ORAL ARGUMENT REMOVED FROM CALENDAR

No. 15-1381
(and consolidated cases)

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

STATE OF NORTH DAKOTA, ET AL.,
Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petitions for Review of Final Action
by the United States Environmental Protection Agency

SUPPLEMENTAL BRIEF OF RESPONDENT EPA IN SUPPORT OF ABEYANCE

ERIC GRANT
Deputy Assistant Attorney General

BRIAN H. LYNK
CHLOE H. KOLMAN
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Phone: (202) 514-6187
Email: brian.lynk@usdoj.gov

Of Counsel:
ELLIOTT ZENICK
SCOTT J. JORDAN
United States Environmental
Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

FEDERAL REGISTERS

GLOSSARY

CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
ECF	Electronic Case Filing
FCC	Federal Communications Commission

STATEMENT OF THE ISSUE

On April 28, 2017, this Court issued an order holding these cases in abeyance for 60 days and further ordering the parties to file supplemental briefs addressing whether the cases should be remanded to the Environmental Protection Agency ("EPA") rather than held in abeyance.

SUMMARY OF THE ARGUMENT

In cases where an agency has announced that it is revisiting a challenged rule, either abeyance or remand may be an appropriate procedure and identifying the superior of these two approaches depends upon case-specific circumstances. Here, either abeyance or remand would appropriately conserve judicial resources by avoiding unnecessary adjudication. Either abeyance or remand would also appropriately preserve the integrity of the administrative process and avoid prejudice to Respondent EPA. While both procedures are suitable in these respects, abeyance is the most suitable option here because it also has the additional advantage of avoiding prejudice to Petitioners. The status quo is that the rule at issue here is in effect and applies to new sources, but Petitioners have petitions pending (and presently stayed) that challenge the Rule on its merits. Were the Court to remand the Rule to EPA, these petitions would be dismissed and Petitioners would be compelled to initiate new litigation in the event that they determine—based on subsequent developments in the administrative process—that their challenges should be renewed.

Abeyance will preserve the pending petitions, while at the same time allowing EPA to pursue further administrative proceedings in the interim.

BACKGROUND

On October 23, 2015, EPA promulgated under section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b), "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule." 80 Fed. Reg. 64,510 ("the Rule" or "the 111(b) Rule"). The 111(b) Rule established standards of performance for carbon dioxide emissions from new, modified, and reconstructed fossil-fuel-fired power plants for two subcategories of plants: fossil fuel-fired electric utility steam generating units (chiefly utility boilers) and stationary combustion turbines (chiefly natural gas-fired units). See generally id.

Fifteen petitions for judicial review of the 111(b) Rule—filed by state governmental entities, companies, trade organizations, and labor groups—were consolidated under the lead case North Dakota v. EPA, No. 15-1381.[1] The Court later consolidated additional petitions seeking judicial review of EPA's denial of administrative petitions for reconsideration of the Rule. See "Reconsideration of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and

[1] A sixteenth petition, filed by Biogenic CO_2 Coalition (No. 15-1480), was severed and is being held in abeyance pending further order of the Court while EPA considers certain issues raised in administrative reconsideration petitions. Order, ECF No. 1605581 (March 24, 2016).

Reconstructed Stationary Sources: Electric Utility Generating Units," 81 Fed. Reg. 27,442 (May 6, 2016). Merits briefing concerning the judicial challenges to both EPA actions was completed on February 6, 2017, and the case was scheduled for oral argument on April 17, 2017. See, e.g., ECF No. 1667709 (order establishing argument format).

On March 28, 2017, the President of the United States issued an Executive Order establishing the policy of the United States that executive departments and agencies "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." Executive Order, "Promoting Energy Independence and Economic Growth," § 1(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). The Executive Order also sets forth the policy that "all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic." Id. § 1(d).

With respect to the 111(b) Rule in particular, the Executive Order directs the Administrator of EPA to "immediately take all steps necessary" to review it for consistency with these and other policies set forth in the Order. Id. § 4. The Executive Order further instructs the agency to "if appropriate [and] as soon as

practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding" the Rule. Id.

In accordance with the Executive Order and his authority under the Clean Air Act, the EPA Administrator signed a Federal Register notice on March 28, 2017, announcing EPA's review of the 111(b) Rule and providing advanced notice of forthcoming rulemaking proceedings. See "Notice of Review of the Clean Power Plan," 82 Fed. Reg. 16,329 (Apr. 4, 2017). Specifically, the Federal Register notice announces that EPA "is initiating its review of the [111(b) Rule]" and "providing advanced notice of forthcoming rulemaking proceedings consistent with the President's policies." Id. at 16,330. The Federal Register notice further notes that if EPA's review "concludes that suspension, revision or rescission of [the Rule] may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." Id.

