

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

 AMERICAN PETROLEUM
 INSTITUTE, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL
 PROTECTION AGENCY,*Respondent.*

 No. 13-1108
 (and consolidated cases)
MOTION TO GOVERN FURTHER PROCEEDINGS

Petitioners in consolidated case No. 12-1409, Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, Group Against Smog and Pollution, and Clear Air Council (“Environmental Group Petitioners”), respectfully request that the Court sever their challenge from the remaining consolidated cases and hold it in abeyance pending further motion of the parties. Abeyance would promote judicial efficiency because resolution of other pending cases may render resolution of Environmental Group Petitioners’ challenge unnecessary.

Counsel for Environmental Group Petitioners have conferred with counsel for the other parties. Respondent Environmental Protection Agency, and Petitioners American Petroleum Institute, Independent Petroleum Association of

America, Independent Oil and Gas Association of West Virginia, Inc., Kentucky Oil and Gas Association, Pennsylvania Independent Oil and Gas Association, Ohio Oil and Gas Association, Illinois Oil and Gas Association, Indiana Oil and Gas Association, and Virginia Oil and Gas Association do not object to this motion. Petitioner Gas Processors Association does not have a position on this motion. Petitioner Western Energy Alliance opposes this motion and reserves the right to file a response.¹ Counsel for Petitioner Texas Oil and Gas Association did not respond to a request for its client's position.

FACTUAL BACKGROUND

This case originated with a number of petitions for review of EPA's final rule regulating volatile organic compounds ("VOCs") and other pollutants from the oil and natural gas sector. Oil and Natural Gas Sector: New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutant Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012). The 2012 Rule set two types of national pollution standards for the oil and natural gas sector: (1) new source performance standards ("NSPS"), promulgated under section 111 of the Clean Air Act, 42 U.S.C. § 7411, regulating VOCs, and (2) national emissions standards for

¹ Petitioner Western Energy Alliance states that it opposes this motion on the grounds that the claim that Environmental Group Petitioners seek to hold in abeyance is inextricably bound together with the other threshold legal issues that it and other parties seek to have the Court review.

hazardous air pollutants (“NESHAP”), promulgated under section 112 of the Clean Air Act, 42 U.S.C. § 7412.

While the NSPS portion of the 2012 Rule regulated emissions of smog- and soot-forming VOCs from the oil and natural gas sector, it did not regulate methane emissions. This was despite the fact that the oil and natural gas sector is the largest industrial source of methane emissions in the United States, and methane is a potent greenhouse gas with a 100-year global warming potential that is 36 times greater than carbon dioxide, and a 20-year global warming potential that is 87 times greater than carbon dioxide. *See* 81 Fed. Reg. 35,830, 35,838 (June 3, 2016); Intergovernmental Panel on Climate Change, Fifth Assessment Report, *Climate Change 2013—The Physical Science Basis, Chapter 8: Anthropogenic and Natural Radiative Forcing* (Sept. 2013), at 714, Table 8.7 & n.b (based on 2011 data).² For that reason, among others, the Environmental Group Petitioners filed a petition for review of the 2012 Rule, which was docketed as Case No. 12-1409. As relevant here, in their Statement of Issues, Environmental Group Petitioners challenged EPA’s “fail[ure] to promulgate standards of performance covering methane

² Available at https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter08_FINAL.pdf.

emissions from new and modified sources in the oil and gas sector.” Statement of Issues, No. 12-1409 (Nov. 16, 2012).³

The Court ultimately severed the litigation over the 2012 Rule into NSPS- and NESHAP-related cases, and consolidated all NSPS-related challenges, including Environmental Group Petitioners’ challenge, under a new docket number: No. 13-1108, the instant case. During the same period, several industry groups and Environmental Group Petitioners filed petitions with EPA seeking administrative reconsideration of aspects of the 2012 Rule. In their petition for reconsideration, Environmental Group Petitioners urged EPA to regulate methane emissions from the oil and natural gas sector. Petition for Reconsideration at 17-18, Docket No. EPA-HQ-OAR-2010-0505-4575 (Oct. 15, 2012).

