ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN PETROLEUM INSTITUTE, et al.,	)	
Petitioners,	)	No. 13-1108 (and consolidated cases)
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	**REPLY IN SUPPORT OF MOTION TO HOLD CASES IN ABEYANCE**
Respondents.	)	

Reply in Support of Motion to Hold Cases in Abeyance

Respondent the United States Environmental Protection Agency (EPA) submits this Reply in support of its Motion to Hold Cases in Abeyance, Doc. #1670157 (Apr. 7, 2017) ("Motion"). In the Motion, EPA notified the Court that the President had issued an Executive Order directing the Agency to review its June 3, 2016 final rule setting new source performance standards for the oil and natural gas sector (the "2016 NSPS Rule") and, if appropriate, initiate a rulemaking proceeding to suspend, revise or rescind that Rule, and asked the Court to hold this litigation in abeyance until 30 days after EPA concluded that review. EPA's requested abeyance is eminently reasonable in light of these consequential developments, which render further judicial proceedings unwarranted at this time.

ARGUMENT

Respondent-Intervenors' sole substantive argument against abeyance is that it would delay the resolution of "fundamental issues of legal authority" that "would be relevant in any future action related to [Clean Air Act] section 111 regulations for the oil and gas sector and any other industrial sectors." Respondent-Intervenors Environmental Groups' Opposition to EPA's Motion to Hold Cases in Abeyance (Doc. #1671197) ("Envtl. Int. Opp.") at 5-6; *see also* Opposition of State Respondent-Intervenors to EPA's Motion to Hold Cases in Abeyance ("State Int. Opp.") at 7 ("at least some of the issues presented . . . are likely to return in any future rulemaking and subsequent litigation").

But it is not the proper role of the Court to try to shape future rulemakings, or to weigh in on issues simply because it may face them at some point in the future. *Cf. Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (courts are "without authority to render advisory opinions") (quotation marks and citation omitted). State Intervenors claim that, because the 2016 NSPS Rule remains in effect, "Petitioners' claims are neither moot nor unripe." State Int. Opp. at 7. This argument misses the point. Abeyance is warranted now because, if the outcome of EPA's review is a decision to initiate a rulemaking proceeding to

revise or rescind the 2016 NSPS Rule,[1] Petitioners' claims could soon become moot or unripe. At the very least, such a rulemaking proceeding could substantially narrow or change the issues the Court may eventually need to decide. Under those circumstances, it would be a poor use of the Court's and the parties' resources to brief and argue the merits of these challenges, especially since the United States' position on some issues may change as the result of a reconsideration proceeding.

Furthermore, Intervenors fail to identify what "fundamental" issues they believe the Court should proceed to decide. Environmental Intervenors cross-reference a motion filed by Petitioners last fall seeking to sever "fundamental legal issues" from the remainder of the case. Envtl. Int. Opp. at 6 (citing Mot. to Govern Further Proceedings, Doc. #1642341). But the Court denied that request. Doc. #1654072. As EPA pointed out when opposing it, no clear line can be drawn between the "legal" and "record" issues raised by the challenges to the 2016 NSPS Rule; rather, almost all of the issues raised are mixed questions of law and fact that must be evaluated in light of the data and analysis set forth in the Rule and

[1] In fact, while the Presidentially mandated review of the 2016 NSPS Rule as a whole is ongoing, EPA recently announced that it is initiating a reconsideration proceeding to address certain issues raised in pending administrative reconsideration petitions. *See* Attachment A (Apr. 18, 2017, letter from S. Pruitt). Thus, the prospect of the Rule being meaningfully revised in the near term is plainly not the remote possibility that Intervenors make it out to be.

supporting record. *See* EPA's Response in Partial Opp'n to Mot. to Govern Further Proceedings, Doc. #1644526, at 3-4. If the Rule or record were to change in a meaningful way, then the parties' and the Court's analysis of the issues—whether primarily "legal" in character or not—would necessarily change as well, rendering any prior adjudication an exercise in futility.[2]

Furthermore, even if similar issues might arise in a future litigation, they would be presented in a different context, with potentially different underlying statutory or regulatory interpretations and a different record. State Intervenors suggest that this is not likely to be the case because "the record here strongly supports the 2016 Rule" and "it is doubtful that EPA can adequately support a different or weaker rule." State Int. Opp. at 6. But such arguments put the cart before the horse, improperly asking the Court to make a procedural decision regarding the course of this litigation based on Intervenors' view of the comparative merits of the existing Rule versus potential future rules, and their speculation as to the likely result of any further rulemaking. The results of any further rulemaking cannot possibly be pre-judged now in the manner suggested by Intervenors.

[2] Tellingly, Petitioners have no desire to litigate their claims in light of that possibility. *See* Industry Petitioners' Joint Response in Support of EPA's Motion to Hold Cases in Abeyance ("Ind. Resp."), Doc. #1671400, at 1-2.

