ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*, *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	No. 19-1140, and consolidated cases

EPA'S COMBINED RESPONSE TO ENVIRONMENTAL AND STATE PETITIONERS' MOTIONS TO HOLD THE CASE IN ABEYANCE

This Court should deny the Environmental and State Petitioners' request that these consolidated cases be brought to a halt. These cases address the appropriate regulation of greenhouse gases from existing coal-fired power plants. This issue is one of great public interest that has been unresolved for many years. Expeditious resolution of the petitions for review here would provide certainty over EPA's authority under the Clean Air Act (CAA), and the validity of the Affordable Clean Energy (ACE) Rule promulgated under the Act.

The Environmental and State Petitioners contend that abeyance is necessary to allow EPA to act on their administrative petitions for reconsideration of the ACE Rule, and to act on a different, pending rulemaking proposal addressing New Source Review (NSR) reform. But, these concerns fall flat. EPA has not initiated reconsideration of any aspect of the ACE Rule, nor has it expressed an intent to do so. And EPA made clear in the ACE Rule that the rule was independent from the pending NSR reform proposal.

The CAA judicial review provision speaks to the circumstances here and encourages review of the ACE Rule without delay. *See* 42 U.S.C. § 7607. The Act expressly allows a challenge to a rule to move forward while administrative petitions for reconsideration of the rule remain pending. § 7607(b)(1). This Court has long held that this statutory structure is evidence of Congress's intent that judicial review of CAA rules take place expeditiously. *See, e.g.*, *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1184, 1186-87 (D.C. Cir. 1980).

Environmental and State Petitioners know this well. Indeed, they identified this very principle when vociferously and repeatedly opposing abeyance in litigation over EPA's prior Clean Power Plan rule. They

argued then that "[t]he judicial review provisions as well as other features of the Clean Air Act Amendments set a tone for expedition." *See* Case No. 15-1363, Doc. Id. No. 1751996, Reply to Mot. Decide Merits at 10 (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 344 (D.C. Cir. 1979)). This Court, they asserted, has long "recognized the value to the administration of Clean Air Act programs of promptly adjudicating 'primarily interpretative questions of comprehensive importance.'" Doc. Id. No. 1669759, Abeyance Opp. at 12 (quoting *Ala. Power Co. v. Costle*, 606 F.2d 1068, 1075 (D.C. Cir. 1979)). Such questions are undoubtedly present now in these pending cases.

Lacking any support in the text of the CAA for abeyance in the circumstances here, Environmental and State Petitioners liken this case to those where the Court held the matter was not ripe for review. *See* Envtl. Mot. at 13, Doc. Id. No. 1807492; State Mot. at 5, Doc. Id. No. 1808098. Setting aside the oddity of the suggestion that their own petitions are unripe, nothing in the administrative petitions or elsewhere prevents this Court from adjudicating the validity of the Clean Power Plan repeal, or other aspects of the ACE Rule now. Nor does the pending NSR reform proposal support an abeyance. The ACE

Rule is independent from this proposal, and action on the proposal is not expected for some time. This Court should thus address these petitions for review now, and resolve the scope of EPA's authority to regulate greenhouse gas emissions.

BACKGROUND

This case involves petitions to review EPA's final action entitled, "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations" (the ACE Rule). 84 Fed. Reg. 32,520 (July 8, 2019).

The ACE Rule finalized three separate and distinct rulemakings. First, EPA repealed the Clean Power Plan, in which EPA promulgated Clean Air Act (CAA) section 111(d) emission guidelines for states to follow in developing plans to reduce greenhouse gas emissions from power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the Clean Power Plan). Second, EPA finalized replacement emission guidelines for states to use when developing plans, premised on an alternative regulatory approach to that set forth in the Clean Power Plan. Third, EPA finalized new regulations for EPA and state implementation of those

guidelines and any future emission guidelines issued under CAA section 111(d).

Shortly after the ACE Rule became effective, this Court dismissed as moot the petitions for review challenging the Clean Power Plan. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.), Doc. Id. No. 1806952. Those consolidated cases had been pending since 2015. Many of the parties that took part in that case are likewise participating in this one.

