EN BANC ORAL ARGUMENT HELD SEPTEMBER 27, 2016

No. 15-1363 (and consolidated cases)

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.

On Petitions for Review of Final Agency Action of the United States Environmental Protection Agency 80 Fed. Reg. 64,662 (Oct. 23, 2015)

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GLOSSARY OF TERMS

EPA	United States Environmental Protection Agency
Rule	U.S. Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

Petitioners and Petitioner-Intervenors respectfully submit this supplemental brief pursuant to this Court's Order of April 28, 2017, directing the parties to address whether these cases should be remanded to the Environmental Protection Agency ("EPA") rather than held in abeyance. ECF No. 1673071. For several reasons, this Court should hold the cases in abeyance pending EPA's review of the Clean Power Plan rule. U.S. Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("the Rule").

First, holding these cases in abeyance best protects Petitioners' rights to judicial review and this Court's ability to resolve challenges to the Rule should EPA ultimately not revise or rescind the Rule. As EPA has noted, the President has directed the agency to review the Rule, *see* Exec. Order No. 13,783, "Promoting Energy Independence and Economic Growth," § 4, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017), and EPA has commenced that review, *see* Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Case in Abeyance (Mar. 28, 2017), ECF No. 1668274; 82 Fed. Reg. 16,329 (Apr. 4, 2017). But as shown in a prior analogous situation described below, such a review may not necessarily result in any change to the Rule even if that outcome is widely anticipated, and abeyance clearly preserves both Petitioners' rights and this Court's responsibility to consider the legality of the Rule.

In 2009, the then-new presidential administration sought and received from this Court abeyance of a pending legal challenge while EPA reviewed a National Ambient Air Quality Standard for ozone that had been adopted the previous year. *See* Order, *Mississippi v. EPA*, No. 08-1200 (and consolidated cases) (D.C. Cir. Jan. 21, 2010), ECF No. 1226738; Order, *Mississippi v. EPA*, No. 08-1200 (and consolidated cases) (D.C. Cir. Mar. 19, 2009), ECF No. 1171013. The standard had been criticized, and it was believed that EPA would reset the standard at a lower level. *See, e.g.*, Robin Bravender, *Tighter smog regs expected as EPA studies Bush rule*, E&E NEWS PM (Sept. 16, 2009) (attached as Ex. A). Indeed, claiming the standard was "not legally defensible," EPA formally proposed to tighten the standard. Letter from Lisa P. Jackson, Adm'r, EPA, to Sen. Thomas R. Carper, July 13, 2011 (attached as Ex. B); 75 Fed. Reg. 2,938 (Jan. 19, 2010). In the end, however, EPA decided to leave the rule in place unchanged, and this Court proceeded simply to lift the abeyance and decide the merits of the legal challenge. *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (per curiam).

This example illustrates the benefits of abeyance in these cases. By holding these cases in abeyance, this Court retains jurisdiction over the pending petitions for review. And if EPA ultimately does not decide to revise or rescind the Rule, this Court can lift that abeyance, reactivate these cases, and proceed directly to resolving the merits of the legal challenges to the Rule.

By contrast, the possible remand suggested by this Court raises questions about continued judicial review if EPA does not revise or rescind the Rule. D.C. Circuit Rules provide that if this Court remands "the record" in a case to the agency, the Court "retains jurisdiction over the case." D.C. Cir. R. 41(b). But if the Court remands "the case," the Court "does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand." *Id.* This Court's Order suggests that it is considering the latter form of remand, asking whether "the[] consolidated cases" should be remanded. Order at 2, ECF No. 1673071.[1]

If this Court remands the consolidated cases without vacating the Rule and without retaining jurisdiction, and if EPA ultimately keeps the Rule in place, Petitioners could face arguments that this Court lacks jurisdiction to review the Rule. Under the Clean Air Act, a petition for review "shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such