On March 28, 2017, EPA filed a motion to hold these cases in abeyance pending completion of EPA's review and any resulting forthcoming rulemaking. ECF No. 1668276. Subsequently, this Court issued orders removing these cases from the oral argument calendar, holding these cases in abeyance for 60 days, and directing the parties to file supplemental briefs by May 15, 2017, addressing "whether these consolidated cases should be remanded to the agency rather than held in abeyance." ECF Nos. 1668612 (order of March 30, 2017), 1673072 (order of April 28, 2017).

ARGUMENT

I. Where an agency is reconsidering a challenged rule, either abeyance or remand may be appropriate, depending upon the circumstances.

Generally speaking, in circumstances in which an agency has announced that it is revisiting a challenged rule, either abeyance or remand can be an appropriate procedure to avoid unnecessary adjudication and interference with an ongoing administrative process. Cf. Anchor Line Ltd. v. Fed. Maritime Comm'n, 299 F.2d 124, 125 (D.C. Cir. 1962) ("when an agency seeks to reconsider its action, it should move the court to remand *or* to hold the case in abeyance pending reconsideration by the agency" (emphasis added)). In any given case, however, one approach may be superior to the other in view of the specific circumstances.

In this Court, a fundamental distinction between abeyance and remand is that in the case of the latter, this Court does not retain jurisdiction. See D.C. Cir. Rule 41(b) ("If the case is remanded, this 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." (emphasis added)). In contrast, where a case is held in abeyance pending agency review, then this Court retains jurisdiction and a petitioner may simply resume its case in the event that the agency elects not to revise the rule.

II. Abeyance is the most suitable approach here, because it would not prejudice Petitioners.

Here, either abeyance or remand would protect the agency's interests. Either procedure would avoid unnecessary adjudication, support the integrity of the administrative process, and ensure due respect for the prerogative of the executive branch to review and if appropriate revise the policy decisions of the prior Administration.[2] And either procedure would avoid compelling the United States to represent the current Administration's position on the many substantive questions that are the subject of EPA's recently announced review.[3]

While EPA's interests would be protected through either abeyance or remand, EPA believes that abeyance is the most suitable approach here, inasmuch as it would have the least disruptive consequences and would avoid any prejudice to Petitioners. A remand would dispose of the petitions for review and terminate the Court's

[2] As noted in Judge Srinivasan's concurring opinion in support of the Court's recent decision denying petitions for rehearing en banc in U.S. Telecom Ass'n v. FCC, No. 15-1063, Slip Op. at 1 (D.C. Cir. May 1, 2017), judicial review is "particularly unwarranted" where an agency might replace an existing rule "with a markedly different one."

[3] Any remand should be without vacatur so as to avoid any premature adjudication or advisory opinion prior to the conclusion of EPA's review. A remand with vacatur would require the Court to prematurely consider the merits of Petitioners' claims and find that the Rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 42 U.S.C. § 7607(d); see also Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 135-36 (D.D.C. 2010) (holding Court lacks authority to order vacatur of rule without consideration of merits); Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 4-5 (D.D.C. 2009) (same).

jurisdiction. Thereafter, if Petitioners became dissatisfied with the pace of further administrative proceedings or otherwise determined that it was necessary to renew their challenges to the Rule in the absence of a new final action suspending, revising, or rescinding the Rule, they would be compelled to file new petitions for review and face the risk that such petitions would be held untimely. See 42 U.S.C. § 7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days from the date notice [of the challenged action] appears in the Federal Register, except . . . if such petition is based solely on grounds arising after such sixtieth day . . . ."). Abeyance, conversely, would preserve the status quo—including the pendency of the petitions for judicial review—while EPA engages in further administrative proceedings. Thus, EPA believes that abeyance is the most appropriate path forward, as it would avoid any prejudice to Petitioners pending the completion of EPA's administrative review and any consequent rulemaking.

CONCLUSION

WHEREFORE, EPA respectfully requests that this litigation be held in abeyance while the agency conducts its review of the 111(b) Rule, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period.

Respectfully submitted,

ERIC GRANT
Deputy Assistant Attorney General

DATED: May 15, 2017 BY: */s/ Brian H. Lynk*

BRIAN H. LYNK
CHLOE H. KOLMAN
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Phone: (202) 514-6187
Email: brian.lynk@usdoj.gov

Of Counsel:

Elliott Zenick
Scott J. Jordan
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of this Court's order dated April 28, 2017, because it contains 1,691 words, excluding the parts of the brief exempted under Rule 32(a)(7)(f), according to the count of Microsoft Word.

s/ *Brian H. Lynk*
BRIAN H. LYNK

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Brian H. Lynk*
BRIAN H. LYNK