ARGUMENT

I. ABEYANCE IS NOT WARRANTED BECAUSE THIS COURT CAN ADDRESS THE CHALLENGES TO THE ACE RULE NOTWITHSTANDING THE PENDING ADMINISTRATIVE PETITIONS.

Environmental and State Petitioners' request for an abeyance runs counter to the CAA's focus on expeditious review, and is unsupported on its own terms. The CAA's judicial review scheme emphasizes the importance of prompt review, in marked contrast to other statutes. Traditional principles of administrative law provide that judicial review of a rule should not move forward while a petition for agency reconsideration remains pending. *E.g.*, *Tenn. Gas Pipeline Co. v. FERC*, 9 F.3d 980, 980-81 (D.C. Cir. 1993) (per curiam) (holding that pendency of petition for agency rehearing renders petition for judicial

review "incurably premature"); *see also Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) (similar). The CAA, "[b]y its terms," however, "reflects a departure from [this] ordinary tolling rule" and allows for judicial review of a rule immediately, without regard to the pendency of any petition for reconsideration. *Ass'n of Battery Recyclers, Inc. v. EPA*, No. 12-1028, 2012 WL 2373298, at *1 (D.C. Cir. June 25, 2012). Section 7607(b)(1) provides that the "filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review . . . ." This Court has held that this language shows "a strong congressional desire" that judicial review happen "expeditiously." *Lead Indus. Ass'n*, 647 F.2d at 1186-87; *Ala. Power Co.*, 636 F.2d at 344 (similar).

Applying this logic, this Court has repeatedly denied opposed motions for abeyance pending EPA's disposition of administrative petitions for reconsideration of CAA rules. In *NRDC v. EPA*, for example, the petitioner sought an abeyance on the grounds that it had filed an administrative petition for reconsideration asserting that another government agency was investigating whether there were

"serious errors" in the scientific studies on which the rule was based. 902 F.2d 962, 974 (D.C. Cir. 1990), other grounds vacated in part by 921 F.3d 326 (D.C. Cir. 1991). The Court held that this "alleged 'new information'" was "too speculative to provide grounds for delaying [ ] decision" on the petition for review. 902 F.2d at 962. The Court reached the same result in *Lead Industries*, 647 F.2d at 1187, and denied an opposed motion for abeyance where the petitioner's purported basis for reconsideration of the rule did not raise "substantial questions about the validity" of EPA's scientific analysis.

To be sure, there are cases—like the Clean Power Plan litigation—where abeyance makes sense notwithstanding the CAA's focus on prompt review. For example, abeyance may be proper where the Agency has initiated reconsideration of the challenged rule, *see Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012), or where the parties agree to an abeyance pending further developments, *Sierra Club v. EPA*, 884 F.3d 1185, 1191 (D.C. Cir. 2018). But, no such circumstances are present here.

A. EPA has not initiated reconsideration of any aspect of the ACE Rule, and so there is no basis for deferring resolution of the petitions.

EPA has not initiated reconsideration of any aspect of the ACE Rule. Thus, the proper course is for this Court to adjudicate the petitions for review challenging the rule now. *See* 42 U.S.C. § 7607(b)&(d); *NRDC*, 902 F.2d at 974. The interest in expeditious review is paramount given that Environmental and State Petitioners are not the only petitioners challenging the ACE Rule. Industry petitioners have brought challenges to the rule as well, and many of these entities oppose abeyance. Petitioners North American Coal Corporation, Robinson Enterprises, and Westmoreland LLC moreover point to concrete harm to their interests from delaying resolution of the case. N. Am. Coal Abeyance Opp., Doc. Id. No. 1808554; Robinson Enters. Opp., Doc. Id No. 1808711; Westmoreland Abeyance Op., Doc. Id. No. 1808726.[1] This, combined with the intense public interest in this case, further supports consideration of these petitions for review

[1] EPA disagrees with the merits arguments that these petitioners set forth in their filings, and will address these issues in EPA's merits brief.

without delay. *See* EPA Mot. to Expedite, Doc. Id. No. 1803976; EPA Reply in Supp. of Mot. to Expedite, Doc. Id. No. 1806760.

