (May 29, 2014). The parties never before sought, and this Court never ordered, an indefinite abeyance.

Things began to change in March, however. When EPA asked for one further brief extension through May 19, 2017, citing the need to brief incoming officials, Environmental-Intervenors did not oppose. Mot. to Extend Briefing Format Deadline, ECF No. 1666167 (Mar. 15, 2017). The Court granted that extension. Order, ECF No. 1668439 (Mar. 29, 2017).

Now, pointing to Executive Order 13783, EPA asks this Court to put this entire litigation in abeyance indefinitely while the agency conducts a “review” of the 2016 Rule, prefatory to a potential rulemaking to suspend, revise, or rescind it. Mot. at 1, 3, ECF No. 1670157 (Apr. 7, 2017). The requested abeyance would last “until 30 days after EPA completes its review of [the 2016 Rule] in light of the Executive Order.” *Id.* at 1. EPA provides no anticipated timeframe for its review.

ARGUMENT

As Respondent-Intervenors have urged in our oppositions to other recent EPA abeyance motions, the agency's mere initiation of a review of the 2016 Rule—with the even more indeterminate possibility of initiating a new rulemaking to consider regulatory changes—is not a valid basis for an indefinite halt to judicial review. *See, e.g.*, Pub. Health & Env'tl. Resp't-Intervenors' Opp. to Mot. to Hold Case in Abeyance, No. 15-1381, ECF No. 1669762 (D.C. Cir. Apr. 5, 2017) (“New Source Abeyance Opp.”).⁵ It would in no way compromise EPA's regulatory review were this Court to resolve the various legal issues presented in this litigation, many of which would be relevant in any future action related to section 111 regulations for the oil and gas sector and other industrial sectors.

This Court has recognized the value to the administration of Clean Air Act programs of promptly adjudicating “primarily interpretative questions of

⁵ *Devia v. Nuclear Regulatory Commission*, 492 F.3d 421 (D.C. Cir. 2007) is not to the contrary. As the opening paragraph of this Court's opinion in that case explains, the petitioners there challenged a decision by the Nuclear Regulatory Commission to permit construction of a spent nuclear storage facility in Utah. *Id.* at 422. But after approval for construction was granted by the Commission, two other agencies denied applications for the project's rights-of-way and lease. *Id.* “Because it [was] speculative whether the project will ever be able to proceed” due to these separate denials, this Court found “petitioners' challenge unripe and direct[ed] that the case be held in abeyance.” *Id.* Here, by contrast, the 2016 Rule is currently in effect without any such external impediments and Petitioners' challenge to it is indisputably ripe.

comprehensive importance.” *See Ala. Power Co. v. Costle*, 606 F.2d 1068, 1075 (D.C. Cir. 1979); *Ala. Power Co. v. Costle*, 636 F.2d 323, 344 (D.C. Cir. 1979); *see also N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) (recognizing the importance of regulatory certainty). Petitioners pointed out many of these “fundamental issues of legal authority” in their earlier filing in these consolidated cases. *See Mot. to Govern Further Proceedings* 8-9, No. 16-1242, ECF No. 1642341 (D.C. Cir. Oct. 21, 2016). Respondent-Intervenors are willing and able to defend the 2016 Rule and litigate the issues raised by its challengers even if the government is not. Accordingly, the indefinite abeyance requested here should be denied.

At the same time, Respondent-Intervenors recognize that litigation of these consolidated cases is in its early stages. In addition, all of the Rules challenged in this litigation are currently in effect.⁶

Thus, while Respondent-Intervenors oppose EPA’s requested indefinite abeyance, we would not oppose an additional extension of the deadline for proposing a briefing schedule for 90 days, consistent with prior stays in these consolidated cases, *see supra* at 3-4, to allow EPA a reasonable amount of time to

⁶ EPA’s Notice states that it is considering, among other things, a rulemaking to “suspend” the 2016 Rule. *Mot., Attach. B* at 3. Respondent-Intervenors oppose any action that interrupts the effectiveness of the Rule, and would immediately seek relief from this Court.

conduct its review and report the findings of that review to the Court and the parties.

CONCLUSION

The motion for abeyance should be denied.

DATED: April 14, 2017

Respectfully submitted,

/s/ Susannah L. Weaver

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 1393 words.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Respondent-Intervenors Opposition to EPA's Motion to Hold Cases in Abeyance** on all parties through the Court's electronic case filing (ECF) system.

DATED: April 14, 2017

/s/ Susannah L. Weaver

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