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)

RESPONDENT EPA'S OPPOSITION TO
INTERVENORS' MOTION TO DECIDE THE MERITS OF CASE

Intervenors' "Motion To Decide the Merits of Case," Doc. No. 1748706 ("Motion"), should be denied. The prudential reasons supporting abeyance remain in place. At this point, EPA is well along in its review of the rule at issue in this case, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("the Rule" or "the Clean Power Plan"), and expects to take final rulemaking action by the first part of 2019—years in advance of when any emission reductions would be required under the Rule. A limited further stay of judicial proceedings until the conclusion of rulemaking will continue to preserve judicial resources and support the integrity of EPA's ongoing rulemaking process. All Petitioners support the requested abeyance.

In five case management orders since EPA commenced its review of the Rule last year, this Court has declined to reactivate the litigation. There is no sound reason for the Court to change course. EPA's final rulemaking—now expected within a period of months—could moot this case and render any further proceedings unnecessary. To the extent that any issues presented in this case could potentially present themselves again in some form in challenges to a new EPA regulatory approach, those issues would differ in important respects. For example, this Court would need to consider, in applying the familiar Chevron review standard, EPA's stated reasons for changing its emission guidelines.

Additionally, this litigation is far from an endpoint, and if reactivated, it would be very unlikely to conclude before EPA's rulemaking. For one thing, Petitioners still have motions pending that request supplemental merits briefing concerning claims arising from EPA's January 2017 reconsideration denial action. Regardless of the need for such supplemental briefing, a merits opinion in these underlying cases would not end litigation but would inevitably lead to further briefing in the form of petitions for rehearing and petitions for a writ of certiorari. Not only would that briefing tax judicial and the parties' resources, it would prejudice EPA, because EPA would likely be unable to represent a conclusive position on issues that are the subject of rulemaking.

For these and other reasons discussed further below, the Court should continue to hold the case in abeyance pending conclusion of administrative proceedings.

BACKGROUND

In October 2015, EPA promulgated the Clean Power Plan, which established emission guidelines for states to follow in developing implementation plans to reduce greenhouse gas emissions from power plants. 80 Fed. Reg. 64,662. Under these guidelines, no emission reductions would be required from power plants until 2022 at the earliest. Id. at 64,785-86.

Numerous states, trade associations, electricity producers, and labor unions filed petitions for review of the Rule. Petitioners requested a stay pending judicial review, and the Supreme Court granted applications for a stay by order dated February 9, 2016. Order, West Virginia v. EPA, No. 15A773. After full merits briefing, oral argument was held before this Court, sitting en banc, on September 27, 2016.

Following the change in Administration, the President, on March 28, 2017, issued Executive Order 13783 directing EPA to review the Rule in accordance with certain new policies and instructing the Agency to conclude any appropriate rulemaking to repeal or revise the Rule "as soon as practicable." 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017). As directed by that Executive Order, the EPA Administrator, on March 28, 2017, announced EPA's review of the Rule, 82 Fed. Reg. 16,329 (Apr.

4, 2017). EPA promptly filed a motion on the same date to hold these cases in abeyance pending the review's completion and any resulting forthcoming rulemaking. Doc. No. 1668274.

By order dated April 28, 2017, this Court held the cases in abeyance for 60 days and directed EPA to file status reports at 30-day intervals. Doc. No. 1673071. The Court further directed 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." Id. Over the next fourteen months, the Court subsequently issued four additional orders, all on the Court's own motion, likewise holding the case in abeyance for 60-day intervals and directing EPA to file status reports at 30-day intervals. See August 8, 2017 Order, Doc. No. 1687838; November 9, 2017 Order, Doc. No. 1703889; March 1, 2018 Order, Doc. No. 1720228; June 26, 2018 Order, Doc. No. 1737735. Three judges issued two concurring statements accompanying the Court's June 26, 2018 abeyance order. One of these concurring statements (statement of Tatel, J., joined by Millett, J.) suggested the parties update the Supreme Court regarding administrative and litigation developments. Doc. No. 1737735 at 2. In response to that statement, public health and environmental organizations who are Respondent-Intervenors in this case sent a letter to Chief Justice Roberts on July 27, 2018. See Attachment A to EPA's August 24, 2018 status report, Doc. No. 1747298 at 9-13.

Since EPA's first request for abeyance, and consistent with the direction in the 2017 Executive Order to conclude Rule review and any appropriate rulemaking "as soon as practicable," EPA has been diligently moving forward towards completion of the rulemaking process. 82 Fed. Reg. 16,093, 16,095. As has been reported by EPA in the required 30-day status reports, EPA has made considerable progress towards concluding these administrative proceedings, which is a top priority for the Agency.