[1] Moreover, this Court generally remands the record to allow the agency to provide reasons for its decision or clarify the record. *See, e.g., Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994) (remanding the record for the agency to explain its basis for its decision to exclude transient, non-community waters systems from its regulation); *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 461 (D.C. Cir. 1989) ("remand[ing] the record to the agency for clarification of its interpretation of its own regulations"). The remand this Court appears to contemplate is for the different and broader purpose of allowing EPA to review and possibly rescind the challenged rule itself.

sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). The initial 60-day period would have long ago expired, and the exception for cases filed on after-arising grounds has been narrowly interpreted by the Court.[2] As a result, even though Petitioners timely filed their petitions for review in these cases, these statutory limitations could be used in an attempt to shield the Rule from any judicial review if, after a remand by this Court, EPA were ultimately not to change course.

While Petitioners do not concede that their timely-exercised rights to judicial review can be extinguished in this way, and believe that review would be available, these questions would be avoided by abeyance.

Second, it is this Court's ordinary practice to hold cases in abeyance when the agency has decided to review the rule being challenged. Just last month, this Court held in abeyance several consolidated cases challenging EPA rules that, as here, the agency intends to review. *See* Order, *Walter Coke, Inc. v. EPA*, No. 15-1166 (and consolidated cases) (D.C. Cir. Apr. 24, 2017), ECF No. 1672430; Order, *Murray Energy Corp. v. EPA*, No. 15-1385 (and consolidated cases) (D.C. Cir. Apr. 11, 2017), ECF No. 1670626; Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (and consolidated

[2] *See, e.g.*, *Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 27 (D.C. Cir. 2016) (rejecting argument that "'the mere application of a regulation,' without anything more, constitutes after-arising grounds"); *see also Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 662-63 (D.C. Cir. 2014) (rejecting argument, in construing similar provision under Surface Mining Control and Reclamation Act, that emergence of parties not previously in existence constitutes after-arising grounds).

cases) (D.C. Cir. Apr. 27, 2017), ECF No. 1672987; *see also* Order, *Dalton Trucking, Inc. v. EPA*, No. 13-74019 (9th Cir. May 10, 2017), ECF No. 10428699. And as here, EPA did not announce that it would rescind or replace those rules, only that it was reviewing them to determine whether it might do so.

While this practice has significant recent and relevant support, it is not new and has been followed in a wide variety of procedural circumstances. In 2009, this Court held in abeyance the State of California's challenge to EPA's denial of a waiver for new motor vehicle emission standards, *see* Order, *California v. EPA*, No. 08-1178 (and consolidated cases) (D.C. Cir. Feb. 25, 2009), ECF No. 1167136, which the agency later rescinded and reversed, *see* Order, *California v. EPA*, No. 08-1178 (and consolidated cases) (D.C. Cir. Sept. 3, 2009), ECF No. 1204414 (dismissing the petitions for review as moot). This Court has also granted abeyance based on an agency's intention to revisit a rule after merits briefing had closed. *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 384 (D.C. Cir. 2012). And this Court has held in abeyance petitions for review of the Federal Communications Commission's rules pending reconsideration by the Commission. *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1316 (D.C. Cir. 2000).

The reasons for this established practice are well known. As this Court has explained and appears to have recognized in its Order, it makes little sense to actively proceed with judicial review when an agency has embarked on a review that could ultimately lead to a substantial revision to or rescission of the rule. *See Am. Petroleum*

Inst., 683 F.3d at 388-89 (holding a case in abeyance where a new proposal "would likely moot the analysis [the court] could undertake" in deciding the case); *see also U.S. Telecom Ass'n v. FCC*, No. 15-1063 (and consolidated cases), 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017) (Srinivasan & Tatel, JJ., concurring in the denial of rehearing en banc) (noting that "[e]n banc review would be particularly unwarranted" where the agency "will soon consider adopting a Notice of Proposed Rulemaking that would replace the existing rule with a markedly different one"). Abeyance conserves judicial and party resources, and allows the Court to efficiently dispose of petitions for review if the challenges become moot. *See Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016) (when a petition challenges a "regulation [that] no longer exists, [the Court] can do nothing to affect [petitioners'] rights relative to it, thus making th[e] case classically moot"); *Larsen v. U.S. Navy*, 525 F.3d 1, 4-5 (D.C. Cir. 2008) (concluding challenge to a withdrawn policy was moot).