Environmental and State Petitioners identify no case law holding that abeyance is proper in these circumstances. Their primary authorities for the principle that abeyance is warranted here include *American Petroleum Institute v. EPA*, 683 F.3d at 387, and *Devia v. Nuclear Regulatory Commission*, 492 F.2d 421 (D.C. Cir. 2007). Envtl. Mot. at 13; State Mot. at 6. But, these are not cases where the Court granted an opposed motion for abeyance; rather, they are cases where the Court held that the dispute was not prudentially ripe. In *American Petroleum Institute*, EPA had "already published [a] proposed rule [which], if enacted, would dispense with the need for such an opinion in a matter of months." 683 F.3d at 388. And, in *Devia*, a parallel administrative process prevented the challenged action from taking effect. 492 F.3d at 427. Again, here, EPA has not initiated reconsideration of the ACE Rule, let alone published a proposed rule seeking to revise it. The mere pendency of petitions for reconsideration do not make this case prudentially unripe. *See supra* at 6-7.

Environmental and State Petitioners' other authorities—the case law they suggest shows the Court's "commonplace abeyance practice"—are inapposite. Envtl. Mot. at 13, 19 n.11. *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 639 (D.C. Cir. 2019), involved a petition for review filed under the CAA's after-arising judicial review provision, which was held in abeyance pending mandatory exhaustion procedures unique to those types of petitions.[2] Other cases involved agreed abeyances or circumstances where, as in *American Petroleum Institute*, reconsideration was underway. *See Sierra Club*, 884 F.3d at 1191 (reconsideration underway); *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008) (reconsideration underway); *New York v. EPA*, No. 02-1387, 2003 WL 22326398, at *1-2 (D.C. Cir. Sept. 30, 2003) (reconsideration underway); *Brick Indus. Ass'n v. EPA*, No. 03-1142, 2004 WL 223231, at *1 (D.C. Cir. Jan. 21, 2004) (industry petitioner

[2] Under *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), a petitioner bringing an "after-arising" challenge under 42 U.S.C. § 7607(b)(1), must first exhaust its concern with EPA in an administrative petition before its case can proceed. 515 F.2d at 666. During this exhaustion process, the petition for review is held in abeyance. *See id.* This process is distinct from an administrative petition for reconsideration under § 7607(d)(7)(B). *Alon*, 936 F.3d at 647.

and EPA agreed on abeyance); *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 (D.C. Cir. 1990) (agreed abeyance). Still others involved different factual contexts entirely, like that of habeas review. *See Basardh v. Gates*, 545 F.3d 1068 (D.C. Cir. 2008). There is simply no authority requiring abeyance in circumstances analogous to those here.

B. In any event, the abeyance motions mischaracterize the impact of the administrative petitions for reconsideration on the petitions for review.

Environmental and State Petitioners are wrong that a decision on their administrative petitions for reconsideration is essential before the Court can address the key legal challenges to the ACE Rule.

1. As an initial matter, the Clean Power Plan repeal is manifestly ripe for review. Environmental and State Petitioners assert, among other things, that EPA's "core statutory interpretation argument for rescinding the Clean Power Plan" was promulgated without notice and comment, and so EPA must reconsider this aspect of the rule. Envtl. Mot. at 3; States Mot. at 8-10. But, Environmental and State Petitioners' own description of the rulemaking process belies the existence of any "logical outgrowth" issue with the Clean Power Plan repeal.

Specifically, the abeyance motions acknowledge that, in the Clean Power Plan repeal proposal, EPA stated that the plain language of CAA section 111 required that the "best system of emission reduction" be limited to those "measures that can be applied to or at the source," and proposed repealing the Clean Power Plan on the grounds that it was inconsistent with the statute. Envtl. Mot. at 6 (quoting 82 Fed. Reg. 48,035, 48,037 (Oct. 16, 2017)); *see also* State Mot. at 6-7. Environmental and State Petitioners further acknowledge that the ACE Rule was based on the same principle—namely, that "section 111 permits measures that can be physically applied at the individual plant to be included in the 'best system of emission reduction,'" and that the Clean Power Plan was inconsistent with EPA's authority under the CAA. Envtl. Mot. at 8-9 (quoting 84 Fed. Reg. at 32,536). *See also* 84 Fed. Reg. at 32,527 ("Because the CPP is premised on implementation of the [BSER] by a source's owner or operator and not application of the BSER to an individual source, the rule contravenes the plain language of CAA section 111(a)(1) and must be repealed.") (cleaned up).

