

ORAL ARGUMENT NOT YET SCHEDULED

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

<hr/>)	
STATE OF CALIFORNIA, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 21-1018 (and
)	consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Respondents.)	
<hr/>)	

OPPOSED JOINT MOTION TO CONTINUE ABEYANCE

On February 17, 2021, this Court ordered that the above-captioned consolidated cases be held in abeyance pending further order of the court, with motions to govern future proceedings due by August 17, 2021. Petitioners in Case No. 21-1018 (“State Petitioners”) and the United States, on behalf of Respondents United States Environmental Protection Agency, and Michael S. Regan, Administrator (together, “EPA”), hereby jointly move the Court to continue to hold the above-captioned consolidated cases in abeyance for 90 days, until Monday, November 15, 2021, with motions to govern future proceedings due on that date.

As discussed below, EPA is still reviewing the rule challenged in this case, entitled “Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures” (the “Airplane Rule” or the “Rule”). 86 Fed. Reg. 2136 (Jan. 11, 2021). However, EPA expects to be able to identify its path forward on the Rule within the next three months. EPA believes this warrants keeping this case in abeyance for the next 90 days. State Petitioners agree and join this motion on the understanding that EPA will provide the parties and the Court with its decision whether to repeal, revise, or reconsider the Airplane Rule by the end of that 90-day period. State Petitioners state they reserve the right to oppose further abeyances if EPA does not provide sufficient information about its plans by this time, including an expected timeline for any reconsideration proceeding or new rulemaking. Petitioners in Case No. 21-1021 (“Environmental Petitioners”) state that they oppose this motion and plan to file their own motion to govern future proceedings. Movant-Intervenor the Boeing Company states that it does not oppose this motion. Movant-Intervenor the Aerospace Industries Association of America states that it has no objection to this motion.

BACKGROUND

On January 11, 2021, EPA promulgated the Airplane Rule under Section 231(a) of the Clean Air Act, 42 U.S.C. § 7571(a). *See* 86 Fed. Reg. 2136. The Airplane Rule establishes greenhouse gas standards applicable to certain classes of

airplane engines. State and Environmental Petitioners each filed a petition for review of the Airplane Rule, which were consolidated under the lead case *State of California v. EPA*, D.C. Cir. No. 21-1018.

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, and an accompanying list of agency actions, directed EPA to review the Airplane Rule to determine if it is consistent with the Administration’s new policies on improving public health and the environment, and tackling the climate crisis. *See, id.* (Section 1); “Fact Sheet: List of Agency Actions for Review,” at “U.S. Environmental Protection Agency” § 4, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

In consideration of the Executive Order and accompanying list of agency actions, the United States moved on February 16, 2021, to place the above-captioned case in abeyance while the Agency conducted its review of the Airplane Rule. ECF No. 1885534. State Petitioners supported a six-month abeyance with the opportunity for an additional abeyance if circumstances justified it, but opposed an indefinite abeyance. Environmental Petitioners did not oppose a six-month abeyance but opposed an indefinite or longer period of abeyance. *Id.*

On February 17, 2021, the Court issued an order placing this case in abeyance pending further order of the Court, and directing the parties to file motions to govern by August 17, 2021. ECF No. 1885804.

ARGUMENT

As anticipated in EPA's February 2021 abeyance motion, EPA has been engaged these past six months in a review of the Airplane Rule to determine whether that rule conflicts with the policies expressed in the President's January 2021 Executive Order. EPA has been diligently conducting that review and is in the process of completing it. However, EPA has not yet reached the consummation of its decision process. State Petitioners and EPA agree that keeping this case in abeyance for an additional three months is in the interest of the parties and the Court because it would allow EPA to complete that process and announce to the public, the parties, and the Court its intended path forward on the challenged Rule.

The proposed abeyance period reflects the time necessary to conduct a regulatory review during the first months of a new Presidential Administration. During the first six months of the abeyance, EPA staff has been engaged in briefing arriving managers, new staff, and political leadership on the applicable regulatory framework, the existing Airplane Rule, and the potential paths forward. That work has coincided with efforts on several other rules under review pursuant

to the January 2021 Executive Order, which have similarly demanded the attention of EPA staff and leadership. Keeping this case in abeyance for an additional 90 days will allow EPA to complete its review of the Airplane Rule and coordinate a final decision between EPA leadership and, as appropriate, leadership at the White House or other federal agencies.

Allowing EPA to reach its decision in response to the Executive Order before it must litigate the merits of the Airplane Rule would support the integrity and efficiency of the administrative process. EPA's review relates to whether the regulatory choices in the Airplane Rule align with the new Administration's still-developing policy, or whether EPA should conduct regulatory proceedings to amend the Rule. Moving forward with litigation before EPA reaches a decision on these issues risks compelling the Agency to take litigation positions on matters presently under review and could require the Agency to redirect resources away from that review and towards litigation. Abeyance would also further the Court's interest in avoiding unnecessary adjudication, as the course of proceedings in this case may be affected by EPA's decision at the conclusion of the administrative review.

