ORAL ARGUMENT NOT SCHEDULED

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

ENVIRONMENTAL DEFENSE FUND, et al., *Petitioners*, v. JANE NISHIDA, et al., *Respondents*.	**Case No. 20-1360 and consolidated cases**

RESPONDENT EPA'S UNOPPOSED MOTION TO HOLD CASES IN ABEYANCE PENDING IMPLEMENTATION OF EXECUTIVE ORDER AND CONCLUSION OF POTENTIAL RECONSIDERATION

The United States, on behalf of Respondents the United States Environmental Protection Agency ("EPA"), and Jane Nishida, Acting EPA Administrator[1] (collectively "EPA"), hereby moves the Court to place these cases in abeyance, pending EPA's implementation of an Executive Order signed on January 20, 2021. That Executive Order directs EPA to review the Clean Air Act regulation at issue in this case (the "Technical Rule" or the "Rule"). In light of this Presidential directive, the Rule is under close scrutiny by EPA, and the

[1] Acting EPA Administrator Jane Nishida is automatically substituted for her predecessor in office pursuant to Fed. R. App. P. 43(c)(2).

positions taken by the Agency in this litigation to date may not reflect EPA's ultimate conclusions. EPA should be afforded the opportunity to fully review the Rule consistent with the Executive Order, the Clean Air Act, and the Agency's inherent authority to reconsider past decisions.

Accordingly, the United States respectfully requests that this Court hold these cases in abeyance while the Agency conducts its review. The United States requests that the abeyance remain in place until 30 days after the conclusion of review and any resulting 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 counsel representing or coordinating with all Petitioners and all Respondent-Intervenors regarding the parties' positions on this motion. The Environmental Petitioners (in Case Nos. 20-1360 and 20-1364) do not oppose abeyance, and request that the court require the agency to file regular status reports. The State Petitioners consent to EPA's motion to hold this litigation in abeyance. Respondent-Intervenors GPA Midstream, American Petroleum Institute and Western Energy Alliance each take no position on this motion. No party stated that it opposes the motion.

BACKGROUND

In September 2020, EPA finalized two rules relating to new source performance standards under 42 U.S.C. § 7411(b) for the oil and natural gas source category. First, a "Policy Rule" removed the transmission and storage segment from the listed source category and rescinded standards for that segment based on EPA's conclusion that transmission and storage operations are distinct from other sources in this category and that EPA presently lacks authority to regulate transmission and storage operations under Section 7411. 85 Fed. Reg. 57,018, 57,027-30 (Sept. 14, 2020). Separately, the Policy Rule rescinded the methane standards applicable to the production and processing segments. EPA concluded that these standards were unnecessary because they were duplicative of the VOC standards, and because EPA lacked authority to establish methane standards based on the findings it had made to date. *Id*. at 57,030-40.

The second rule is under review here. In this "Technical Rule," EPA made a number of technical amendments to the oil and gas source category's new source performance standards. 85 Fed. Reg. 57,398 (Sept. 15, 2020). Among other changes, EPA revised requirements for monitoring fugitive emissions from low production well sites and gathering and boosting compressor stations, respectively.[2]

[2] Earlier-filed memoranda in the case provide more detailed background regarding

Multiple petitions for review of the Technical Rule were filed in this Court and consolidated. A number of parties also intervened as Respondents. On January 15, 2021, the Court denied Petitioners' motion for a partial judicial stay of the Rule pending review, which EPA had opposed. Doc. No. 1880331 (*per curiam* order). The Court has not ordered a merits briefing schedule or set an argument date.

On January 20, 2021, President Joseph R. Biden Jr. signed Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). The Executive Order establishes a policy to:

> listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

Id. (Section 1). To that end, the Executive Order specifically directs "all executive departments and agencies . . . to immediately review and, as appropriate and consistent with applicable law, take action to address the

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the Technical Rule and define technical terms. *See, e.g.*, Doc. No. 1875418 (EPA opposition memorandum filed Dec. 11, 2020).

promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id.*

The Executive Order specifically identified the Technical Rule as potentially in conflict with new federal policy. *Id.* § 2. (Section 2). Under the Executive Order, EPA, "as appropriate and consistent with applicable law, shall consider publishing for notice and comment a proposed rule suspending, revising, or rescinding" the Technical Rule "by September 2021." *Id.* § 2(a)(i)).

In consideration of the Executive Order, EPA requested on January 21, 2021, that the Department of Justice's Environment and Natural Resources Division "seek and obtain abeyances or stays of proceedings in pending litigation" concerning, *inter alia*, rulemakings within the scope of the Executive Order. Ex. 1, Letter from Melissa A. Hoffer, Acting General Counsel. The United States has moved for an abeyance of the Policy Rule litigation. *See* Doc. No. 1883156 in Case No. 20-1357 and consolidated cases.

ARGUMENT

The Executive Order marks 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 Technical Rule in accordance with the new policies set forth in the Order. 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.

It is well-established that 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 U.S.C. § 7601(a).

Courts may defer judicial review of a final rule pending completion of reconsideration proceedings. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*"). 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 Technical Rule and, as appropriate, initiate a new rulemaking "suspending, revising, or rescinding" that action. 86 Fed. Reg. at 7037 (Section 2(a)). EPA has requested that the United States seek an abeyance of this litigation so that it may review the Technical Rule in accordance with this directive. As that review may result in the revision or rescission of the Rule at issue in this case, "[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.

Notably, granting abeyance here would also be consistent with this Court's past practice. This court has granted abeyances in litigation challenging other Section 7411 rules when a change in presidential administrations prompted EPA to reconsider its decision. *See, e.g.*, *American Petroleum Institute v. EPA*, D.C. Cir. No. 13-1108, ECF No. 1675813 (placing in abeyance challenges to the previous Section 7411(b) regulation of oil and gas sources); *North Dakota v. EPA*, D.C. Cir. No. 15-1381, ECF Nos. 1673072 & 1688176 (placing in abeyance challenges to a Section 7411(b) regulation of power plants); *see also, e.g.*, *Texas v. EPA*, D.C. Cir. No. 17-1021, ECF No. 1715548 (placing in abeyance challenges to Clean Air Act regional haze regulations); *California v. EPA*, D.C. Cir. No. 08-1178, ECF No. 1167136 (placing in abeyance challenges to grant of Clean Air Act waiver for state greenhouse gas regulations).

Abeyance also will not prejudice any party. As discussed above, currently there is neither a merits briefing schedule in place nor a calendared argument date. None of the Petitioners challenging the Technical Rule opposes the requested abeyance of judicial proceedings. Respondent-Intervenors each take no

position on this motion and, in any case, they face no harm arising from the postponement of judicial review of the Rule, which remains in effect.

WHEREFORE, the United States 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 rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period.[3]

Respectfully submitted,

Dated: February 5, 2021 By: */s/ Brian H. Lynk*

BRIAN H. LYNK, D.C. Bar. No. 459525
Environment & Natural Resources Div.
Environmental Defense Section
United States Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-6187 (tel.)
Attorney for Respondent

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

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Respondent EPA's Notice of Filing of Certified Index complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains 1824 words according to the count of Microsoft Word and therefore is within the word limit of 5,200 words.

Dated: February 5, 2021

/s/ Brian H. Lynk
Brian H. Lynk

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed with the Clerk of the Court this 5th day of February, 2021, using the appellate CM/ECF System, causing true and correct copies thereof to be sent to all counsel of record through the appellate CM/ECF system.

/s/ Brian H. Lynk
Brian H. Lynk