ORAL ARGUMENT HELD SEPTEMBER 27, 2016

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*.	No. 15-1363 and consolidated cases

PETITIONERS' AND PETITIONER-INTERVENORS' RESPONSE IN SUPPORT OF EPA'S MOTION TO HOLD CASES IN ABEYANCE

Petitioners and Petitioner-Intervenors respectfully submit this response in support of EPA's motion to hold these consolidated cases in abeyance in light of EPA's announcement that it has commenced a review of the Rule pursuant to the recent Executive Order.[1] Holding petitions for review in abeyance is the Court's usual response when, as here, the agency has indicated that it is undertaking a review of the challenged regulation, especially in the context of a turnover of presidential administrations. That policy has special force when pending agency action could render a challenge moot: Here, there is a real risk that a decision by this Court on the

[1] The Executive Order is included as Attachment 1 to the Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, ECF No. 1668274 (Mar. 28, 2017) ("EPA Motion").

legality of the existing Rule will amount to a mere advisory opinion because the Rule may well be repealed or substantially altered in the near future. Similarly, further action by this Court on this case would unnecessarily expend judicial and party resources while lacking practical effect in light of the stay entered by the Supreme Court—an action predicated on the Supreme Court's determination that Petitioners are likely to succeed on the merits and that the balance of equities weighs against allowing the Rule to go into effect. Any concerns about EPA's review carrying on indefinitely can be addressed by accepting the agency's offer to report to the Court periodically on the status of its review. The Court should therefore grant EPA's motion to hold these cases in abeyance.

As detailed in EPA's motion, the President issued an Executive Order on March 28 that established a new energy policy of the United States focused on developing domestic energy sources, including coal and natural gas, free of regulations that "unduly burden the development or use" of these resources. Promoting Energy Independence and Economic Growth, Executive Order No. 13783 of March 28, 2017, §§ 1(a), (c). Among other things, the Order specifically instructs EPA to review the Rule for consistency with this policy and, if appropriate, take action to "suspend[], revis[e], or rescind[]" the Rule. *Id.* § 4(a). In connection with this change in policy, the Order rescinds a number of prior presidential actions, including the President's Climate Action Plan of June 2013 and the Presidential Memorandum on Power Sector

Carbon Pollution Standards, *id.* § 3(b), both of which served as cornerstones of the Rule, *see* 80 Fed. Reg. 64662, 64665, 64677 (Oct. 23, 2015).

This Court has repeatedly recognized that abeyance is appropriate when an agency is revisiting a challenged regulation, especially during a transition from one presidential administration to another. For example, in May 2008, petitioners challenged EPA's Ozone NAAQS Rule. After the January 2009 change in administrations, when briefing was already underway, EPA moved to hold the case in abeyance to allow the agency to review the 2008 revisions and determine whether they should be reconsidered. *See Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013). The Court granted the motion, holding the case in abeyance until further order of the Court. Order, *Mississippi v. EPA,* No. 08-1200 (D.C. Cir. Mar. 19, 2009); *see also* Order, *Mississippi v. EPA,* No. 08-1200 (D.C. Cir. Jan. 21, 2010) (granting a motion to continue the abeyance and denying a motion to resume the litigation). Likewise, in February 2009, the Court granted EPA's motion to hold in abeyance the State of California's challenge (originally filed in May 2008) to EPA's denial of a waiver for new motor vehicle emission standards so that EPA could reconsider the denial. Order, *California v. EPA*, No. 08-1178 (D.C. Cir. Feb. 25, 2009).[2]

[2] In this regard, as noted below, the Court's ordinary practice is reinforced by the fact that there are additional challenges to the Rule ripened by the denial of petitions for reconsideration, that remain to be briefed and argued. *See, e.g.*, Joint Motion to Sever and Consolidate, *West Virginia v. EPA,* No. 15-1363 (D.C. Cir. Feb. 24, 2017) (ECF No. 1663046).

