ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NORTH DAKOTA, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 17-1014 (and consolidated cases)
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,	)	
	)	
Respondents.	)	
	)	

REPLY IN SUPPORT OF EPA'S MOTION
TO HOLD CASES IN ABEYANCE

Two months after his inauguration, the President of the United States issued an Executive Order directing the Environmental Protection Agency ("EPA") to immediately take all steps necessary to review the Clean Power Plan – the underlying rule at issue in these cases, which challenge EPA's denial of petitions for administrative reconsideration of the rule ("the Denial Action"). The Executive Order also instructs EPA to, if appropriate and as soon as practicable, publish for notice and comment a proposed rule suspending, revising, or rescinding the Clean Power Plan.

EPA immediately followed the direction of the Executive Order, as it must, by announcing its initiation of review of the Clean Power Plan and potential forthcoming

rulemaking. As a result of these very consequential developments, further judicial proceedings in these cases challenging EPA's related Denial Action are unwarranted at this time. Therefore, EPA immediately requested that these cases be held in abeyance to avoid unnecessary adjudication or interference with the current administrative process. Abeyance will thus avoid an advisory opinion on issues that may become moot, preserve the integrity of the administrative process, and conserve judicial resources.

ARGUMENT

The Executive Order, EPA's current review of the Clean Power Plan, and advanced notice of potential forthcoming rulemaking provide compelling grounds for abeyance. Intervenors offer no persuasive reasons for denying the motion.

A new administration is perfectly entitled to consider a change in policy course, even if there is pending litigation over the particular policy matter. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.") (Rehnquist, J., concurring in part and dissenting in part). Here, the Executive Order and concomitant required review process constitute transformative developments rendering the present claims unfit for further judicial proceedings at this time. Abeyance would "protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's

interest in avoiding unnecessary adjudication." Am. Petroleum Inst. v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) (internal quotation omitted); see also Devia v. Nuclear Regulatory Comm'n, 492 F.3d 421, 423 (D.C. Cir. 2007) (dismissing challenge to agency action following merits briefing and supplemental briefing). The Agency's policy with respect to the Clean Power Plan is under review, so issues concerning the Rule – and petitions to reconsider that Rule – are unfit for further judicial proceedings.

Intervenors' brief arguments in opposition do not undermine this bedrock principle of judicial restraint and judicial economy. First, Intervenors' argument that the abeyance is inappropriate because the Executive Order represents the "mere initiation of a 'nascent review,'" creating only an "indeterminate possibility of initiating a new rulemaking," misconstrues the terms of the Executive Order. See Movant Respondent-Intervenor Public Health and Environmental Organizations' Opposition ("Int. Opp."), ECF No. 1669771, at 4. The Executive Order specifically directs EPA to "*immediately* take all steps necessary to review" the Clean Power Plan. Executive Order § 4 (emphasis added). And EPA followed this directive posthaste, announcing hours after the issuance of the Executive Order that "*it is reviewing* the Clean Power Plan" and describing "the review of the [Rule] that EPA *is initiating today*." 82 Fed. Reg. 16,329, 16,329, 16,330 (Apr. 4, 2017) (emphasis added).

EPA has been directed to review the Clean Power Plan for consistency with the policies set forth in the Executive Order. Executive Order § 4; 82 Fed. Reg. at

16,329-30. Accordingly, EPA has made clear that its review "will follow each of the principles and policies set forth in the Executive Order, as consistent with EPA's statutory authority" and has articulated the factors that will guide its review. 82 Fed. Reg. at 16,330. Thus, EPA's review is not tentative or equivocal, and the review is being conducted within the confines of the Executive Order and in accordance with the Clean Air Act.

Second, Intervenors' contention that proceeding to litigation could resolve legal issues that "would be relevant in any future regulatory action related to the Clean Power Plan" is speculative and ignores the proper role of a reviewing court. See Int. Opp. at 4. Whether any given issue will remain relevant will depend upon exactly what EPA does following its current administrative review, the basis for that action, and how that action affects interested parties. If the Court does face some of the same issues in the future, those issues might well be presented in a completely different context and posture, with potentially different administrative interpretations supporting EPA's legal judgments and a different administrative record supporting revised scientific conclusions.

