ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 19-1140
(and consolidated cases)

STATE AND MUNICIPAL PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION FOR ABEYANCE PENDING FINAL ACTION ON PETITION FOR ADMINISTRATIVE RECONSIDERATION

State and Municipal Petitioners moved to hold these consolidated cases in abeyance pending the Environmental Protection Agency's (EPA) final action on their administrative reconsideration petition, because an abeyance would promote judicial economy and an orderly, fair review. An abeyance will allow the parties to brief all the interrelated merits arguments in one proceeding and the Court to make one final ruling. An abeyance will not cause any immediate or significant hardship to any party, and EPA can reduce any delay by acting quickly on the reconsideration petition.

In opposing this motion, EPA, states intervening for respondents ("West Virginia Intervenors"), and three sets of industry petitioners[1] argue that abeyance is not mandatory under the Clean Air Act. That is undoubtedly true, but does not answer State and Municipal Petitioners' grounds for abeyance. Under the specific circumstances presented by this case, abeyance will eliminate the inefficiency and unfairness of a piecemeal review and give EPA the opportunity to correct errors, including patent contradictions between the Rule[2] and its implementing regulations. Abeyance here implicates none of the unique concerns that led State and Municipal Petitioners to oppose abeyance in the fully briefed and argued Clean Power Plan challenge, *West Virginia v. EPA*.[3] EPA, West Virginia Intervenors, and Industry Petitioners identify no credible hardship from an abeyance, especially

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[1] These are Petitioners Robinson Enterprises, Inc. *et al.* (Case No. 19-1175), Westmoreland Mining Holdings LLC (Case No. 19-1176), and North American Coal Corporation (Case No. 19-1179, together "Industry Petitioners").

[2] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) ("Rule").

[3] Undersigned petitioners Colorado, Michigan, New Jersey, North Carolina, Pennsylvania, Wisconsin, Los Angeles, and Denver, and movant-intervenor Nevada, were not intervenor-respondents in *West Virginia v. EPA*, Case No. 15-1363, but the other undersigned petitioners were. For the sake of convenience, this brief will refer to both sets of state and city parties as "State and Municipal Petitioners."

given their willingness in *West Virginia* to delay for years a dispositive ruling on many of the same legal issues presented here.

ARGUMENT

I. The Court should not conduct the piecemeal review suggested by EPA and other abeyance opponents.

A. Abeyance opponents do not dispute this Court's authority to hold the cases in abeyance pending final agency action on the reconsideration petitions.

EPA's opposition to the abeyance motions concentrates on proving what State and Municipal Petitioners do not dispute: that the Clean Air Act generally favors a prompt review of challenged rules, and does not *require* courts to stay review for a pending petition for agency reconsideration. (EPA's Combined Resp. to Envtl. & State Pet'rs' Mot. Hold Case in Abeyance, Doc. #1809478 ("EPA Opp."), at 5-6, 11.) Equally undisputed is that this Court has, in fact, placed rule challenges in abeyance to await agency action on such petitions. (EPA Opp. at 7, 10; *see also* State & Mun. Pet'rs' Mot. for Abeyance, Doc. #1808103 ("State Mot."), at 5; Mot. of Envtl. & Pub. Health Pet'rs for Abeyance, Doc. #1807492, at 19 n.11.) Contrary to EPA's suggestion (EPA Opp. at 10), the Court has held review in abeyance over the agency's opposition, even where the agency has not yet decided to convene reconsideration proceedings. *See, e.g.*, *Am. Trucking Ass'n, Inc. v. EPA*, No. 97-1440, 1998 WL 65651, at *1 (D.C. Cir. Jan. 21, 1998). In the circumstances of this case, as State and Municipal Intervenors explained in their motion, the Court

should exercise its discretion to hold this case in abeyance to avoid the inefficient use of resources and uncertain outcome that would result from piecemeal review.

B. Abeyance opponents would have the Court conduct an inefficient, piecemeal review of interrelated merits issues.

The abeyance opponents ask the Court to disregard the issues raised by the administrative reconsideration petitions, even though those issues are directly related to arguments petitioners will be making on the merits. That approach runs directly counter to courts' strong policy of "avoiding inefficient and unnecessary piecemeal review." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012).[4] The policy against piecemeal review conserves judicial resources and ensures courts "make decisions only when they have to, and then, only once." *Id.*

EPA's section 111 arguments illustrate the inefficiency and unfairness of the approach it suggests. It is true EPA's proposed rule provided notice of EPA's new, incorrect view that section 111 restricts EPA's consideration of the best system of emission reduction to "measures that can be applied to or at the source." (EPA Opp. at 12-14.) But State and Municipal Petitioners could not have guessed EPA

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[4] Although EPA and Industry Petitioners stress the fact that *American Petroleum Institute* concerned the prudential ripeness doctrine (*see, e.g.*, EPA Opp. at 9), as West Virginia Intervenors explain, "the considerations guiding whether to grant a motion for abeyance are similar to those relating to prudential ripeness." (Joint Opp'n of West Virginia et al. Opposing Mot. for Abeyance, Doc. #1809834 ("WV Intv. Opp."), at 19.) Those considerations support granting abeyance here, as discussed below.

