

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

AMERICAN PETROLEUM INSTITUTE, et al.,**Petitioners,****v.****UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,****Respondents.**

**No. 13-1108 (and
consolidated cases)****STATE PETITIONERS' JOINT RESPONSE IN SUPPORT OF EPA'S
MOTION TO HOLD CASES IN ABEYANCE**

The State Petitioners respectfully submit this Joint Response in Support of Respondents' April 7, 2017 motion to hold these consolidated cases in abeyance (ECF No. 1670157). As Respondent United States Environmental Protection Agency ("EPA" or "Agency") explained in the abeyance motion, EPA is formally reviewing "and, if appropriate, will initiate proceedings to suspend, revise, or rescind" EPA's final rule entitled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35,823 (June 3, 2016) ("2016 NSPS Rule"). *See* EPA Motion at 3 (quoting

Attachment B to EPA Motion, which is EPA's Federal Register Notice, "Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources," now at 82 Fed. Reg. 16331, 16332 (Apr. 4, 2017)). Because the 2016 NSPS Rule is under formal review by EPA, and because that review may lead EPA to substantially alter or even rescind the Rule, the Court should grant EPA's requested relief and hold these consolidated cases in abeyance until EPA's review is completed. State Petitioners are aware that these consolidated cases also challenge two related EPA rules, but State Petitioners are not parties to those separate challenges and take no position regarding the Motion to Hold Cases in Abeyance with regard to those challenges.

State Petitioners urge the Court, however, to hold the cases in abeyance but maintain them on the docket in case the parties need to request any form of interim relief.

ARGUMENT

The interests of justice and judicial economy counsel in favor of holding these cases in abeyance as EPA requests. Such abeyance would conserve judicial and party resources by deferring and perhaps eliminating the need for the parties to brief the many complex issues presented in these cases, and the need for the Court thereafter to consider the lawfulness of the 2016 NSPS Rule and the other two Rules at issue during the pendency of EPA's review.

The Court's authority "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. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1888-89 (2016) (noting court's "inherent power ... to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases") (citations omitted).

EPA's request is routine. The government frequently requests abeyances in pending litigation to address changes in policy due to changes in presidential administrations. *See, e.g., California et al. v. EPA*, No. 08-1178, ECF No. 1167136 (D.C. Cir., Feb. 25, 2009) (staying briefing for several months to permit President Obama to reconsider determinations promulgated by EPA under President Bush); *New Jersey v. EPA*, No. 08-1065, ECF No. 1108959 *ff.* (D.C. Cir.) (case held in abeyance for seven years during President Obama's administration to permit review of regulations promulgated under President Bush); *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (noting this Court's grant of motion to hold case in abeyance after change in administrations); Clerk's Order No. 08-1200 (D.C. Cir. Mar. 19, 2009) (granting abeyance after President Obama's election to permit agency to review and reconsider Bush Administration rule); Order, *Am. Petroleum Instit. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (holding case in abeyance

pending EPA reconsideration); Order, *Sierra Club v. EPA*, No. 09-1018 (D.C. Cir. Feb. 19, 2009) (similar); Order, *Natural Resources Defense Council v. EPA*, No. 08-1250 (D.C. Cir. Dec. 3, 2008) (similar); *see generally* Richard J. Lazarus, *The Transition and Two Court Cases*, 26 *The Environmental Forum* 12, at 14 (Feb. 2009).

More recently this Court acknowledged the propriety of the type of relief sought by EPA here by holding an Affordable Care Act challenge in abeyance when the incoming administration had signaled a change in policy that could affect the legal terrain on which the appeal had been argued. *See House of Representatives v. Burwell*, No. 16-5202, Order at 1, ECF No. 1649251 (Dec. 5, 2016) (granting motion to hold in abeyance challenge to the Affordable Care Act six weeks before presidential inauguration). And just last week this Court granted a similar motion in litigation challenging EPA's 2015 National Ambient Air Quality Standards (NAAQS) for ozone. In that case, briefing is complete and oral argument was scheduled for this week. Yet, this Court granted abeyance. *See Murray Energy Corp. v. EPA*, No. 15-1385, ECF No. 1670218 (Apr. 11, 2017) (granting EPA's motion to hold cases in abeyance while EPA evaluates if it should reconsider the 2015 ozone standards in part or in whole or retain the 2015 ozone standards). The Court should do the same in this case.

Holding these consolidated cases in abeyance would not only conserve judicial and party resources but also avoid the possibility of the Court issuing an opinion that is then rendered both moot and advisory by EPA's taking action to revise or rescind the 2016 NSPS Rule. *See Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1107, 1010-11 (D.C. Cir. 2001) (“[t]he old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed” because “[a] new system is now in place” and “[a]ny opinion regarding the former rules would be merely advisory”). It is a fundamental Article III principle that “an actual controversy must be extant at all stages of review.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997). It “is not enough that a dispute was very much alive when suit was filed;” the “parties must continue to have a personal stake in the outcome of the lawsuit” to prevent the case from becoming moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–78 (1990) (internal quotation marks omitted).