Likewise, it is not the proper role of this Court to try to shape forthcoming potential rulemaking through an advisory opinion. Nor is it the proper role of this Court to weigh in on issues prematurely just because it might face them again in a different context. Cf. Chamber of Commerce v. EPA, 642 F.3d 192, 199 (D.C. Cir. 2011) (noting that federal courts are "without authority to render advisory opinions"

(internal quotation omitted)). Further, as this Court has acknowledged, because EPA's interpretations of the Clean Air Act are afforded significant deference, "[i]t is more consistent with the conservation of judicial resources to make that deference-bound review after the agency has finalized its application of the relevant statutory text," which here will occur following the conclusion of EPA's review of the Rule, and, if appropriate, further administrative proceedings. Am. Petroleum Inst., 683 F.3d at 389.

Moreover, there is no doubt that postponing judicial review here will conserve judicial resources. As Intervenors concede, "litigation of the petitions in No. 17-1014 is in its earliest stages with no briefing schedule set and relatively little investment of time and resources by the parties or the Court." Int. Opp. at 5. The parties and the Court should not be forced to expend resources to prepare, file, and argue briefs in this matter where no briefing has yet begun and where EPA is already reviewing the Clean Power Plan and has announced potential administrative proceedings. In addition, holding these cases in abeyance would preserve judicial resources by obviating the need for the Court to rule on the pending motions to sever certain of these petitions and consolidate them instead with the original Clean Power Plan proceedings in West Virginia v. EPA. See, e.g., ECF Nos. 1663047, 1668921, 1668929, 1668952, 1670187.

Intervenors' further insinuation that EPA's abeyance request is improper because the abeyance would be "indefinite" is unsupported. Int. Opp. at 4. The fact

that the requested abeyance will continue until EPA has concluded its administrative proceedings is not improper, even where the full length of the abeyance is not yet known. In Devia, for example, this Court – following full briefing – placed a challenge to a Nuclear Regulatory Commission licensing decision in open-ended abeyance, fully recognizing that such abeyance period could last a period of years. 492 F.3d at 424; see also Case No. 05-1419, ECF No. 1667424 (reflecting that Devia remains in abeyance 10 years later).

Finally, Intervenors would not be harmed by the abeyance, regardless of its duration. Intervenors do not allege, and cannot demonstrate, any prejudice arising from a delay of these petitions challenging the Denial Action, which Intervenors support. Whatever Intervenors' contentions as to the effects of an abeyance in related challenges, a delay in adjudication of the EPA's Denial Action itself would have no effect on Intervenors' interests. Intervenors admit as much in their response, in which they express support for a delay in briefing of the Denial Action until the Court rules in West Virginia v. EPA. Int. Opp. at 5-6. Meanwhile, the petitioners whose administrative petitions were denied, and who seek relief from this Court, support abeyance. See Petitioners' & Movant Petitioner-Intervenors' Response in Support, ECF No. 1670432.

On the other hand, abeyance would avoid compelling the United States to represent the current Administration's position on substantive questions that are being considered in an ongoing administrative process. Proceeding with the litigation

would prejudice EPA as it would likely be unable to represent the Administration's conclusive position, and could call into question the integrity of the administrative proceedings. Given the prejudice to the United States, and in the absence of prejudice to any party seeking relief from the Court, see Devia, 492 F.3d at 427 (explaining that the inquiry into hardship largely relates to the "the degree and nature of the regulation's present effect on *those seeking relief*" (emphasis in original)), EPA's request for an abeyance should be granted.

CONCLUSION

Wherefore, for the reasons set forth above and in EPA's opening motion, EPA's Motion to Hold Cases in Abeyance should be granted.

Respectfully submitted,

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DATED: April 12, 2017 BY: */s/ Eric G. Hostetler*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains approximately 1,451 words according to the count of Microsoft Word and therefore is within the word limit of 2,600 words.

Dated: April 12, 2017

/s/ Eric G. Hostetler
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in Support of EPA's Motion to Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 12th day of April, 2017.

/s/ Eric G. Hostetler
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