would, in its final rule, rely on sections 105 and 302 of the Clean Air Act (which never appear in the proposed rule) to support that erroneous view, and therefore could not have filed comments on sections 105 and 302 during the original public comment period. (*See* EPA Opp. at 13.) In effect, EPA wants the Court to rule on a subset of the statutory arguments for its "to or at the source" theory now, then its new section 105 and 302 arguments for that same theory later, after it disposes of the reconsideration petitions. (EPA Opp. at 15 n.3.) This is not a coherent or fair way to review EPA's interpretation of the Clean Air Act. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a 'holistic endeavor.'"); *Del. Dept. of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 97 (D.C. Cir. 2018) ("[W]e must look not only to the particular statutory language at issue, but also to the language and design of the statute as a whole.").[5]

EPA suggests (perhaps too candidly) that nothing State and Municipal Petitioners say in their reconsideration petition will change its mind about section 111's proper interpretation. (EPA Opp. at 14 ("additional notice and comment on this issue would serve no purpose").) That is unfortunate, but it does not constrain

[5] The same principles militate against Industry Petitioners' suggestion that their "threshold" arguments under section 112 or sections 108-110 of the Clean Air Act could be litigated prior to State and Municipal Petitioners' and Environmental and Public Health Petitioners' claims. To be clear, no party has filed any motion to sever, and State and Municipal Petitioners reserve the right to respond to any such motion, if filed.

this Court's ability to manage its docket and hear the case in an orderly, complete manner. If EPA denies the reconsideration petition promptly, State and Municipal Petitioners will petition this Court for relief well before the 60-day deadline under 42 U.S.C. § 7607(b) and seek to consolidate the issues before the Court, so that it may take up all parties' claims and defenses together. To facilitate this, the Court should hold the cases in abeyance until EPA takes final agency action on the reconsideration petition.

II. EPA confirms its administrative process is incomplete as to the New Source Review program revisions, and nowhere disputes the tentative nature of its policy on state plan stringency.

As State and Municipal Petitioners explained in their motion (at 5-6), an abeyance would allow EPA "an opportunity to correct its own mistakes," and even if EPA remains unconvinced, permitting EPA's administrative process "to reach its end can at least solidify or simplify the factual context and narrow the legal issues at play." *Am. Petroleum Inst.*, 683 F.3d at 387. EPA admits that the administrative process for the proposed New Source Review revisions has not "reached its end." (EPA Opp. at 18.) EPA and Industry Petitioners' only argument is that this issue is not so important as the abeyance motions assert. EPA argues it decided the "best system of emissions reduction" "without regard to the proposed [New Source Review] reforms," but that is exactly the problem. (EPA Opp. at 19.) EPA proposed a system of emission reduction that would be implemented only if it also

revised its New Source Review program, and then—not letting changed circumstances deter it—finalized the same proposed system without making the New Source Review revisions it said were so necessary. As explained in the reconsideration petitions, by EPA's own analysis, postponing New Source Review revisions means its selected system of emission reduction is either more expensive or less effective at reducing emissions than originally modeled. Because of this change, EPA should reopen the Rule for further comment or reevaluate its determination of the best system of emission reduction. (State Mot., App. A, at 2, 20.)

Neither does EPA dispute that the policy toward more stringent state implementation plans announced in the Rule—that it likely will disapprove more stringent state plans, despite finalizing regulations that *preserve* States' ability to enact more protective plans—remains "tentative." (*See* State Mot. at 9-10.) As the reconsideration petitions demonstrate, this policy is patently contradictory and contrary to Supreme Court precedent (*see id.*, App. A, at 24-29), and abeyance opponents make no attempt to defend it. Because the reconsideration petitions give EPA the opportunity to correct its tentative position—or at least "solidify" the policy sketched in the Rule—abeyance is appropriate here.

III. State and Municipal Petitioners' request for abeyance is consistent with their efforts to obtain a ruling in *West Virginia v. EPA*.

The abeyance opponents belabor in their oppositions an observation State and Municipal Petitioners themselves made: in *West Virginia v. EPA*, many of the same States and Cities opposed an abeyance, though under different circumstances. (State Mot. at 10-11.) In that case, after full briefing and argument on the merits to the *en banc* Court, EPA sought an indefinite abeyance, which led to three years of delay while the Clean Power Plan was stayed. The State and Municipal Petitioners who were intervenor-respondents in that case rightly urged the *en banc* Court to rule on the submitted case, which would have answered many of the same statutory questions now before the Court and—if the Court ruled in favor of State and Municipal Petitioners—would have allowed EPA and States to implement the Clean Power Plan and enjoy its substantial benefits to the environment and human health.

Here, in contrast, where the Court's review has not even begun, with no briefing at all, and with the Rule not subject to any stay, the clearest way to achieve regulatory certainty is to ensure that the Court's merits ruling disposes of all the arguments that could invalidate the Rule.