These are just some of the cases this Court has held in abeyance to permit EPA to reconsider a challenged regulatory program, including as part of the transition to a new administration. *See* Order, *Am. Petroleum Inst. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (holding case in abeyance pending EPA reconsideration); Order, *Sierra Club v. EPA*, No. 09-1018 (D.C. Cir. Feb. 19, 2009) (similar); Order, *Nat. Res. Def. Council v. EPA*, No. 08-1250 (D.C. Cir. Dec. 3, 2008) (similar). Indeed, the Court recently held a challenge to the Affordable Care Act in abeyance in light of the presidential transition. *See* Order, *House of Representatives v. Burwell*, No. 16-5202 (D.C. Cir. Dec. 5, 2016).

These cases reflect this Court's long "recogni[tion] that '[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.'" *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). And here, the case for abeyance is even stronger because, unlike in these other cases, the existing regulation has been stayed by the Supreme Court and thus cannot take immediate effect even if upheld by the Court. There is thus no possibility of harm to other parties or the public interest from a delay in this Court's consideration of the case while EPA revisits the Rule. *See infra.* And periodic status reports will give the Court the opportunity to ensure that EPA acts in a timely fashion, and allow the Court to pick up where it left off if EPA's review does not produce a material change to the Rule. *See* EPA Motion at 9 n.2. Simply preserving

the *status quo* until then is amply warranted—and indeed, is precisely what the Supreme Court found Petitioners are entitled to in light of the irrevocable harm threatened by the Rule and Petitioners' likelihood of success on the merits.

The Court's established practice of granting abeyance in cases like these is a sound one, because any decision by this Court on the legality of the Rule as initially promulgated could amount to an advisory opinion. The Executive Order directs EPA to "immediately take all steps necessary to review the [Rule]." Executive Order No. 13783, *supra*, § 4(a). If EPA concludes that the Rule—which was designed to "aggressive[ly] transform[]" the domestic electricity sector away from fossil fuels[3]—"unduly burden[s] the development of domestic energy resources" like coal and natural gas, *id.* § 1(c), it must "as soon as practicable" initiate a rulemaking proceeding to "suspend[], revis[e], or rescind[]" the Rule, *id.* § 4(a). As EPA's motion explains, the agency has already implemented the first part of this directive by "immediately" commencing a review of the Rule and issuing a notice of review and advance notice of proposed rulemaking. EPA Motion at 7 & Att. 2.

If EPA rescinds or substantially modifies the Rule, the relief requested in the petitions for review will be unavailable because the Rule as it currently stands will no longer exist. Where "[e]ach cause of action challenge[s] the validity of" a regulation,

[3] White House Fact Sheet (attached to State Pet'rs' Mot. for Stay and Expedited Consideration of Petition for Review, *West Virginia v. EPA,* No. 15-1363 (D.C. Cir. Oct. 23, 2015) (ECF 1579999)).

and "that regulation no longer exists, [the Court] can do nothing to affect [petitioners'] rights relative to it, thus making th[e] case classically moot for lack of a live controversy." *Akiachak Native Cmty. v. Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016); *see also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (holding case in abeyance where EPA's proposed course "if adopted, would necessitate substantively different legal analysis and would likely moot the analysis we could undertake if deciding the case now"); *Larsen v. U.S. Navy*, 525 F.3d 1, 4–5 (D.C. Cir. 2008) (challenge to withdrawn policy was moot); *Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1190–91 (D.C. Cir. 2004) (similar); *cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 n.3 (1994) (noting that a prior suit "became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order"). As a result, an opinion regarding the legality of the Rule after EPA has already withdrawn or revised it "would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits." *Akiachak Native Cmty.*, 827 F.3d at 106 (internal quotation marks omitted). Nor is this a case in which the legal issues raised by the Rule will necessarily survive EPA's action rescinding or modifying the Rule; unlike in cases such as *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290 (D.C. Cir. 2000), EPA's rescission or modification may very well obviate Petitioners' challenges here.[4]