The reconsideration petitions led to additional rulemakings, including a final rule issued in 2013, which amended requirements for storage vessels, *see* 78 Fed. Reg. 58,416 (Sept. 23, 2013), and a final rule issued in 2014, which established alternative compliance approaches, *see* 79 Fed. Reg. 79,018 (Dec. 31, 2014). Industry groups again petitioned for review of the 2013 and 2014 Rules,⁴ and also

³ Environmental Group Petitioners do not seek to advance or hold in abeyance any of the other issues raised in their Statement of Issues.

⁴ The challenges to the 2013 Rule were consolidated with the challenges to the 2012 Rule. *See* Order of Dec. 3, 2013, *Am. Petroleum Inst. v. EPA*, No. 13-1289 (D.C. Cir.). The challenges to the 2014 Rule are consolidated at docket number 15-1040. *See* Order of Mar. 4, 2015, *Indep. Petroleum Ass’n of Am. v. EPA*, No. 15-

filed administrative petitions for reconsideration of the 2013 and 2014 Rules. On June 3, 2016, EPA issued its latest final rule. In the 2016 Rule, EPA for the first time finalized standards of performance for emissions of *both* methane and VOCs from the oil and natural gas sector, including sources in the production, processing, transmission and storage segments. *See* 81 Fed. Reg. at 35,824. Shortly thereafter, a number of States and industry groups filed petitions for review of EPA's 2016 Rule, *see, e.g., North Dakota v. EPA*, No. 16-1242 (filed July 15, 2016), and several groups also filed administrative petitions for reconsideration of the 2016 Rule. On August 10, 2016 EPA denied the remaining requests for reconsideration of the 2012, 2013, and 2014 Rules that had not been addressed in the subsequent rulemakings. *See* 81 Fed. Reg. 52,778 (Aug. 10, 2016). The administrative petitions for reconsideration of the 2016 Rule remain pending.

Throughout this process, the Court has granted several extensions of the motion to govern deadline in this case, including EPA's September 19, 2016 motion requesting an extension until October 6, 2016. *See* Unopposed Motion to Extend Time, No. 13-1108 (Sept. 19, 2016); Clerk's Order, No. 13-1108 (Sept. 19, 2016).

1040 (D.C. Cir.). The 2014 challenge is currently being held in abeyance. *See id.*, Order of Apr. 23, 2015.

REQUEST FOR SEVERANCE AND ABEYANCE

Environmental Group Petitioners understand that EPA intends to move to consolidate all of the pending challenges to its NSPS Rules for the oil and natural gas sector. Environmental Group Petitioners request that their challenge to the 2012 Rule be severed from the consolidated cases and continue to be held in abeyance until litigation over EPA's 2016 Rule is resolved. This is because, as a practical matter, resolution of the challenges to the 2016 Rule may render resolution of Environmental Group Petitioners' challenge to the 2012 Rule unnecessary.

Specifically, Environmental Group Petitioners filed their petition for review in this case in order to argue that, in 2012, EPA had a *mandatory* duty to determine whether methane regulation was appropriate and to move forward with methane standards for new and modified sources in the oil and gas sector under section 111 of the Clean Air Act. Since that time, EPA has determined that it *may* regulate methane emissions from new and modified sources in the oil and gas sector and has exercised its alleged discretion to do so. In particular, EPA published the 2016 Rule regulating methane emissions from the oil and natural gas sector, in which it claimed that "section 111 leaves the EPA with the authority and *discretion* to ... determine the pollutants for which standards should be developed." 81 Fed. Reg. at 35,828 (emphasis added).

Notwithstanding Environmental Group Petitioners' differing view of the nature of EPA's legal duty to regulate methane emissions from the oil and natural gas sector, the 2016 Rule, as a practical matter, establishes such methane standards and limits the need for Environmental Group Petitioners to pursue their claim at this time. Industry and state petitioners challenging the 2016 Rule, however, have raised a number of substantive and procedural challenges to EPA's methane standards. *See, e.g.*, Statement of Issues, *North Dakota v. EPA*, No. 16-1242 (Aug. 22, 2016). If EPA's 2016 Rule regulating methane from the oil and gas sector is ultimately upheld in court, it may be unnecessary for the court to resolve Environmental Group Petitioners' claim. On the other hand, if the 2016 Rule is struck down, it may become necessary for Environmental Group Petitioners to pursue their claim that EPA has a *mandatory* duty to regulate methane emissions from this source category.⁵ Holding their petition in abeyance preserves Environmental Group Petitioners' legal claim regarding whether EPA's duty is mandatory or discretionary—a distinct legal question not likely to be raised in the current litigation over the NSPS Rules—but avoids expending judicial resources in a situation in which “other pending proceedings ... may affect the outcome of the case.” *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (holding a