Nothing more is required for the ACE Rule to be a logical outgrowth of the Clean Power Plan repeal proposal. The proposal's

discussion of the plain meaning of section 111, and whether the Clean Power Plan comported with this meaning, shows that commenters "reasonably should have filed their comments on this subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004).

Unsatisfied, Environmental and State Petitioners contend that reconsideration is required on their purported "logical outgrowth" concerns because not every one of EPA's "grammatical and semantic arguments" on the plain meaning of section 111 was fully articulated in the proposal. Envtl. Mot. at 11; State Mot. at 6-7. But, "EPA is not required to adopt a final rule that is identical to the proposed rule." *Ne. Md. Waste Disposal*, 358 F.3d at 951. Nor must the Agency include as part of a proposal an exhaustive discussion of every rationale supporting the rule it proposes to adopt. *See id*. Rather, "the key question is whether commenters should have anticipated that EPA might issue the final rule it did." *City of Portland, Or. v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (internal quotations omitted). There is simply no question that the Clean Power Plan repeal proposal put commenters on notice that EPA might issue a final rule repealing the Clean Power

Plan on the grounds that this rule was inconsistent with section 111 of the CAA.

Moreover, because EPA's repeal of the Clean Power Plan is based on the "plain language of CAA section 111," 84 Fed. Reg. at 32,524, additional notice and comment on this issue would serve no purpose. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (no logical outgrowth problem where a "new round of notice and comment would not provide commenters with their first occasion to offer new and different criticisms which the agency might find convincing") (internal quotations omitted). Again, EPA concluded in the ACE Rule that the plain language of CAA section 111 compelled repeal of the Clean Power Plan. 84 Fed. Reg. at 32,532. EPA claimed no deference for this interpretation. *Id*. Thus, the validity of the Clean Power Plan repeal turns on a *Chevron* step-one analysis, and that question is squarely before the Court. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Environmental and State Petitioners can challenge EPA's interpretation of section 111 in

their merits briefs, and the Court can then decide whether the Agency is correct. No further administrative process is necessary to ripen this question for review.

2. Environmental and State Petitioners' arguments about the other aspects of the ACE Rule—*e.g.*, the emission guidelines, and the revisions to the implementing regulations—fare no better. For these issues, Environmental and State Petitioners seek abeyance primarily on the grounds that it would be inefficient to litigate their challenges separately from EPA's decision on the administrative petitions. *See* Envtl. Mot. at 18-22; States Mot. at 7, 9-10.[3] This claim of inefficiency, however, runs directly counter to the arguments these same parties made in the Clean Power Plan litigation.

There, they urged the Court to "'fulfill its virtually unflagging obligation to hear and decide cases within its jurisdiction." No. 15-1363, Doc. Id No. 1748706, Mot. Decide Merits at 14 (quoting *Susan B.*

[3] EPA does not concede that any of the issues raised by Environmental and State Petitioners satisfy the criteria for reconsideration under 42 U.S.C. § 7607(d)(7)(B). EPA will address these administrative petitions in due course. If EPA later denies these petitions, Environmental and State Petitioners can obtain review of that decision. *See id*. For the reasons described below, it is premature to hold this proceeding in abeyance now in anticipation of decisions EPA has not yet made.

Anthony List v. Driehaus, 573 U.S. 149 (2014)). A prompt ruling on the merits of the Clean Power Plan was essential, they argued, because they had been seeking federal limits on carbon pollution from existing power plants "for almost fifteen years." Abeyance Opp. at 15. Ruling on the key legal issues "will also promote regulatory certainty by resolving the basic legal questions raised by the challengers, while abeyance would magnify and prolong regulatory uncertainty." *Id.*

Not only did these parties assert that the Court should resolve the challenges to the Clean Power Plan while (unlike here) EPA was reconsidering that rule, the environmental organizations there also opposed an abeyance motion early in the case that is analogous to the one they bring now. They argued then that "the mere filing of an administrative reconsideration petition does not, standing alone, render issues raised in that petition unripe for judicial review," and that it was "premature" to order abeyance. Doc. Id. No. 1594442, Resp. to LKE Abeyance Mot. at 1-2. As discussed above, the same is true now. Abeyance would unnecessarily delay resolution of the "basic legal questions" presented by the petitions for review.

