ORAL ARGUMENT SCHEDULED FOR APRIL 19, 2017

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

MURRAY ENERGY CORP.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 15-1385 (consolidated with Nos.
	)	15-1392, 15-1490, 15-1491, 15-1494)
U.S. ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' OPPOSITION TO MOTION TO POSTPONE ORAL ARGUMENT

Only eight business days before oral argument, EPA seeks to delay the argument indefinitely on the thin excuse that it wants time to consider whether to reconsider the rule at issue. EPA has failed to provide the requisite "extraordinary cause" for postponing the argument. By contrast, granting EPA's request would severely prejudice Public Health and Environmental Petitioners and Respondent-Intervenors[1] by stalling their ability to seek judicial relief to protect their members from dangerous ozone pollution, and postponement would be hugely inefficient. Resolution of the important legal issues in this case could clarify the agency's authority in matters that will arise regularly. EPA's motion should be denied.

[1] Public Health and Environmental Organizations are, collectively, Petitioners Sierra Club, Physicians for Social Responsibility, National Parks Conservation Association, Appalachian Mountain Club, and West Harlem Environmental Action, Inc., and Respondent-Intervenors American Lung Association, Sierra Club, Natural Resources Defense Council, and Physicians for Social Responsibility.

I. EPA'S MOTION DOES NOT SATISFY THE STANDARDS FOR POSTPONEMENT.

EPA's motion satisfies neither this Circuit's Rules nor the Federal Rules of Appellate Procedure requirements for winning a continuance of oral argument. Fatally, EPA does not (and cannot) even claim to satisfy these requirements. The only basis for postponing the argument that EPA has provided is to give the new administration a chance to review the standards, citing (at 6) the litigation over the 2008 standards as the sole precedent for granting its motion.[2] That example is no support because there this Court stayed litigation before any briefs had been filed, and no party opposed that abeyance; as discussed below, the example powerfully cuts against delaying argument here. EPA's motion thus falls far short of the "extraordinary cause" the Circuit Rules require. D.C. Cir. R. 34(g); *see Handbook of Practice and Internal Procedures* 49 (Jan. 26, 2017) ("The Court disfavors motions to postpone oral argument….").

Further, weighed in the balance, EPA's desire does not justify delaying this case's resolution. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (in reviewing motion to hold case in abeyance, Court "may also take account of the traditional factors in granting a stay," which include prejudice to other parties than movant). Public Health and Environmental Organizations will suffer severe

[2] EPA suggests (at 7 n.6) it needs to review a recent Executive Order to see if that Order means EPA "potentially" needs to review the standards. Among other failings, this double speculation is not extraordinary cause.

prejudice from delay. EPA identifies no countervailing harm to it, and there is none.

Resolution of this litigation will not prejudice EPA.[3] The Clean Air Act empowers and obligates EPA to review the standards regardless of the litigation. *See* 42 U.S.C. § 7409(d)(1). For example, the review that resulted in the 2015 standards at issue here began and proceeded while litigation over the 2008 standards was pending. 80 FR 65,292, 65,297/3-98/1 (Oct. 26, 2015), JA0296-97.

EPA's claimed concern (at 6-7) that, without delay, its lawyers might be unable to "represent the current Administration's conclusive position" on various issues lacks merit. This is a record review case, where other positions the agency might have taken are irrelevant. *See Mexichem Specialty Resins 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."). Nor would a judicial decision foreclose other reasonable options the agency might take under new leadership, provided the agency could provide the necessary rational explanation under the Act. *See, e.g.*, *FCC v. Fox Television Stations*, 556 U.S. 502, 514-15 (2009); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). That the agency may have to defend a rule that may not entirely accord with the new Administration's views is

[3] Instead, resolution of this case could benefit EPA by resolving questions of law all petitioners raise that will recur under the Clean Air Act, as discussed below.

not extraordinary: it is routine under the rule of law.[4] Thus, EPA fails to provide the extraordinary basis that would justify delaying consideration of this case.

This Court has already warned of the danger of approving the course EPA seeks to follow here. In *American Petroleum Institute v. EPA* ("*API*"), the Court cautioned that "an agency can[not] stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." 683 F.3d 382, 388 (D.C. Cir. 2012). Unlike in *API*, EPA has not proposed a new rule, nor is there any indication how long potential reconsideration proceedings could drag on for.

Further, EPA's motion is hardly "filed reasonably in advance of the hearing date." Fed. R. App. P. 34(b). It comes only eight business days before the argument—but two and a half months after Inauguration Day, and five months after Election Day. EPA identifies no reason why it required so much time just to decide it wanted to have time to review the ozone standards. This Court already delayed oral argument once in this case. EPA does not and cannot explain why it needs yet more time.

[4] *See, e.g.*, *Coal. of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613 (D.C. Cir. 2010) (upholding, in Obama Administration, standards set under Bush Administration); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (resolving, under Bush Administration, legality of rules made by Clinton Administration).

II. POSTPONEMENT OF ORAL ARGUMENT IS INAPPROPRIATE BECAUSE IT WOULD SEVERELY PREJUDICE PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS.

Ozone is a widespread, corrosive pollutant that triggers asthma attacks, sends people to the hospital, and likely kills, as EPA itself has found based on extensive scientific evidence. 80 FR 65,302/1-09/1, JA0301-08; *see* Health/Environmental Opening Br. 3-5; Health Int. Br. 8-13; Medical Amicus Br. 5-21. Children, asthmatics, and the elderly are especially vulnerable, but ozone can also harm healthy adults. Health/Environmental Opening Br. 3.

