ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2017

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

STATE OF NORTH DAKOTA, ET AL., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 15-1381 (and consolidated cases)

NOTICE OF EXECUTIVE ORDER, EPA REVIEW OF RULE AND FORTHCOMING RULEMAKING, AND MOTION TO HOLD CASES IN ABEYANCE

Respondents United States Environmental Protection Agency, et al. (collectively "EPA"), hereby provide notice of (1) an Executive Order from the President of the United States titled "Promoting Energy Independence and Economic Growth" and directing EPA to review the Clean Air Act regulation at issue in this case (the "111(b) Rule" or "the Rule"); and (2) EPA's initiation of a review of the Rule and (3) if appropriate, a forthcoming rulemaking related to the Rule and consistent with the Executive Order. Pursuant to these developments, the Rule is under close scrutiny by EPA, and the prior positions taken by the agency with

respect to the Rule do not necessarily reflect its ultimate conclusions. EPA should be afforded the opportunity to fully review the Rule and respond to the President's direction in a manner that is consistent with the terms of the Executive Order, the Clean Air Act, and the agency's inherent authority to reconsider past decisions. Deferral of further judicial proceedings in these cases is thus warranted.

Accordingly, EPA respectfully requests this Court to hold these cases in abeyance while the agency conducts its review (including continuation of the oral argument currently scheduled for April 17, 2017), and requests that the abeyance remain in place until 30 days after the conclusion of review and any resulting forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period. As discussed further below, such abeyance will promote judicial economy by avoiding unnecessary adjudication and will support the integrity of the administrative process. Respondents contacted coordinating counsel for Petitioners, Petitioner-Intervenors, and Respondent-Intervenors regarding their positions on this motion. Petitioners and Petitioner-Intervenors do not oppose the motion. Environmental and public health organization Respondent-Intervenors and State Respondent-Intervenors oppose this motion and intend to file responses. Respondent-Intervenors Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company,

and Sacramento Municipal Utility District (collectively "Utility Respondent-Intervenors") will take no position until reviewing EPA's motion and reserve the right to file a response in opposition. Utility Respondent-Intervenors further represented that they "would not object to a request to continue the oral argument currently scheduled for April 17, 2017, until at least 30 days after the Court rules on EPA's motion for abeyance." Respondent-Intervenor Next Era Energy Inc. takes no position on the motion.

BACKGROUND

The Executive Order and EPA's current review of the Rule follow various proceedings undertaken during the prior Administration. These proceedings and the more recent developments under the new Administration are summarized below.

On October 23, 2015, EPA promulgated under section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b), "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule" (the "111(b) Rule" or "the Rule"). 80 Fed. Reg. 64,510. The 111(b) Rule established standards of performance for carbon dioxide greenhouse gas emissions from new, modified, and reconstructed fossil-fuel-fired power plants for two subcategories of plants: fossil fuel-fired electric utility steam generating units (chiefly utility boilers) and stationary combustion turbines (chiefly natural gas-fired units). See generally id.

Fifteen petitions for judicial review of the 111(b) Rule, filed by state governmental entities, companies, trade organizations and labor groups, were consolidated under the lead case North Dakota v. EPA, No. 15-1381.[1] The Court later consolidated additional petitions seeking judicial review of EPA's denial of administrative petitions for reconsideration of the Rule. See "Reconsideration of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units," 81 Fed. Reg. 27,442 (May 6, 2016). Merits briefing concerning the judicial challenges to both EPA actions was completed on February 6, 2017. This case is currently scheduled for oral argument on April 17, 2017. See, e.g., ECF No. 1667709 (Order of March 24, 2017, establishing argument format).[2]

On March 28, 2017, the President of the United States signed an Executive Order establishing the policy of the United States that executive departments and agencies (Agencies) "immediately review existing regulations that potentially burden

[1] A sixteenth petition, filed by Biogenic CO_2 Coalition (No. 15-1480), was severed and is being held in abeyance pending further order of the Court, while EPA considers certain issues raised in administrative reconsideration petitions. ECF No. 1605581 (Order dated March 24, 2016).

[2] This Court requested that the parties submit suggestions concerning the format for the argument. ECF Nos. 1655453, 1644323. EPA complied with that order by joining in the parties' filing on March 20, 2017, of oral argument format suggestions, which the Court adopted. See ECF No. 1666889. However, for the reasons explained below, EPA seeks to hold further judicial proceedings in abeyance, including oral argument.

the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." Executive Order, "Promoting Energy Independence and Economic Growth," (Attachment 1 hereto) § 1(c). The Executive Order also sets forth the policy that "all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic." Id. § 1(d).