II. THE PENDING NEW SOURCE REVIEW PROPOSAL DOES NOT WARRANT AN ABEYANCE EITHER.

EPA's pending proposal to revise the NSR program does not weigh in favor of an abeyance of the petitions for review as Environmental Petitioners argue. *See* Envtl. Mot. at 13-17. EPA made clear in both the proposed and final ACE Rule that the rule was intended to stand alone, independent of any reforms to the NSR program. The ACE Rule is thus reviewable now.

The NSR program is a preconstruction permitting program that, among other things, requires major stationary sources of air pollution to obtain permits before making major modifications to that source. *See Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 309 (2014) (citing 42 U.S.C. §§ 7470–7492). At the time of the ACE proposal, EPA also proposed revising elements of the NSR program to advance the Agency's "policy goal of encouraging efficient use of existing energy capacity and managing the burden on states." 83 Fed. Reg. 44,746, 44,780 (Aug. 31, 2018). This proposal remains pending.

As an initial matter, Environmental Petitioners repeatedly assert that EPA intends to "finalize its [NSR] proposal" imminently. Envtl. Mot. at 2-4. There has been no such judgment. EPA suggested in the

ACE Rule only that it "intends to take final action on [the NSR proposal] in a separate final action at a later date." 84 Fed. Reg. at 32,537. The content of this intended final action has not yet been determined. Nor has the interagency review process for any final action begun. *See* OIRA, Executive Order Submissions Under Review (Oct. 4, 2019), reginfo.gov/public/do/eoReviewSearch. Thus, final action on the NSR proposal is months away at a minimum. Holding these petitions for review in abeyance pending action on the NSR reform proposal would delay resolution of this case a half a year or more, taking into account the sixty-day period for filing petitions for review provided by the CAA, 42 U.S.C. § 7607(b)(1).

In any event, from the very beginning, EPA stated that it might finalize the ACE Rule without the proposed NSR reforms. The Agency provided in the ACE proposal that the ACE Rule and the proposed NSR reforms were severable and "appropriate policies in their own right." 83 Fed. Reg. at 44,783. EPA also took comment on how the ACE Rule could be implemented "if EPA does not finalize revisions to the NSR regulations (Comment C-59)." *Id.* at 44,777. The Agency then reiterated this position in the final ACE Rule, stating that "the consequences" of

NSR reform "are no longer considered in parallel with ACE." 84 Fed. Reg. at 32,555.

Further, EPA determined which technologies comprised the "best system of emissions reduction" in the ACE Rule without regard to the proposed NSR reforms. *See* 83 Fed. Reg. at 44,755-62 (proposing the BSER without regard to any NSR reforms); 84 Fed. Reg. at 32,537 (keeping two candidate technologies as part of the BSER despite the fact that EPA believed they were more likely to trigger NSR applicability). Thus, Environmental Petitioners are wrong that the proposed revisions to the NSR program are a "major part" of ACE Rule. Envtl. Mot. at 14.[4]

Finally, even if this Court were to credit Environmental Petitioners' arguments that action on the NSR reform proposal could impact the emission guidelines and implementing regulations, these arguments do not bear in any way upon the Clean Power Plan repeal. As discussed above, the repeal of the Clean Power Plan is based solely

[4] Environmental Petitioners further overlook that in the NSR proposal, EPA proposed that states would "have the discretion to decide whether to" adopt the proposed changes into their permitting rules. 83 Fed. Reg. at 44,782.

on the scope of EPA's authority under the plain language of CAA section 111. Thus, abeyance is not warranted on the grounds that the NSR proposal remains pending.

CONCLUSION

For the reasons stated above, the Environmental and State Petitioners' motions for abeyance should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify that the foregoing complies with the type-volume limitation because it contains 3,753 words, according to the count of Microsoft Word.

/s/ *Meghan E. Greenfield*
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c), that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

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