Finally, Intervenors "recognize that litigation of these consolidated cases is in its earliest stages," but nonetheless oppose abeyance on the grounds that it is "indefinite," proposing that the Court instead extend the May 19, 2017, briefing format deadline by 90 days. Envtl. Int. Opp.at 5-7; *see also* State Int. Opp. at 1-2. EPA cannot predict right now how long its ongoing review will take, but that process should not be unnaturally cabined by Intervenors' desire to force the agency to act quickly—particularly where Petitioners' challenges have not been briefed or argued, and Intervenors have identified no prejudice that will result from abeyance.[3]

State Intervenors cite *Mexichem Specialty Resins, Inc. v EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015), for the proposition that the Agency may not avoid review of an issue by "disclaim[ing] its previous position." Int. States' Opp. at 8. But there, the petitioners asked the Court to stay the challenged rule after the issue they raised had been briefed and EPA had "emphatic[ally]" defended that issue at argument.

[3] As Industry Petitioners note, some of these cases have already been on hold for over four years. Ind. Resp. at 2. Environmental Intervenors argue that this was pursuant to a series of discrete extensions, not "an indefinite abeyance." Envtl. Int. Opp. at 4. In fact, the Court did hold one of the three sets of cases that were consolidated into this litigation in "indefinite" abeyance for over a year and a half. *See* No. 15-1040, Doc. # 1548949 (Apr. 23, 2015, order granting abeyance until thirty days after completion of administrative proceedings). As it did during that prior abeyance period, EPA has offered to file periodic status reports to keep the Court up to date on the status of administrative process. Mot. at 6.

Here, EPA is not asking the Court to stay the *Rule*, but rather to simply hold the *litigation* in abeyance pending completion of EPA's review; the issues raised have not been briefed or argued; and there is no risk that granting the requested relief will allow EPA to "deny[] interested parties the opportunity to oppose or otherwise comment on significant changes in regulatory policy." *Mexichem*, 787 F.3d at 557. To the contrary, EPA seeks abeyance to allow it to consider further rulemaking proceedings, "that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." Motion, Attach. B at 3.

Critically, EPA indisputably has the right to fully and freely consider whether it wants to proceed on the course it set in June 2016 in light of the change in administration. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part). 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. As this Court has explained, in such circumstances abeyance is the appropriate course because it will "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 (D.C. Cir. 2012). Abeyance is therefore the appropriate course here.

CONCLUSION

For these reasons and those set forth in its Motion, EPA respectfully requests that the Court hold this case in abeyance until 30 days after the conclusion of the Agency's ongoing review process.

Respectfully submitted,

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DATED: April 21, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in Support of Motion to Hold Cases in Abeyance complies with the requirements of Fed. R. App. P. Rule 27(d) because it contains 1467 words according to the count of Microsoft Word and is in 14-point, proportionately spaced font.

Dated: April 21, 2017

/s/ Amanda Shafer Berman
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of Motion to Hold Cases in Abeyance was today served electronically through the court's CM/ECF system on all registered counsel.

/s/ Amanda Shafer Berman
Counsel for Respondent

DATED: April 21, 2017

Attachment A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

April 18, 2017

THE ADMINISTRATOR

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RE: Convening a Proceeding for Reconsideration of Final Rule, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources," published June 3, 2016, 81 Fed. Reg. 35824

Dear Mr. Feldman, Ms. Broome, Mr. Elliott and Mr. Hite:

This letter concerns petitions from the American Petroleum Institute, Texas Oil and Gas Association, Independent Associations and GPA Midstream Association, all dated August 2, 2016, to the U.S. Environmental Protection Agency requesting reconsideration, and in some circumstances an administrative stay, of provisions included in the EPA's final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources," 81 FR 35824 (June 3, 2016), pursuant to section 307(d)(7)(B) of the Clean Air Act and section 705 of the Administrative Procedure Act.

We find that the petitions have raised at least one objection to the fugitive emissions monitoring requirements included in the Final Rule (§60.5397a and associated provisions) that arose after the comment period or was impracticable to raise during the comment period and that is of central relevance to the rule under 307(d)(7)(B) of the CAA. Therefore, by this letter the EPA is convening a proceeding for reconsideration of those fugitive emissions monitoring requirements.

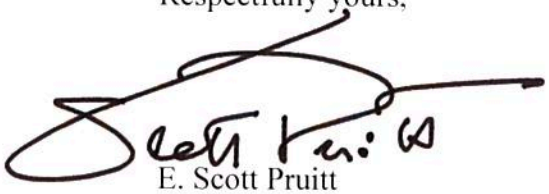
Among the issues raised in the petitions that meet the requirements for reconsideration under CAA section 307(d)(7)(B) are objections regarding the provisions for requesting and receiving an alternative means of emission limitations and the inclusion of low-production wells. These provisions, or certain aspects of these provisions, were not included in the proposed rule so the public could not have raised objections to these provisions during the public comment period. As part of the reconsideration process, the EPA will provide an opportunity for notice and comment on the issues raised in the petitions that meet the standard of CAA section 307(d)(7)(B), as well as any other matter we believe will benefit from additional comment.

As a result of this reconsideration, the EPA intends to exercise its authority under CAA section 307 to issue a 90-day stay of the compliance date for the fugitive emissions monitoring requirements. Sources will not need to comply with these requirements while the stay is in effect.

This letter does not address other requests for reconsideration raised in these and other petitions. Nor does it address the merits of, or suggest a concession of error on, any issue raised in the petitions.

If you have any questions concerning this action, please contact Mr. Peter Tsirigotis in the Office of Air Quality Planning and Standards at (888) 627-7764 or airaction@epa.gov.

Respectfully yours,



E. Scott Pruitt