ORAL ARGUMENT REMOVED FROM CALENDAR

Case No. 15-1381 (and consolidated cases)

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

State of North Dakota,

Petitioner,

v.

United States Environmental Protection Agency,

Respondent.

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

Supplemental Brief for State Respondent-Intervenors in Response to the Court's April 28, 2017, Order, by the States of California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, and the City of New York

---

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MICHAEL J. MYERS
ANDREW G. FRANK
Assistant Attorneys General

MAURA HEALEY
Attorney General of Massachusetts
MELISSA A. HOFFER
CHRISTOPHE COURCHESNE
TRACY L. TRIPLETT
JILLIAN M. RILEY
Assistant Attorneys General

XAVIER BECERRA
Attorney General of California
GAVIN G. MCCABE
DAVID A. ZONANA
Supervising Deputy Attorneys General
TIMOTHY E. SULLIVAN
JONATHAN WIENER
ELIZABETH B. RUMSEY
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612
(510) 879-0987
Attorneys for the State of California, by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Xavier Becerra

Additional counsel on signature pages

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

GLOSSARY OF ABBREVIATIONS

CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
SIP	State Implementation Plan

PRELIMINARY STATEMENT

The undersigned Respondent-Intervenor States and Municipalities ("State Intervenors") submit this supplemental brief in response to the Court's April 28, 2017, Order, which (1) granted temporarily, for 60 days, the motion of Respondent U.S. Environmental Protection Agency (EPA) to hold the case in abeyance, and (2) requested briefing from the parties "addressing whether these consolidated cases should be remanded to the agency rather than held in abeyance." (ECF No. 1673072.)

State Intervenors continue to believe that judicial economy and the public interest would be best served by the Court proceeding to decide this case. Petitioners' claims present a live controversy. EPA's Clean Air Act section 111(b) rule limiting carbon dioxide (CO_2) emissions from new, modified, and reconstructed power plants ("the Rule")[1] has never been stayed, and it continues to govern CO_2 emissions from power plants newly constructed after January 8, 2014, or modified or reconstructed after June

[1] 42 U.S.C. § 7411(b); "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,510 (Oct. 23, 2015).

18, 2014. Petitioners agree that this Court's case management decisions on the litigation do not alter that fact.[2]

State Intervenors recognize that this case is in a significantly different posture—with respect to both the stage of litigation[3] and the impacts to the environment—from the related litigation over the Clean Power Plan (*West Virginia v. EPA*, D.C. Cir., No. 15-1363). The Rule at issue in this case is in effect, while, in contrast, the Clean Power Plan is currently stayed. Because of this, unlike in the Clean Power Plan case, here State Intervenors see little difference between the environmental impacts of remand as compared to abeyance: the Rule remains in effect in either instance. If the Court chooses not to proceed to the merits of this case, State Intervenors request that the order clarify what effect the Court intends remand or abeyance to have on

[2] Petitioners used the ongoing effectiveness of the Rule to persuade the Court that this case should be held in abeyance. State and Non-State Petitioners' and Petitioner Intervenors' Response in Support of EPA's Motion to Hold Cases in Abeyance, Mar. 30, 2017, (ECF No. 1668604), at 2. ("The Section 111(b) Rule has not been stayed, and thus will remain in effect during the period of the abeyance. Thus, any hardship granting the abeyance would cause would be to the Petitioners who nevertheless support the abeyance.")

[3] At the time EPA requested abeyance for both of these cases, this case had been fully briefed and the merits panel had already been announced, whereas the Clean Power Plan had been under review by the en banc Court for over seven months after a full day of oral argument.

the litigation of any future EPA actions concerning the Rule, including any attempts by EPA to rescind, revise, or replace it.

ARGUMENT

I. THE COURT SHOULD DECIDE THE MERITS OF PETITIONERS' CHALLENGES

State Intervenors urge the Court to decide the merits of Petitioners' fully briefed challenges to the Rule. The Rule's emissions limits on coal and gas power plants remain in force unless and until EPA lawfully changes them, which would require EPA to complete the notice-and-comment process required by section 307(d) of the Clean Air Act. 42 U.S.C. § 7607(d). This process would, as EPA recently told the Court, "take a significant period of time, requiring development of a proposal, solicitation of public comment, and preparation and promulgation of a final rule." Respondents' Opposition to Petitioners' and Petitioner-Intervenors' Motions to Extend the Briefing Schedule, Dec. 21, 2016, (ECF No. 1652426), at 4. Thus, Petitioners' claims pending before this Court continue to present a live controversy.