With respect to the 111(b) Rule, the Executive Order directs the Administrator of EPA to "immediately take all steps necessary" to review it for consistency with these and other policies set forth in the Order. Id. at § 4. The Executive Order further instructs the agency to "if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding" the Rule. Id.

In accordance with the Executive Order and his authority under the Clean Air Act, the EPA Administrator signed a Federal Register notice on March 28, 2017, announcing EPA's review of the 111(b) Rule and providing advanced notice of forthcoming rulemaking proceedings. See Notice of Review of the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units (Attachment 2 hereto).

Specifically, the Federal Register notice announces that EPA "is initiating its review of the [111(b) Rule]" and "providing advanced notice of forthcoming rulemaking proceedings consistent with the President's policies." Id. at 3. The Federal Register notice further notes that if EPA's review "concludes that suspension, revision or rescission of [the Rule] may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." Id.

SUMMARY OF ARGUMENT

The Executive Order, Rule review, and potential rulemaking proceedings mark substantial new developments that warrant holding this litigation in abeyance. Consistent with the inherent authority of federal agencies to reconsider past decisions and EPA's statutory powers under the Clean Air Act, EPA should be afforded the opportunity to respond to the Executive Order by reviewing the Rule in accordance with the new policies set forth in the Order.

Because the Rule is under agency review and may be significantly modified or rescinded through further rulemaking in accordance with the Executive Order, holding this case in abeyance is the efficient and logical course of action here. Abeyance will further the Court's interests in avoiding unnecessary adjudication, support the integrity of the administrative process, and ensure due respect for the

prerogative of the executive branch to reconsider the policy decisions of a prior Administration.

ARGUMENT

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("State Farm"). EPA's interpretations of statutes it administers are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). See also Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "'[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 State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). The Clean Air Act complements EPA's inherent authority to reconsider prior rulemakings by providing the agency with broad authority to prescribe regulations as necessary to carry out the Administrator's authorized functions under the statute. 42 USC § 7601(a).

Courts may defer judicial review of a final rule pending completion of reconsideration proceedings. See Am. Petroleum Inst. v. EPA ("API"), 683 F.3d 382 (D.C. Cir. 2012). And this Court has often held challenges to Clean Air Act rules, in particular, in abeyance pending completion of reconsideration proceedings. See, e.g., Sierra Club v. EPA, 551 F.3d 1019, 1023 (D.C. Cir. 2008); New York v. EPA, No. 02-1387, 2003 WL 22326398, at *1 (D.C. Cir. 2003) (same).

With these principles in mind, and based on recent developments, abeyance is warranted in this case. The President of the United States has directed EPA to immediately take all steps necessary to review the 111(b) Rule and, if appropriate and as soon as practicable, initiate a new rulemaking relating to the Rule. In accordance with this directive, EPA has begun a review of the Rule. EPA has also announced that if the review concludes suspension, revision, or rescission of the Rule may be appropriate, EPA's review will be followed by a rulemaking process. Thus, "[i]t would hardly be sound stewardship of judicial resources to decide this case now." API, 683 F.3d at 388. Abeyance would allow EPA to "apply its expertise and correct any errors, preserve[] the integrity of the administrative process, and prevent[] piecemeal and unnecessary judicial review," id., while furthering the policy set forth in the Executive Order, as consistent with the Clean Air Act.

Abeyance is also warranted to avoid holding oral argument in the midst of the new Administration's review of the rule at issue in this case. Were the Court to deny this motion and hold oral argument as scheduled, counsel would likely be unable to

represent the current Administration's position on the many substantive questions that are the subject of that nascent review. Nor would it be proper for counsel to speculate as to the likely outcome of the current Administration's review, as any such speculation could call into question the fairness and integrity of the ongoing administrative process.

Significantly, none of the numerous Petitioners challenging the 111(b) Rule opposes the requested abeyance of judicial proceedings. Respondent-Intervenors oppose abeyance, but they face no harm arising from the postponement of judicial review of the Rule.

WHEREFORE, EPA requests that this Court hold these cases in abeyance while the agency conducts its review of the Rule, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period.[3]

[3] EPA is willing to provide status reports at regular intervals during the abeyance period (EPA suggests every 120 days) if the Court would find that useful.

Respectfully submitted,

BRUCE S. GELBER
Deputy Assistant Attorney General

DATED: March 28, 2017 BY: */s/ Brian H. Lynk*

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Notice of Executive Order, EPA Review of Rule and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 2,079 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ Brian H. Lynk
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Executive Order, EPA Review of Rule and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance has been served through the Court's CM/ECF system on all registered counsel this 28th day of March 2017.

/s/ *Brian H. Lynk*
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