In the 2015 action at issue here, EPA strengthened the national clean air standards for ozone somewhat, but because the standard still routinely allows levels that harm people's health, Public Health and Environmental Petitioners are challenging those standards in this case. *Id.* 19-40. EPA's own estimates found that standards more protective than those adopted in 2015 would prevent hundreds or thousands of deaths, thousands of heart attacks and hospital admissions and emergency room visits, over a million asthma attacks in children, and hundreds of thousands of missed work and school days. EPA-HQ-OAR-2013-0169-0057 at ES-16 tbl.ES-6, https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0169-0057. Every day this case is delayed, Petitioners' ability to seek relief leading to more protective standards is also delayed. Meanwhile, more people will suffer heart attacks, asthma attacks, hospitalization, and death from ozone exposure.

Public Health and Environmental Respondent-Intervenors would also be prejudiced by a delay in oral argument and in resolution of this case. EPA's review of its position is likely to lead to delayed implementation of the 2015 standards. For example, as a result of EPA's reconsideration of the 2008 ozone standards, implementation of those standards was delayed by at least two years, without any change in the standard. *See Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 148 (D.C. Cir. 2015); Health/Environmental Opening Br. 8; 80 FR 75,706, 75,712/3 (Dec. 3, 2015) (describing how EPA paused implementation of 2008 standards pending reconsideration). Delayed implementation of the 2015 standards—which are more health-protective than the prior standards—will severely prejudice the interests of Public Health and Environmental Intervenors in safeguarding their members' health.[5]

The serious harms to Public Health and Environmental Organizations resulting from delayed litigation mean EPA's motion must be denied. To overcome those harms and obtain the "stay 'of indefinite duration'" EPA requests, EPA would have to substantiate "'a pressing need,'" and, as discussed above, EPA has failed to do so. *Belize Social Dev't Ltd. v. Gov't of Belize*, 668 F.3d 724, 731-32 (D.C. Cir. 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). Thus, it

[5] The 2015 standards' protections have already been delayed substantially: the standards were established two years late and required a court order to hasten them. Order, *Sierra Club v. EPA*, No. 13-cv-2809 (N.D. Cal. Apr. 30, 2014). Further delay would exacerbate the harms that have already resulted.

would be inappropriate to delay oral argument. *See Dellinger v. Mitchell*, 442 F.2d 782, 786 (D.C. Cir. 1971) ("'[T]he suppliant for a stay [of litigation] must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.'") (emphasis added); *Ohio Envtl. Council v. U.S. District Court*, 565 F.2d 393, 396 (6th Cir. 1977) ("[I]t is…clear that a court must tread carefully in granting a stay of proceedings, since a party has a right to a determination of its rights and liabilities without undue delay.").

III. POSTPONEMENT OF ORAL ARGUMENT WOULD BE TREMENDOUSLY INEFFICIENT.

A continuance at this late date would disserve the parties and judicial economy. This case has been fully briefed since September 2016, and the parties—certainly the Public Health and Environmental Organizations—have already begun preparing for argument. Agency review and potential reconsideration would also "conflict with proceedings in court" because the Court likely already has "taken up the case for preparation and argument." *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.l (D.C. Cir. 1990).

Instead, this Court's resolution of the important legal arguments that are already fully briefed could increase efficiency by clarifying the extent and limitations of the agency's authority and responsibility. For example, among the

issues raised by the petitioners are whether EPA lacks authority to set standards that allow adverse health effects, waive compliance with new standards by certain highly-polluting new and modified factories and power plants, or consider costs and background pollution levels when establishing health- and welfare-protective standards. Health/Environmental Opening Br. 19-30, 57-62; Health Int. Br. 15-28. EPA must review and revise standards every five years, 42 U.S.C. § 7409(d)(1), and the issues raised by both sets of petitioners will arise again and again in those actions.[6] *See, e.g.*, *AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) ("[J]udicial economy suggests that we address some of AT&T's other arguments to avoid re-litigation of identical issues in a subsequent petition.").

Even if EPA took the extreme step of declining to zealously defend the standards against Industry and State Petitioners, Public Health and Environmental Intervenors will offer such a defense. Non-governmental entities can and do stand in successfully for agencies that decline to defend their regulations.[7] Indeed, this

[6] The Supreme Court recently denied a government motion to stay a pending case with far-reaching, important effects, which involves another Obama-era environmental rule the new administration is reviewing and potentially seeking to revise. Order, *Nat'l Ass'n for Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. Apr. 3, 2017). Notably, no merits brief has been filed in that case yet.

[7] *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2684-89 (2013); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456-60, 463 (D.C. Cir. 1991); *Wyoming v. USDA*, 661 F.3d 1209, 1225-26 (10th Cir. 2011); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

Court has already allotted Public Health and Environmental Intervenors oral argument time.

CONCLUSION

For the foregoing reasons, EPA's request for postponement of oral argument should be denied. As the last paragraph of its conclusion, after only having said it seeks postponement of the oral argument, EPA alternatively requests (at 8) the whole case be held in abeyance. That request is meritless for all the same reasons.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2)(C), that the foregoing **Public Health and Environmental Organizations' Opposition to Motion to Postpone Oral Argument** contains 1,946 words, as counted by counsel's word processing system, and thus complies with the 5,200 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **size 14 Times New Roman** font.

DATED: April 10, 2017

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2017, I have served the foregoing **Public Health and Environmental Organizations' Opposition to Motion to Postpone Oral Argument** on all registered counsel through the court's electronic filing system (ECF).

/s/Seth L. Johnson
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