If the Court now resolves the issues Petitioners are raising in this case, EPA can avoid making legal errors in its review of the Rule, and these same issues will not have to be re-litigated during the challenges to any resulting rulemaking. State Intervenors' position that failure to resolve these

controversies would be inefficient and contrary to the public interest is explained in more detail in the Opposition of State Intervenors to EPA's Motion to Hold Cases in Abeyance (Apr. 5, 2017, (ECF No. 1669738)).

Moreover, neither remand nor abeyance is necessary to allow EPA to review the Rule pursuant to the March 28, 2017, Executive Order or even for it to begin a new Clean Air Act section 307(d) rulemaking.[4] EPA has informed the Court that its review of the Rule began even before the Court ordered the current abeyance and that it is committed to this review regardless of the procedural posture of this case. Reply in Support of EPA's Motion to Hold Cases in Abeyance, Apr. 12, 2017, (ECF No. 1670859), at 7 n.4 ("[T]he review of the 111(b) Rule is current and ongoing, not tentative or planned. Any suggestion that EPA would abandon this review is speculative and contradicts EPA's decision to adhere to the specific review terms of the Executive Order.").

[4] Exec. Order No. 13783 ("Promoting Energy Independence and Economic Growth," signed March 28, 2017), 82 Fed. Reg. 16,093 (Mar. 31, 2017). As State Intervenors previously explained, the Executive Order's policies are not the same as the factors EPA is required to consider in setting new source performance standards under section 111(b) of the Clean Air Act, making any future rulemaking based on the Executive Order vulnerable to being vacated by this Court. *See* Opposition of State Intervenors to EPA's Motion to Hold Cases in Abeyance, Apr. 5, 2017, (ECF No. 1669738), at 4-7 & n.3.

Should the Court decide not to address the merits of Petitioners' challenges, however, and to follow one of the two approaches presented in its April 28, 2017, Order, State Intervenors respectfully offer the recommendations in sections II and III, below, on specific aspects of an abeyance or remand order.

II. IF THE COURT REMANDS THE CASE TO EPA, IT SHOULD SPECIFY WHAT EFFECT REMAND HAS ON PETITIONERS' CLAIMS

In the context of this case—where the Court has not determined that EPA must correct or further explain its interpretation of the law or the record—a "remand" to EPA is the equivalent of a dismissal of Petitioners' claims, as described below.[5] To the extent that the Court intends to dispose of EPA's abeyance motion in a way that allows Petitioners to raise their previously filed claims against the Rule in some later proceeding, such a disposition would be more accurately considered an "abeyance" of this case,

[5] The Court should not entertain any suggestion that it should vacate the Rule in conjunction with remand. Vacatur would be improper here when this Court has issued no ruling on the merits at all—let alone a decision finding the Rule to be invalid. *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (refusing to vacate rule because "granting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits"). Even if EPA disclaims its previous positions, vacatur is not permissible. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (explaining that an agency cannot circumvent the rulemaking process through "rescission by concession").

not a "remand," and State Intervenors respectfully suggest that the Court describe it as such to avoid confusion in the future.

If the Court remands the "record" to the agency, it retains jurisdiction, but if it remands the "case," the case is terminated and any claims would have to be refiled, if that is otherwise allowed by law. D.C. Cir. R. 41(b) ("If the *record* in any case is remanded to the district court or to an agency, this court retains jurisdiction over the case. 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); *cf. United States v. McKie*, 73 F.3d 1149, 1155 (D.C. Cir. 1996) ("Because we remand the record for limited purposes, rather than remanding the entire case, we retain jurisdiction pending the district court's resolution of the . . . issue."). To avoid confusion in later proceedings, State Intervenors request the Court specify in its upcoming order whether it intends Petitioners' claims to be terminated by a remand or, instead, held in abeyance and subject to this Court's jurisdiction.

III. IF THE COURT ORDERS THE CASE HELD IN ABEYANCE, IT SHOULD CLARIFY HOW THAT ORDER AFFECTS CHALLENGES TO SUBSEQUENT RELATED EPA ACTIONS OR RULES

If this Court grants an abeyance, it should consider structuring its order so that future challenges to an EPA replacement rule (or rescission) could be consolidated and decided together with the current case. The Eleventh Circuit recently followed a similar approach in *Alabama Environmental Council v. EPA*, 711 F.3d 1277 (11th Cir. 2013). There, an environmental group challenged EPA's approval of a state implementation plan (SIP) revision. Then a change in Administration occurred, and EPA decided to reconsider the approval, leading the court to stay the case during the reconsideration while retaining jurisdiction of the original challenge. *Id.* at 1279. EPA subsequently reversed itself and disapproved the SIP revision, and a different petitioner (a power plant company) challenged that decision. The Eleventh Circuit then considered both sets of challenges together—the environmental group's original challenge to the SIP approval, and the power plant's subsequent challenge to the SIP disapproval—and upheld the agency's original approval. *Id.* at 1285.