[4] The Supreme Court's recent denial of an abeyance request in *National*

Even if the Court were to issue a decision before EPA completed an effort to rewrite or repeal the Rule, EPA's forthcoming action could still moot the case, and the parties would be entitled to seek vacatur of the Court's ruling in this Court, *see Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc), or in the Supreme Court, *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) ("When a civil case becomes moot pending appellate adjudication, '[t]he established practice … in the federal system … is to reverse or vacate the judgment below and remand with a direction to dismiss.'" (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950))); *see also Am. Bar Ass'n v. FTC*, 636 F.3d 641, 649 (D.C. Cir. 2011) (explaining the reasons favoring vacatur based on intervening legislative changes). Indeed, the Supreme Court is highly unlikely to allow such important issues to be determined by a decision that it may not be able to review. *See Munsingwear,* 340 U.S. at 40 (vacatur is proper to "clear[ ] the path for future relitigation of the issues"); *see also A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961) ("We think the principle enunciated in *Munsingwear* at least equally applicable to unreviewed administrative orders…."); *cf. Relf v. Weinberger*, 565 F.2d 722, 727 (D.C. Cir. 1977) (vacating orders

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Association of Manufacturers v. Department of Defense, *see* Order, No. 16-299 (S. Ct. Apr. 3, 2017), likewise says nothing about the appropriateness of abeyance in these cases. The question presented to the Supreme Court is limited to whether the federal courts of appeals, or instead the federal district courts, have jurisdiction to review a rule defining the term "waters of the United States" under 33 U.S.C. § 1369(b)(1)(F). This jurisdictional question about the proper forum for review will be implicated by any rule defining the reach of the Clean Water Act.

where agency announced its "inten[tion] to issue a new notice of rule making … at the conclusion of which it will promulgate [new] comprehensive regulations").[5]

Finally, for many of the same reasons, a decision by this Court regarding the current Rule would require an unnecessary expenditure of additional party and judicial resources. Although briefing and oral argument have taken place on challenges to the Rule in Case No. 15-1363, this Court has not yet issued its decision, and there are now additional challenges to the Rule ripened by the denial of petitions for reconsideration that remain to be briefed and argued. *See supra* n.2. The Court thus would need to expend the significant resources to resolve all issues, to issue a decision for the *en banc* Court, as well as any separate concurrences or dissents, and, potentially, deal with any petitions for rehearing. The non-prevailing parties surely would file protective petitions for writs of certiorari in the Supreme Court, requiring all of the numerous parties and the Justices to expend further resources. Given the large number of parties and counsel involved in this matter and the complexity of the issues, such an effort would be extensive. Because, as explained above, the case could ultimately be mooted by EPA's forthcoming action, all of this effort would be wasted.

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[5] The Executive Order's rescission of the presidential actions that formed the cornerstone of the Rule indicates that substantial revisions or even rescission of the Rule is not merely speculative. In any event, EPA's requested abeyance, EPA Motion at 8-9, would allow for an orderly review of the Rule. As EPA notes, it can provide periodic status reports on the progress of its review, allowing the Court to pick up where it left off if EPA decides no further action is necessary. *See id.* at 9 n.2 (offering to provide periodic status reports).

Moreover, a decision by this Court would have no practical effect while EPA revisits the Rule because the Supreme Court has stayed the Rule pending disposition of any petitions for writs of certiorari (or a decision on the merits if the petitions are granted). Order, *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016) (No. 15A787). Thus, even if this Court were to uphold the Rule, the Rule would not take effect until, at the very least, the Supreme Court denied the inevitable petitions for writs of certiorari. And such a denial is highly unlikely, given the importance of the issues, EPA's ongoing efforts to revisit the Rule, and the fact that, in staying the Rule, the Supreme Court necessarily found that a petition for certiorari filed by Petitioners would likely be granted.

For the foregoing reasons, Petitioners and Petitioner-Intervenors support EPA's motion to hold this case in abeyance.

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1. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,299 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of April, 2017, a copy of the foregoing response was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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