Furthermore, the requested extension will not prejudice any party. While Environmental Petitioners state that they are opposed to further abeyance, the requested three-month period is narrowly tailored to the additional time EPA

requires to complete its review and will not unduly delay litigation in the event such litigation moves forward on the merits. And should the Agency indicate in the next three months its intention to amend the Airplane Rule, the proposed abeyance period will allow the Court and the parties to assess at that point – with full information – whether (or how) litigation should proceed while additional regulatory work is conducted.

WHEREFORE, State Petitioners and the United States jointly request that this Court hold the above-captioned consolidated cases in abeyance for an additional 90 days while the Agency completes its review of the Rule, with motions to govern future proceedings due on or before Monday, November 15, 2021.

DATED: August 16, 2021

Respectfully submitted,

TODD KIM
Assistant Attorney General

/s/ Chloe H. Kolman ¹
CHLOE H. KOLMAN
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-9277

¹ Counsel for Respondents represents that the other parties listed in the signature blocks on this document consent to this filing.

chloe.kolman@usdoj.gov

Counsel for Respondents

/s/ Theodore A.B. McCombs

THEODORE A.B. MCCOMBS
Deputy Attorney General
Natural Resources Law Section
California Department of Justice
600 West Broadway, Suite 1800
P.O. Box 85266
San Diego, CA 92186-5266
(619) 738-9003 (Office)
theodore.mccombs@doj.ca.gov

*Counsel for the State of California, by and
through Attorney General Rob Bonta and
the California Air Resources Board*

FOR THE STATE OF
CONNECTICUT

WILLIAM TONG
Attorney General

/s/ William E. Dornbos

William E. Dornbos
Assistant Attorney General
Office of the Attorney General
165 Capitol Ave.,
Hartford, CT 06106
(860) 808-5250

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General

/s/ Gerald T. Karr

Matthew J. Dunn
Chief, Environmental Enforcement/
Asbestos Litigation Division
Gerald T. Karr
Assistant Attorney General
Office of the Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-3369

FOR THE STATE OF MARYLAND

BRIAN E. FROSH

Attorney General

/s/ Joshua M. Segal

Joshua M. Segal

Special Assistant Attorney General

Office of the Attorney General

200 St. Paul Place

Baltimore, MD 21202

(410) 576-6300

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY

Attorney General

/s/ Carol Iancu

Christophe Courchesne, Deputy Chief

Carol Iancu

Assistant Attorneys General

Energy and Environmental Bureau

One Ashburton Place, 18th Floor

Boston, MA 02108

(617) 963-2428

FOR THE STATE OF MINNESOTA

KEITH ELLISON

Attorney General

/s/ Peter N. Surdo

Peter N. Surdo

Special Assistant Attorney General

445 Minnesota Street, Suite 1400

St. Paul, MN 55101-2127

(651) 757-1061

FOR THE STATE OF NEW JERSEY

ANDREW BRUCK

Acting Attorney General

/s/ Mark A. Fisher

Mark A. Fisher

Deputy Attorney General

Division of Law

Department of Law & Public Safety

25 Market Street, PO Box 093

Trenton, NJ 08625-0093

(609) 376- 2740

FOR THE STATE OF NEW YORK

LETITIA JAMES, Attorney General

/s/ Matthew Eisenson

Matthew Eisenson

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM

Attorney General

/s/ Paul Garrahan

Gavin G. McCabe
Assistant Attorneys General
Anthony Dvarskas
Chief Scientist
Environmental Protection Bureau
Office of the Attorney General
28 Liberty Street, 19th Floor
New York, NY 10005
(212) 416-8459

Paul Garrahan
Attorney-in-Charge
Steve Novick
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE COMMONWEALTH OF
PENNSYLVANIA

JOSHUA D. SHAPIRO
Attorney General

/s/ Ann R. Johnston

Ann R. Johnston
Senior Deputy Attorney General
Public Protection Division, Health Care
Section
Pennsylvania Office of Attorney
General
1600 Arch St., Suite 300
Philadelphia, PA 19103
(267) 940-6696

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

/s/ Nicholas F. Persampieri

Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON

Attorney General

/s/ Christopher H. Reitz

Christopher H. Reitz

Assistant Attorney General

Office of the Attorney General

P.O. Box 40117

Olympia, WA 98504-0117

(360) 586-4614

FOR THE DISTRICT OF
COLUMBIA

KARL A. RACINE

Attorney General

/s/ Loren L. AliKhan

Loren L. AliKhan

Solicitor General

Office of the Attorney General

for the District of Columbia

400 6th St., NW, Suite 8100

Washington, DC 20001

(202) 727-6287

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion to Continue Abeyance complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, 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 1,111 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ Chloe H. Kolman

CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Continue Abeyance have been served through the Court's CM/ECF system on all registered counsel this 16th day of August, 2021.

/s/ Chloe H. Kolman

CHLOE H. KOLMAN