Third, abeyance would further the purposes of, and ensure appropriate effect to, the U.S. Supreme Court's stay of the Rule. In issuing any stay, the Supreme Court considers whether there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court w[ould] vote to reverse [a] judgment below [upholding the Power Plan]; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (Kennedy, Circuit Justice

2006); *see also Nken v. Holder*, 556 U.S. 418, 427-29 (2009). The Supreme Court's extraordinary stay in this case thus reflects the Court's conclusion that the Rule merits Supreme Court review, has a "fair prospect" of being held unlawful, and the Rule would likely cause irreparable harm if permitted to take effect. Given these conclusions, the Rule should not go into effect unless and until the Supreme Court has decided the Rule is lawful or declined an opportunity to review the Rule on the merits.

Were this Court to remand the cases to EPA and not retain jurisdiction, the stay could be jeopardized prior to any judicial review of the Rule's legality. The Supreme Court stayed the Rule "pending disposition of [Petitioners'] petitions for review in [this Court] and disposition of [Petitioners'] petition for a writ of certiorari, if such writ is sought." *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). Under the text of the Supreme Court's order, it could be argued that a decision by this Court to remand the cases without expressly retaining jurisdiction "dispos[es]" of Petitioners' petitions for review, triggering the timeline for filing petitions for a writ of certiorari in the Supreme Court. As a result, a remand would generate additional litigation in the near term before the Supreme Court and likely this Court, presumably not the intended result. Regardless of whether the agency ultimately decides to retain, revise, or rescind the Rule, litigation over the remand order would waste both judicial and agency resources.

Respondent-Intervenors have objected to holding the cases in abeyance while the stay remains in effect. State & Municipal Resp't-Intervenors' Opp'n to Mot. to Hold Proceeding in Abeyance at 4 (Apr. 5, 2017), ECF No. 1669699; Corrected Pub. Health & Envtl. Resp't-Intervenors' Opp'n to Mot. to Hold Cases in Abeyance at 5-7 (Apr. 5, 2017), ECF No. 1669770. But there is nothing inconsistent about holding the cases in abeyance while there is a stay in effect. The Supreme Court concluded that the balance of equities favors preserving the status quo, did not set a time limit on its stay, and plainly intended that the Rule would not go into effect until the high court itself had an opportunity to determine whether to accept review of the case and, if it did so, to issue a decision on the merits. In fact, it is the position of Respondent-Intervenors that is inconsistent with the stay. Allowing the Rule possibly to go into effect through a remand while EPA conducts its review would contravene the Supreme Court's conclusion that the Rule has a fair prospect of being found to be legally flawed, its weighing of the harms, and its directive preventing the Rule from going into effect pending high court review.

Any concern as to delay in EPA's review can be readily addressed by requiring EPA periodically to report on its progress. For example, this Court could issue an order requiring the agency to report at certain intervals specifically on its progress in complying with the President's directive to complete its review of the Rule and its determination whether to "suspend, revise, or rescind" the Rule "as soon as practicable." Exec. Order No. 13,783, § 4, 82 Fed. Reg. at 16,095. If these periodic

reports cause any of the parties to be concerned with the pace of EPA's progress in satisfying the President's directive, they could explain to this Court why it should end the abeyance and decide the cases or remand them to EPA. This approach provides all the advantages of abeyance discussed above but also provides additional assurance that the agency is not seeking simply to "perpetually dodge review" by merely indicating its intent to revisit the challenged Rule. *Am. Petroleum Inst.*, 683 F.3d at 388.

CONCLUSION

This Court should hold the consolidated cases in abeyance.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(2)(C), I hereby certify that the foregoing Supplemental Brief of Petitioners and Petitioner-Intervenors contains 2,306 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, and that this supplemental brief therefore is within the word limit of 3,900 words established by the Court in its Order of April 28, 2017. I also certify that this supplemental brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Garamond font.