This Court has described as a “perfectly uncontroversial and well-settled principle of law” the proposition that “when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot.” *Akiachak Native Community v. U.S. Dep't of Interior*, 827 F.3d 100, 113-14 (D.C. Cir. 2016) (citing cases). *See also id.* at 106 (noting that an order following withdrawal “would accomplish nothing—amounting to exactly the

type of advisory opinion Article III prohibits”); *Initiative & Referendum Institute v. U.S. Postal Service*, 685 F.3d 1066, 1074 (D.C. Cir. 2012) (mooting challenge because regulation was amended); *Larsen v. U.S. Navy*, 525 F.3d 1, 4-5 (D.C. Cir. 2008) (similar); *Coalition of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1190 (D.C. Cir. 2004) (mooting challenge after agency abandoned the regulation and resolved petitioners’ objections); *Nat’l Mining Ass’n*, 251 F.3d at 1010-11 (*supra*); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1295–96 (D.C. Cir. 2000) (holding a challenge to regulation moot after agency clarified it); *Nat’l Black Police Ass’n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (similar, as to an amended statute); *Freeport–McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992) (finding a case “plainly moot” where the challenged agency order had been “superseded by a subsequent order,” and noting that such an occurrence was so routine that “[o]rdinarily, we would handle such a matter in an unpublished order”). A superseding rulemaking is sufficient to render review of the old regulation moot. *Gulf Oil Corp. v. Simon*, 502 F.2d 1154, 1156 (Temp. Emer. Ct. App. 1974) (cited in *Akiachak Native Community*, 827 F.3d at 114); *Freeport–McMoRan Oil & Gas Co.*, 962 F.2d at 46.

Respondent-Intervenor Environmental Groups’ opposition to EPA’s abeyance motion has no merit. Their principal argument in opposing the motion is that for this litigation to proceed would not “compromise EPA’s regulatory

review.” ECF No. 1671197 at 5. But the Environmental Groups do not – and cannot – deny that if EPA revises or rescinds the 2016 Rule, the work of the parties and the Court in briefing and deciding the complex issues presented here may be wasted, and those issues may even become moot. The Environmental Groups propose limiting the abeyance to 90 days, but EPA’s motion already offers status reports on its review of the 2016 Rule every 60 days, and any fixed deadline for EPA’s review would be arbitrary – if the review were not complete, EPA would seek to extend the abeyance for the same good and sound reasons advanced in its current motion. At bottom, the Environmental Groups provide no convincing reason to deny EPA’s motion.

While EPA’s abeyance motion is amply justified and should be granted, at the same time, it is important that this case remains on the Court’s docket during EPA’s review because the 2016 NSPS Rule remains in force and contains near-term compliance deadlines that potentially may interfere with State Petitioners’ regulatory functions. Under the Clean Air Act, states have primary authority and responsibility for the implementation and enforcement of new source performance standards such as those set forth in the 2016 NSPS Rule. *See* 42 U.S.C. 7411 (c), (g). Provisions of that Rule that State Petitioners contend are unlawful are scheduled to take effect beginning in June 2017, and impose further obligations by the end of 2017, and unless those provisions are stayed, State Petitioners’

regulatory functions will be disrupted. State Petitioners are working with Industry Petitioners to encourage EPA to defer those compliance deadlines and to administratively stay other objectionable aspects of the 2016 NSPS Rule during the pendency of EPA's review. But if those efforts are unsuccessful, State Petitioners want to preserve the right to seek appropriate relief from this Court.

CONCLUSION

For the foregoing reasons, State Petitioners respectfully request grant EPA's motion to hold these cases in abeyance until 30 days after EPA completes its review of the 2016 NSPS Rule.

Dated: April 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(1)(D) of the Federal Rules of Appellate Procedure and Circuit Rules 27(a)(1) and 27(a)(1)(2), I certify that the foregoing **STATE PETITIONERS' JOINT RESPONSE IN SUPPORT OF EPA's MOTION TO HOLD CASES IN ABEYANCE** contains 2,573 words, as counted by a Microsoft Office Word 2010 used to prepare the response.

/s/ Paul M. Seby

Paul M. Seby

Dated: April 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of April 2017, a copy of the foregoing **STATE PETITIONERS' JOINT RESPONSE IN SUPPORT OF EPA's MOTION TO HOLD CASES IN ABEYANCE** was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Paul M. Seby
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