In this respect, West Virginia Intervenors' claim of hardship is especially perplexing. According to these States, their pollution control agencies "cannot wait for resolution of litigation before moving forward" with developing their state

plans, and a decision invalidating the Rule will mean wasted time and effort. (WV Intv. Opp. at 8-9.) But West Virginia Intervenors fail to articulate how abeyance changes any of that. The possibility of a decision by this Court that invalidates the Rule may cast a "specter of futility" over state efforts (*id.* at 9); but surely, these efforts would be just as wasteful if the Court were to uphold the Rule in this proceeding, but remand it later on review of EPA's action on the reconsideration petitions. Judicial review may "unavoidably" involve risk of sunk regulatory costs (*id.* at 10), but the more orderly and complete the Court's review is, the less risk of surprise and wasted effort there is—especially if EPA does grant reconsideration and narrows the issues in play.

IV. An abeyance will not prejudice EPA, West Virginia Intervenors, or Industry Petitioners, who repeatedly avoided a dispositive ruling on their arguments.

EPA makes no case for prejudice or hardship from an abeyance; rather, it points to "intense public interest" in the case—as if this were a rare feature of this Court's docket—and the hardship alleged by Industry Petitioners. (EPA Opp. at 8.) But Industry Petitioners do not and cannot identify any "immediate and significant" hardship from their claims being considered alongside the complete set of parties' claims and defenses, on a complete record. *Am. Petroleum Inst.*, 683 F.3d at 389. Instead, Industry Petitioners contend an "indefinite" delay would continue regulatory "uncertainty." (Resp. of Pet'r N. Am. Coal Corp. Mots. for

Abeyance, Doc. #1808554 ("NACC Opp."), at 7.) Likewise, West Virginia Intervenors assert the abeyance would "afflict" their pollution control agencies with "an unnecessary pallor of uncertainty" as they develop their state plans. (WV Intv. Opp. at 6.)

These parties' concerns over uncertainty are difficult to credit, considering the years of delay and uncertainty they facilitated while supporting abeyance of the Clean Power Plan litigation and opposing a decision on the merits. The abeyance motions ask for an abeyance pending final action by EPA, the timing of which is fully under EPA's control but which ought to occur, at most, within a few months. West Virginia Intervenors and Industry Petitioners postponed a legal ruling on EPA's authority under the Clean Air Act *for three years*—and, unlike State and Municipal Petitioners, they identify no distinguishing circumstances that make a further, marginal wait suddenly intolerable. North American Coal Corporation, for example, voiced no anxiety over the frustration of long-term planning, investment barriers, or slow adoption of new technology when, throughout 2017 and 2018, it asserted it was unnecessary to decide *West Virginia v. EPA*.[6] By necessity, that

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[6] *Compare* NACC Opp. at 7 *with* Pet'rs' & Pet'r-Intervenors' Resp. in Supp. EPA's Mot. Hold Cases in Abeyance, Case No. 15-1363, Doc. #16669984 (Apr. 6, 2017); Pet'rs' & Pet'r-Intervenors' Resp. Opp'n Mot. Decide Merits of Case, Case No. 15-1363, Doc. #1750741 (Sept. 14, 2018).

ruling would have decided EPA's legal authority to issue greenhouse gas emission guidelines—what Industry Petitioners now style as "the bedrock question." (NACC pp. at 6.[7])

Again, the Rule is in effect. The decision of what resources to spend to comply with an operative law subject to ongoing litigation is a question agencies and businesses regularly confront. For a State or business to decide it must begin compliance work now, rather than wait for the litigation to conclude, is a reasonable choice to make, but not evidence of immediate and significant hardship from an abeyance. West Virginia Intervenors may prefer that there were no litigation at all—and Industry Petitioners may wish there were no Rule at all—but they suffer no real detriment from waiting for the Court to ensure its judicial review is an efficient, fair, and conclusive one.

CONCLUSION

For the foregoing reasons, State and Municipal Petitioners request the Court hold the cases in abeyance until final EPA action on the reconsideration petitions.

[7] Indeed, Westmoreland Mining and the Robinson petitioners raise in their present challenges the very same section 112 argument that was fully briefed, argued, and ready for decision in *West Virginia v. EPA*. (*Compare* Mem. Opp'n Mot. for Abeyance, Doc. #1808711, at 4; Pet'r Westmoreland Opp'n Mot. for Abeyance, Doc. #1808726, at 1 *with* Opening Br. Pet'rs Core Legal Issues, Case No. 15-1363, Doc. #1599889, at 61-74 (Feb. 19, 2016) (section 112 argument in Clean Power Plan challengers' merits brief).)

Dated: October 11, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Timothy E. Sullivan, hereby certifies:

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/s/ *Timothy E. Sullivan*
TIMOTHY E. SULLIVAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to EPA's Motion to Expedite was filed on October 11, 2019, using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Timothy E. Sullivan
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