Dated: May 15, 2017

/s/ Elbert Lin
Elbert Lin

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of May, 2017, a copy of the foregoing Supplemental Brief of Petitioners and Petitioner-Intervenors was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Elbert Lin
Elbert Lin

Exhibit A

E&E NEWS PM

LATE-BREAKING NEWS

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AIR POLLUTION

Tighter smog regs expected as EPA studies Bush rule

Robin Bravender, E&E reporter

Published: Wednesday, September 16, 2009

The Obama administration is expected to issue substantially tougher smog standards after reconsidering the contentious 2008 regulations set by the George W. Bush administration, clean air experts say.

In response to a court deadline, U.S. EPA announced today that it will reconsider the national air quality standards for ozone, or smog. The Bush EPA tightened the national limits last year, but critics assailed the administration for adopting a standard that failed to protect public health (***Greenwire***, Sept. 16).

EPA said it plans to conduct a full review of the science that influenced the 2008 decision -- including more than 1,700 scientific studies and public comments that were submitted during that process. The agency said it would also review the findings of EPA's independent science advisory committee, which recommended stricter limits than those ultimately adopted.

"This is one of the most important protection measures we can take to safeguard our health and our environment," said EPA Administrator Lisa Jackson. "Reconsidering these standards and ensuring acceptable levels of ground-level ozone could cut health care costs and make our cities healthier, safer places to live, work and play."

Experts tracking the issue say the reconsideration will almost certainly lead to stricter standards.

"It is unimaginable that EPA would go through this whole process to come up with a standard that weakens the status quo," said Bill Becker, executive director of the National Association of Clean Air Agencies.

The Bush EPA strengthened the ozone limits from 84 parts per billion (ppb) to 75 ppb, although EPA's Clean Air Scientific Advisory Committee (CASAC) had recommended a primary health-based standard between 60 and 70 ppb.

Environmentalists also accused the Bush White House of interfering to prevent EPA from establishing a more stringent secondary standard to protect forests, crops and wildlife, something EPA staff members and science advisers had recommended.

"We all knew that [the Obama administration] wanted to reconsider it, but now the question is, what do they do?" said Jeff Holmstead, former EPA air chief during the Bush administration. "Most of us that watch these things think they'll probably end up lowering it to 70 or 69 or something."

Becker and Earthjustice attorney David Baron, who represented environmental groups in a lawsuit challenging the Bush standard, predicted that EPA will set the limit in its science advisers' recommended range of between 60 and 70 ppb.

"It's most likely to be somewhere within the range recommended by CASAC," Baron said. "Where that will be is an open question right now."

Despite EPA's best intentions to safeguard public health, Holmstead said it seems unlikely that regions already struggling to meet the current standards will be able to comply with stricter limits.

"It really forces regulators to be dishonest, because they have to come up with this modeling and these plans that purport to show that whatever they're doing is going to allow them in 10 years or in 20 years to meet the

standard," Holmstead said. "But everybody knows that they're not going to do that."

Baron dismissed that argument, saying that EPA must set a high bar in order to encourage innovation.

"We've had strong standards set in the past or standards that seemed to be strong that we've been able to meet," Baron said. "Unless you set protective targets, you're not going to generate the efforts to meet those standards."

Amy Chai, staff counsel for the National Association of Home Builders, said she is optimistic that the agency will relax the standards. The industry association sued the agency over the Bush administration rule, arguing that the ozone levels were too stringent and would prove costly to businesses.

"I remain hopeful, but you know I really don't know which way it's going go," Chai said. "Our concerns have always been that these requirements are going to lead to increased burdens on our industry."

The agency plans to issue a proposed rule by Dec. 21 and to sign the final rule by Aug. 31, 2010.

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Exhibit B

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

JUL 13 2011

THE ADMINISTRATOR

The Honorable Thomas R. Carper
United States Senate
Washington, D.C. 20510

Dear Senator Carper:

Thank you for your letter of July 11, 2011, regarding the U.S. Environmental Protection Agency's reconsideration of the 2008 National Ambient Air Quality Standard (NAAQS) for ground-level ozone, which is commonly known as "smog." I appreciate the opportunity to clarify why the Agency is undertaking a reconsideration of the 2008 standard, which had been set by the previous Administration.