To briefly summarize some of the key administrative developments since the March 2017 Executive Order, EPA proposed in October 2017 to repeal the Clean Power Plan on the grounds that it exceeds EPA's statutory authority under a proposed change in the Agency's interpretation of section 111 of the Clean Air Act, 42 U.S.C. § 7411. 82 Fed. Reg. 48,035 (Oct. 16, 2017). EPA then published in December 2017 an Advance Notice of Proposed Rulemaking ("ANPR") soliciting information on systems of emission reduction that are in accord with the revised legal interpretation proposed. 82 Fed. Reg. 61,507 (Dec. 28, 2017). The comment period for the ANPR closed on February 26, 2018, and the comment period on the proposed repeal closed on April 6, 2018. On August 20, 2018, EPA Acting Administrator Andrew R. Wheeler signed the proposed "Affordable Clean Energy Rule" ("ACE Rule"), which was published in the Federal Register on August 31, 2018. 83 Fed. Reg. 44,746. The period for public comment on the ACE Rule proposal will be open through October 31, 2018. 83 Fed. Reg. 45,588 (Sept. 10, 2018). EPA intends and expects to take final rulemaking action in the first part of 2019.

In the ACE Rule proposal, EPA proposes to regulate power plants in a substantially different manner than under the Clean Power Plan. Consistent with the methodological approach EPA has adhered to in dozens of previously issued section 111 rules, EPA has identified a proposed best system of emission reduction for regulated power plants by evaluating technologies or systems that are applicable to, at, or on the premises of those sources. 83 Fed. Reg. at 44,748. Applying this familiar and longstanding approach, EPA has proposed to determine that the best system of emission reduction for greenhouse gas emissions from existing coal-fired power plants is heat rate improvements that can be applied at the source. Id. at 44,749. EPA has identified specific heat rate improvement technologies that states would need to consider in establishing standards of performance for individual existing coal-fired plants. Id. at 44,749, 44,756-58. The proposal further includes revised section 111(d) implementing regulations and a revised applicability test for determining whether a physical or operational change made to a power plant may be a major modification triggering the Act's New Source Review program. Id. at 44,769-44,783. EPA is soliciting comments on all aspects of the proposal.

Intervenors' characterization, Motion at 2, that EPA's proposal would fail to "mandate any carbon dioxide pollution reductions from power plants" is incorrect. Consistent with Congress's scheme of cooperative federalism under Clean Air Act section 111(d), the emission guidelines in the ACE proposal would impose a mandate on states to establish standards of performance for power plants to limit carbon

dioxide emissions, applying EPA's traditional approach to identifying the best system of emission reduction—that is, by identifying controls that can be applied to, at, or on an individual stationary source. See 83 Fed. Reg. 44,752, 44,808-09. Intervenors' characterizations of the proposal also overstate the degree to which projected carbon emissions from power plants differ under the proposed new regulatory approach from those projected under the Clean Power Plan. EPA projects that emission reductions directly attributable to the ACE Rule, combined with expected emission reductions due to a variety of other industry trends, will result in a decrease of carbon dioxide emissions by 2030 of 33 to 34 percent below 2005 levels. This compares with the current projection that such emissions will fall 36 percent below 2005 levels under the Clean Power Plan. See August 2018 Proposed ACE Rule Regulatory Impact Analysis at 3-14 and 3-15 (Table 3-6), available at https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf.

ARGUMENT

I. Prudential Reasons Supporting Abeyance Remain in Place.

The finish line of EPA's further regulatory efforts is now in sight. EPA intends and expects to conclude all rulemaking concerning section 111(d) emission guidelines for existing power plants in the first part of 2019. In its five case management orders over the last 18 months, this Court has consistently concluded that abeyance of these proceedings pending further EPA review is appropriate.

There is no sound reason for the Court to change course now. EPA has made considerable progress towards promulgating a new rule. Indeed, not only are the prudential considerations supporting abeyance still valid, those considerations are more compelling than ever with EPA well along in its rulemaking efforts. To reactivate the litigation would waste judicial and the parties' resources. It would prejudice the integrity of the ongoing rulemaking. And it would result in an opinion that could become moot and subject to vacatur shortly after release—all without expediting the ultimate implementation of emission guidelines. Even under the Clean Power Plan, emission reductions would not be required before 2022 at the earliest.