Here, this Court could similarly structure any abeyance by maintaining jurisdiction over the current challenges to the Rule and ordering the consolidation of future challenges to any EPA actions affecting the Rule. If

the Court holds this case in abeyance, State Intervenors respectfully request that the Court clarify for the parties whether it intends that its retention of jurisdiction to decide Petitioners' challenges to the Rule also includes jurisdiction over challenges to future actions by EPA to suspend, rescind, or revise the Rule.

CONCLUSION

State Intervenors believe that judicial economy and the public interest are best served by the Court ruling on Petitioners' claims. If the Court instead decides to remand the case to EPA or hold the case in abeyance, State Intervenors respectfully request that the Court clarify in its order what effect it intends the remand or abeyance to have on this case and future cases related to the Rule.

Dated: May 15, 2017

Respectfully Submitted,

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MICHAEL J. MYERS
ANDREW G. FRANK
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2392

MAURA HEALEY
Attorney General of Massachusetts
MELISSA A. HOFFER
CHRISTOPHE COURCHESNE
TRACY L. TRIPLETT
JILLIAN M. RILEY
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2423

XAVIER BECERRA
Attorney General of California
ROBERT W. BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
GAVIN G. MCCABE
DAVID A. ZONANA
Supervising Deputy Attorneys General

/s/ Timothy E. Sullivan
TIMOTHY E. SULLIVAN
JONATHAN WIENER
ELIZABETH B. RUMSEY
Deputy Attorneys General
Attorneys for the State of California, by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Xavier Becerra
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-0987
Timothy.Sullivan@doj.ca.gov

GEORGE JEPSEN
Attorney General of Connecticut
MATTHEW I. LEVINE
ROBERT D. SNOOK
SCOTT N. KOSCHWITZ
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

MATTHEW P. DENN
Attorney General of Delaware
VALERIE S. EDGE
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3d Floor
Dover, DE 19904
(302) 739-4636

DOUGLAS S. CHIN
Attorney General of Hawai‘i
HEIDI M. RIAN
WILLIAM F. COOPER
Deputy Attorneys General
333 Queen Street, Rm. 905
Honolulu, HI 96813
(808) 586-4070

LISA MADIGAN
Attorney General of Illinois
MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

TOM MILLER
Attorney General of Iowa
JACOB LARSON
Assistant Attorney General
Environmental Law Division
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319
(515) 281-5341

JANET T. MILLS
Attorney General of Maine
GERALD D. REID
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333
(207) 626-8800

BRIAN E. FROSH
Attorney General of Maryland
ROBERTA R. JAMES
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230
(410) 537-3748
Attorneys for State of Maryland, by and through Attorney General Brian E. Frosh

LORI SWANSON
Attorney General of Minnesota
KAREN D. OLSON
Deputy Attorney General
MAX KIELEY
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1244
Attorneys for State of Minnesota, by and through the Minnesota Pollution Control Agency

HECTOR BALDERAS
Attorney General of New Mexico
JOSEPH YAR
Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 490-4871

ELLEN F. ROSENBLUM
Attorney General of Oregon
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

PETER F. KILMARTIN
Attorney General of Rhode Island
GREGORY S. SCHULTZ
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-6902

MARK HERRING
Attorney General of Virginia
JOHN W. DANIEL, II
Deputy Attorney General
DONALD D. ANDERSON
Senior Assistant Attorney General and Chief
MATTHEW L. GOOCH
Assistant Attorney General
Environmental Section
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 225-3193

ROBERT W. FERGUSON
Attorney General of Washington
KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769

KARL A. RACINE
Attorney General for the District of Columbia
JAMES C. MCKAY, JR.
Senior Assistant Attorney General
Office of the Attorney General for the District of Columbia
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

ZACHARY W. CARTER
Corporation Counsel of the City of New York
CARRIE NOTEBOOM
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Supplemental Brief for State Respondent-Intervenors in Response to Court's April 28, 2017, Order, dated May 15, 2017, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's Order issued on April 28, 2017, which limited the briefs for each party to 3,900 words. I certify that this brief contains 1,746 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Timothy E. Sullivan
TIMOTHY E. SULLIVAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for State Respondent-Intervenors in Support of Respondent was filed on May 15, 2017, using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Timothy E. Sullivan
TIMOTHY E. SULLIVAN