⁵ In addition, in response to administrative petitions, EPA might change its course of action and decide, based on the *discretionary* authority it claims, not to regulate methane emissions from the oil and natural gas sector after all.

detainee's direct review petition in abeyance where resolution of his separate habeas action "may [have] entirely, or partially, moot[ed] his direct review petition").

This Court has granted a similar motion under similar circumstances in the recent past. In *Sierra Club v. EPA*, environmental petitioners filed suit to argue that EPA was required *at that time* to regulate greenhouse gas emissions under the Clean Air Act's Prevention of Significant Deterioration ("PSD") permitting program. EPA Reply to Motion to Govern at 1-3, No. 09-1018 (D.C. Cir. June 30, 2010). EPA, by contrast, had determined that it was required to do so only "once a regulation adopted under the Act required 'actual control of emissions.'" Motion to Govern at 2-3, No. 09-1018 (June 9, 2010) (citing 75 Fed. Reg. 17,004, 17,004 (April 2, 2010)). In other words, the environmental petitioners believed that EPA presently had the authority (and duty) to regulate greenhouse gas emissions under the PSD program, while EPA believed that it had to wait until such time as it actually controlled greenhouse gas emissions under another provision of the Act. While environmental petitioners' case was pending, however, EPA finalized a rule to regulate greenhouse gas emissions from motor vehicles, triggering the date of "actual control" and the regulation of greenhouse gas emissions under the PSD program under EPA's interpretation. EPA Reply to Motion to Govern at 2-3, No. 09-1018. Industry petitioners then challenged both EPA's rule regulating

greenhouse gas emissions from motor vehicles and EPA's finding that greenhouse gases endangered public health and welfare. *Id.* at 3-4.

EPA moved to hold environmental petitioners' original lawsuit in abeyance to allow the challenges to the motor vehicle rule and the endangerment finding—which would affect the necessity of litigating environmental petitioners' claims—to be resolved first. *Id.* at 10. This Court agreed to do so, ordering that environmental petitioners' case “remain held in abeyance pending further order of the court to allow other pending proceedings that may affect the outcome of these cases to proceed.” Order, No. 09-1018 (Sept. 14, 2010). Notably, this Court issued its order over the opposition of industry respondent-intervenors. *See* Joint Response of Intervenor-Respondents to Respondent's Motion to Govern Further Proceedings, No. 09-1018 (D.C. Cir. June 22, 2010).⁶

The same treatment is warranted here. As in *Sierra Club*, the outcome of challenges to the 2016 Rule might render Environmental Group Petitioners' challenge to the 2012 Rule no longer necessary, or it might heighten the need for their challenge to be heard. Accordingly, the most efficient and fair way to handle Environmental Group Petitioners' challenge is to hold it in abeyance.

⁶ Ultimately, EPA's endangerment finding and motor vehicle regulations were upheld and the environmental petitioners' case was dismissed upon a motion of the parties to dismiss the case voluntarily. *See* Joint Stipulation, No. 09-1018 (July 17, 2014) (moving to dismiss case voluntarily); Clerk's Order, No. 09-1018 (July 18, 2014) (dismissing case).

In light of these circumstances, Environmental Group Petitioners respectfully request that this case be severed from the consolidated cases and held in abeyance until the litigation over EPA's 2016 Rule is resolved, to be reopened upon the motion of one of the parties for good cause. In the event that a party moves the Court to lift the abeyance period and reopen the case, the parties would propose a briefing schedule.

CONCLUSION

For the foregoing reasons, Environmental Group Petitioners respectfully request that the Court sever their challenge from the remaining consolidated cases and hold it in abeyance pending further motion of the parties.

DATED: October 5, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **MOTION TO GOVERN** on all parties through the Court's electronic case filing (ECF) system.

DATED: October 5, 2016

/s/ Susannah L. Weaver

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