

ORAL ARGUMENT NOT YET SCHEDULED

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

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AMERICAN PETROLEUM INSTITUTE, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 13-1108 (and
)	consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,)	
)	
)	
Respondents.)	
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**INDUSTRY PETITIONERS’ JOINT RESPONSE IN SUPPORT OF EPA’S
MOTION TO HOLD CASES IN ABEYANCE**

Industry Petitioners in the above-captioned consolidated petitions for review respectfully submit this response in support of the Respondents’ April 7, 2017 motion to hold these cases in abeyance (ECF No. 1670157). As Respondent United States Environmental Protection Agency (“EPA” or “Agency”) explained in the abeyance motion, EPA has initiated administrative proceedings to review EPA’s final rule entitled, “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule,” 81 Fed. Reg. 35,823 (June 3, 2016) (“2016 NSPS Rule”). This Court should grant EPA’s requested

relief and hold these consolidated cases in abeyance until 30 days after EPA completes its review of the 2016 NSPS Rule.

Holding these cases in abeyance is amply justified – primarily because all of the principal parties agree that abeyance is appropriate. All of the Petitioners challenging the 2016 NSPS Rule support abeyance.¹ EPA and Administrator Pruitt, the Respondents who are defending the 2016 NSPS Rule, obviously support abeyance because they filed the pending motion. While there potentially may be a case or controversy that eventually must be decided, that will not be known until EPA completes its review of the 2016 Rule. There is no reason for this court to expend judicial resources in the meantime.

Notably, there is no briefing schedule in place, no briefs have been filed, and oral argument has not been scheduled. Thus, holding these cases in abeyance would conserve judicial and party resources.

Lastly, no party will be prejudiced by abeyance. The Environmental Intervenors have been content for over four years to keep these cases on hold. A few more months of abeyance will not upset the status quo.

¹ The State Petitioners have indicated they will file a separate response in support of EPA's motion.

BACKGROUND

On January 4, 2017, this Court consolidated three groups of cases: *American Petroleum Institute v. EPA*, No. 13-1108 (and consolidated cases), *Independent Petroleum Association of America v. EPA*, No. 15-1040 (and consolidated cases), and *State of North Dakota v. EPA*, No. 16-1242 (and consolidated cases). These consolidated cases now involve challenges to three final actions by EPA: (a) “Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews,” 77 Fed. Reg. 49,490 (Aug. 16, 2012) (“2012 NSPS Rule”); (b) “Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards,” 79 Fed. Reg. 79,018 (Dec. 31, 2014) (“2014 NSPS Rule”); and (c) “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule,” 81 Fed. Reg. 35,823 (June 3, 2016) (“2016 NSPS Rule”).

This litigation is complex, presenting both fundamental legal issues and implementation issues. The three rules under review present multiple issues and there are numerous parties. And, there is potential overlap in the issues presented by the three rules (e.g., the scope of the source category is relevant to all three rules). There are multiple Petitioners. There are also State, Industry, and Environmental Intervenor-Respondents, who seek to defend certain of these rules on behalf of Respondent EPA.

EPA is in the process of reviewing the 2016 NSPS Rule to determine whether it is consistent with the policy objectives outlined in the May 28, 2017 Executive Order entitled “Promoting Energy Independence and Economic Growth” (hereinafter “Executive Order”). EPA Abeyance Motion at 2-3; *see also* 82 Fed. Reg. 16,331 (Apr. 4, 2017) (published Federal Register notice announcing EPA’s review of the 2016 NSPS Rule). As part of this review, EPA will, “if appropriate,” “initiate proceedings to suspend, revise, or rescind” the 2016 NSPS Rule. EPA Abeyance Motion at 3.

This case does not have a briefing schedule in place, and oral argument has not been scheduled. Pursuant to this Court’s Order dated March 29, 2017 (ECF No. 1668439), the parties must file a briefing schedule and proposed format for briefing by May 19, 2017.

ARGUMENT

Holding this case in abeyance is warranted. As EPA points out, agencies have the inherent authority to reconsider or revise their decisions. EPA Abeyance Motion at 4; *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Dietz v. Bouldin*, 136 S. Ct. 1885, 1888-89 (2016). Under the Executive Order, EPA is required to evaluate whether it should initiate a rulemaking to address the 2016 NSPS Rule in some way. The required evaluation is underway. EPA Abeyance

Motion at 3; *see also* 82 Fed. Reg. 16,331 (Apr. 4, 2017) (published Federal Register notice announcing EPA's review of the 2016 NSPS Rule).

Industry Petitioners support EPA's effort to evaluate the 2016 NSPS Rule. The Executive Order plainly shows that the Trump administration has a significantly different perspective than the prior administration on the policy issues that underlie the 2016 NSPS Rule. It is easily conceivable that EPA will decide to make significant changes to the rule that address the challenges that Industry Petitioners are planning to bring in this case. Industry Petitioners agree that it makes sense to put this case on hold until EPA decides what to do with the rule.

Having said that, it is important for the case to remain on the docket during EPA's review. Industry Petitioners have separately petitioned EPA to administratively stay or extend near-term compliance deadlines so that affected facilities do not need to invest time and resources in implementing aspects of the rule that may change or be eliminated. If EPA fails to provide administrative relief, Industry Petitioners want to reserve the option of seeking appropriate relief from this Court.

As noted above, the Environmental Intervenors have been content to keep these cases on hold for over four years. Keeping them on hold for another few months would maintain the status quo and hardly would cause prejudice to the Environmental Intervenors that heretofore plainly has not existed.

Notably, this Court just days ago granted a similar motion in litigation challenging EPA's 2015 National Ambient Air Quality Standards (NAAQS) for ozone. In that case, briefing is complete and oral argument was scheduled for this week. The Environmental Petitioners in that case had briefed several fundamental issues as to the legal and factual underpinnings of that rule. Yet, this Court granted abeyance. *See Murray Energy Corp. v. EPA*, No. 15-1385, ECF No. 1670626 (Apr. 11, 2017) (granting EPA's motion to hold cases in abeyance while EPA evaluates if it should reconsider the 2015 ozone standards in part or in whole or retain the 2015 ozone standards); *see also* Opp'n To Mot. To Hold Cases in Abeyance, *State of North Dakota v. EPA*, No. 15-1381, ECF No. 1669762 (filed Apr. 5, 2017) at 7-8, 8 n.4 (citing several cases held in abeyance where briefing had not yet begun or had not been completed by the time the abeyance was put in place). If abeyance is warranted in that case, it surely is warranted here.

CONCLUSION

For the foregoing reasons, Industry Petitioners respectfully request the Court grant EPA's motion to hold these cases in abeyance until 30 days after EPA completes its review of the 2016 NSPS Rule.

Respectfully submitted,

No. 16-1270

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(1)(D) of the Federal Rules of Appellate Procedure and Circuit Rules 27(a)(1) and 27(a)(2), I certify that the foregoing Petitioners' Joint Response in Support of EPA's Motion to Hold Cases In Abeyance contains 1,160 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit of 5,200 words set by Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure.

/s/ William L. Wehrum

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Dated: April 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April 2017, a copy of the foregoing Petitioners' Joint Response in Support of EPA's Motion to Hold Cases In Abeyance was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ William L. Wehrum

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