For more than 40 years, the Clean Air Act (CAA) has protected Americans against diseases from air pollution – guarding the public by setting national health standards based on the best science. The review of the ozone standard every five years, as demanded by the Clean Air Act, is particularly vital. Ozone is among the most widespread and stubborn air pollutants. It contributes to the smog which can shroud U.S. cities, fields and canyons. It is responsible for tens of thousands of visits to emergency rooms by Americans each year for serious bronchial conditions, including asthma. It is hardest on the breathing of the very old and the very young, but it can affect everyone. It is responsible for millions of lost days of school due to illness and damages vegetation in the United States -- an estimated $500 million in reduced crop production each year.

The CAA sets up a two-step process for addressing unhealthy levels of six different air pollutants, including ozone. The first step is setting ambient air quality standards, which is the science-based step. The second step is reducing pollution levels to meet the standards; cost and other factors are considered in this step. Ozone pollution, or smog, is commonly associated with aggravated asthma attacks, but it also contributes to thousands of premature deaths a year, and millions of lost work and school days.

In setting the health-based ambient standards, Congress required EPA to review the best available science every 5 years and, if appropriate, revise the ambient standards to a level requisite to protect human health with an adequate margin of safety. The CAA requires that this standard setting be based solely on science. Since science is the cornerstone of all of our actions, we rely on the work of an independent, Congressionally-established body, the Clean Air Science Advisory Committee (CASAC), to review the work of the Agency health scientists and provide recommendations to the Agency on where protective standards ought to be set. This group is made up of wholly independent expert scientists, public health officials and other similar experts.

In the 2008 standard-setting process, the CASAC submitted recommendations to the Agency that a protective standard for ground-ozone would be appropriate within the range of 0.060-0.070 parts per million (ppm). However, the Bush EPA set the standard outside of the CASAC-recommended range, at 0.075 ppm. Based on arguments that the 0.075 ppm designation was "arbitrary and capricious" because it was not consistent with the recommendations of CASAC, the Bush-era EPA's decision was immediately challenged in court.

The legal defensibility of the 2008 decision posed major challenges for the Federal Government given the strength of the scientific record at the time, the weakness of the 2008 ozone decision in light of that scientific record and the requirements of the CAA, and other factors. Were the standard to be overturned in court, it would have resulted in more financial and planning uncertainty for Cities and States, when they could afford it the least.

Upon my confirmation as EPA Administrator, I had to choose between defending the Bush-era ozone standard in court or agreeing to reconsider the 2008 designation. I decided that reconsideration was the appropriate path based on concerns that the 2008 standards were not legally defensible given the scientific evidence in the record for the rulemaking, the requirements of the Clean Air Act and the recommendation of the CASAC. This reconsideration will be based on the scientific record that was the basis for the 2008 standard.

I am committed to working with states and local areas to provide healthy air to all Americans by identifying cost-effective implementation solutions to meet any revised standards. There is much flexibility in the Clean Air Act that EPA can build into implementation of the reconsidered ozone standard, and I recognize that this flexibility will be critical to states working under constrained resources to continue economic development and job growth.

As history has shown us, this flexibility will minimize the costs associated with updating the standard. In 1997, for instance, the Agency heard claims about excessively high costs and unreasonable burdens associated with meeting the standards we set at the time ozone and particulate matter. Critics said that the new EPA standards would result in banning barbecues, fireworks and antique cars, and have other serious effects on our society and that they would cost tens of billions of dollars a year and that many areas would never be able to attain the standards. In reality, it has cost a fraction of that amount, and the vast majority of areas around the country now meet those standards, or will as a result of the Cross-State Air Pollution Rule that we finalized last week.

Again, I thank you for your leadership and your inquiry. Should you have any further questions, please feel free to contact me.

Sincerely,

Lisa P. Jackson