A. Continued Abeyance Will Promote Judicial Economy.

In support of their Motion, Intervenors assert that an opinion will conserve resources. Motion at 3. But the opposite is true. EPA has published two proposed rules, either of which, if finalized, could moot this case and "dispense with the need for . . . an opinion in a matter of months." Am. Petrol. Inst. v. EPA, 683 F.3d 382, 388 (D.C. Cir. 2012). Thus, it would "hardly be sound stewardship of judicial resources to decide this case now." Id. And Intervenors overlook that any opinion by this Court would not end the litigation over the Clean Power Plan. Any decision would almost certainly generate substantial additional briefing in the form of possible petitions for rehearing and almost-certain petitions for a writ of certiorari. Moreover, there is related litigation pending in this Court involving challenges to EPA's January 2017 denial of reconsideration petitions, and Petitioners' challenges to that denial

action would need to be resolved as well. See North Dakota v. EPA (D.C. Cir. Case Nos. 17-1014 et al.). In fact, many Petitioners still have pending motions requesting supplemental briefing, *prior* to any merits opinion, addressing the challenges to the reconsideration denial. See, e.g., Joint Motion to Sever and Consolidate, Doc. No. 1663046 (Feb. 24, 2017).

There is no reason to believe that all of these further proceedings could or would conclude prior to the completion of EPA's rulemaking. At that point of completion, any merits opinion that this Court may have issued in the interim could be moot and subject to vacatur by the Supreme Court. See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) (noting that the "established practice of the [Supreme] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss"). In short, reactivating the litigation now would likely be a frenetic road to nowhere, squandering both this Court's and the parties' resources to no evident purpose.

Intervenors' assertion, Motion at 15, that challenges to a new rulemaking would involve "the same legal questions" reflects an overly simplistic analysis. To begin with, there is no certainty at this point about the nature of EPA's final action, including the supporting legal interpretations and administrative record. But even accepting that certain aspects of some of the issues raised by Petitioners could potentially present themselves again in some form, those issues might well still differ

in important respects. For example, in applying the familiar Chevron standard of review to EPA interpretations of the Clean Air Act, an EPA interpretation must be upheld unless it is either unambiguously foreclosed or unreasonable. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Consequently, it would be important for this Court in evaluating any final EPA action to consider EPA's articulated final statutory interpretation and the stated reasons therefor. As this Court has put it, "[i]t is more consistent with the conservation of judicial resources to make . . . deference-bound review *after* the agency has finalized its application of the relevant statutory text," which will occur here following rulemaking. Am. Petrol. Inst., 683 F.3d at 389 (emphasis added). Moreover, any record-based issue would need to be resolved based on the record before EPA at the time of its final action (likely early 2019), as opposed to the record that was before EPA in 2015. In short, a ruling on the legality of the Clean Power Plan might not resolve anything regarding the legality of an alternative regulatory approach.

This Court's recent decision in Utility Solid Waste Activities Group v. EPA, No. 15-1219, 2018 WL 4000476 (D.C. Cir. Aug. 21, 2018) ("Utility Solid Waste"), which is cited by Intervenors, see Motion at 1-2, 15, supports the general proposition that the Court has discretion to deny a request for abeyance, a point that no party contests. But the circumstances in Utility Solid Waste are distinguishable. In that case, EPA made last-minute requests for either an abeyance of proceedings or a remand of certain issues based on the Agency's intent to reconsider a Resource

Conservation and Recovery Act ("RCRA") rule pertaining to coal ash waste impoundments. The Court denied the request for abeyance while granting in part the Agency's alternative request for remand. The Court denied EPA's request for remand of a challenge to the Agency's authority to regulate inactive waste impoundments, doing so in significant part because of the objection of certain petitioners, who would be unable to vindicate their own claims without resolution of that particular issue. Utility Solid Waste, 2018 WL 4000490 at *15. In contrast to that unusual situation, all Petitioners here support EPA's request for abeyance, which would not prejudice any of them. Moreover, in this case EPA made a timely request for abeyance on the same date an Executive Order directed the Agency to review the Rule, and EPA is well along towards a rulemaking.[1]

B. Continued Abeyance Will Promote the Integrity of EPA Rulemaking.

Continued abeyance will also promote the integrity of EPA's rulemaking and avoid prejudice to EPA. As noted above, a decision from this Court would not end the litigation. It would instead generate further litigation. There are likely to be petitions for rehearing and almost certain petitions for a writ of certiorari, along with renewed litigation on EPA's January 2017 denial of reconsideration petitions. Such

[1] Petitioners also cite Air Alliance Houston v. EPA, No. 17-1155, 2018 WL 4000490 (D.C. Cir. Aug. 17, 2018). Air Alliance Houston did not involve an agency request for abeyance, but rather an EPA rule that delayed a rule's compliance dates pending reconsideration. Here, any delay in implementation of the Clean Power Plan arises from the Supreme Court's stay of the rule; it does not arise from an EPA delay action.

further litigation could compel the United States to represent the Administration's current position on substantive questions that are being considered in the ongoing rulemaking. EPA would likely be unable to represent any conclusive position, as statements by EPA in litigation concerning issues that are the subject of rulemaking could call into question the fairness and integrity of the administrative proceedings.

II. EPA Is Not in Violation of Any Mandatory Duty or Seeking to Avoid Judicial Review.

Contrary to Intervenors' insinuation, EPA is neither "flouting" a mandatory duty nor trying to engage in a "perpetual dodging" of judicial review. See Motion at 13. EPA has requested abeyance in good faith based on sound prudential considerations. There will be a full and fair opportunity for judicial review at the conclusion of EPA's ongoing rulemaking.

With respect to the asserted failure to perform an alleged mandatory duty to promulgate emission guidelines, EPA performed any such duty in 2015 when it promulgated the Clean Power Plan. That the Supreme Court subsequently decided to stay those guidelines pending judicial review (over EPA's objection) does not place EPA in violation of any mandatory duty. It rather just reflects the Supreme Court's conclusion that a stay of the Rule was appropriate.

Nor does the Supreme Court's stay of the Clean Power Plan make it inappropriate for EPA to reconsider its regulatory approach. Cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (explaining

that an agency's interpretations of statutes it administers is not "carved in stone" but must be evaluated "on a continuing basis" (internal quotation marks and citations omitted)); see also Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (stating that 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" (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 59 (1983))).

It is also not unprecedented for this Court to hold challenges to a regulation in abeyance where a judicial stay of the rule being challenged is in place. For example, this Court just last year stayed provisions of another EPA Clean Air Act rule addressing carbon emissions, although the case was being held in abeyance during an EPA reconsideration proceeding. See October 27, 2017 Order, Doc. No. 1701733, Truck Trailer Mfrs. Ass'n v. EPA, Case No. 16-1430 (D.C. Cir.).

Moreover, as EPA has represented in status reports, completion of rulemaking on the ACE proposal is a top priority of the Agency. Intervenors do not offer any reason for questioning the reasonableness of EPA's remaining projected timetable. Intervenors instead second-guess whether EPA needed to issue three Federal Register notices in the year leading up to the ACE proposal. See Motion at 7. But those notices reflected a natural rulemaking progression as EPA considered comments and adjusted its thinking, and the overall reconsideration timetable for the administrative review process has been well within reason.

EPA also does not seek to "dodg[e]" judicial review. See Motion at 13. Any final EPA rule will be subject to judicial review, and the Court will be able to expedite such review, if appropriate. Accordingly, this is not a situation where interested parties will be unable to have their day in Court concerning emission guidelines for power plants. The appropriate *timing* of judicial review is at issue, and this Court should endeavor to avoid an advisory opinion.

III. Intervenors' Criticisms of EPA's Proposal Should Be Advanced in Rulemaking Comments.

Intervenors present at some length their criticisms and concerns with EPA's proposed ACE Rule. See Motion at 2, 9-14. But these concerns with EPA's proposal should properly be presented to the Agency in rulemaking comments. EPA will then have an opportunity to consider them and make any appropriate adjustments to the proposal as warranted. The fact that Intervenors may have concerns regarding the contents of the ACE proposal (which other interested parties might not share) does not alter the prudential calculus weighing strongly in favor of continued abeyance. To the contrary, a public comment process is precisely the vehicle Congress established in the Clean Air Act for interested parties to share their concerns about a regulatory proposal.

IV. Intervenors, Along With All Other Parties, Oppose Remand.

Finally, Intervenors make clear that they do not support a remand, which is the other alternative before the Court. Motion at 18-19; see also June 26, 2018 Order,

Doc. No. 1737735 at 3 (concurring statement of J. Wilkins, joined by J. Millett). Thus, no party supports this option.

Intervenors concur that a remand of the case could result in prejudice to Petitioners because the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(b), generally requires that challenges be filed within 60 days of publication of the Agency's action. Motion at 19 n.8. Any post-remand challenge to the Rule by Petitioners would occur well after the expiration of the initial 60-day period. Cf. Util. Solid Waste Activities Group v. EPA, 2018 WL 400476 at *16 (construing analogous judicial review provision under RCRA to bar petitioners from bringing another challenge unless and until the EPA takes additional regulatory action).

CONCLUSION

WHEREFORE, this matter should be held in abeyance pending the conclusion of EPA rulemaking, and Intervenors' "Motion to Decide the Merits of Case" should be denied.

Respectfully submitted,

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DATED: September 14, 2018

/s/ Eric G. Hostetler

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent EPA's Opposition to Intervenors' Motion to Decide the Merits of Case have been served through the Court's CM/ECF system on all registered counsel this 14th day of September, 2018.

/s/ Eric G. Hostetler
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains approximately 3,548 words according to the count of Microsoft Word and therefore is within the word limit of 5,200 words.

Dated: September 14, 2018

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