ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, et al., Petitioners, v. JANE NISHIDA, Acting Administrator, et al., Respondents.	No. 20-1357 (and consolidated cases)

MOTION TO HOLD CASES IN ABEYANCE PENDING IMPLEMENTATION OF EXECUTIVE ORDER AND CONCLUSION OF POTENTIAL RECONSIDERATION

The United States, on behalf of Respondents United States Environmental Protection Agency, and Jane Nishida, Acting 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 "2020 Rule" or the "Rule"). In light of this Presidential directive, the 2020 Rule is under close scrutiny by EPA, and the positions taken by the Agency in this litigation

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

to date may not reflect their ultimate conclusions. EPA should be afforded the opportunity to fully review the 2020 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 and suspend the remainder of the briefing schedule 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 coordinating counsel for Petitioners and Respondent-Intervenors regarding their positions on this motion. Counsel for State Petitioners (No. 20-1357) states that they consent to the motion for abeyance. Counsel for Environmental Petitioners (Nos. 20-1359 & 20-1363) states that they do not oppose abeyance, and request that the Court require the Agency to file regular status reports. Counsel for Respondent-Intervenor American Petroleum Institute states that it does not oppose the motion. Counsel for Respondent-Intervenors State of North Dakota; GPA Midstream Association; and Domestic Energy Producers Alliance, et al.[2], state

[2] Domestic Energy Producers Alliance; Eastern Kansas Oil & Gas Association; Illinois Oil and Gas Association; Independent Oil and Gas Association of West Virginia, Inc.; Independent Petroleum Association of America; Indiana Oil and Gas Association; Kansas Independent Oil and Gas Association; Kentucky Oil

that these Respondent-Intervenors take no position in response to the United States' request for abeyance, but reserve the right to respond to this motion upon review.

BACKGROUND

On September 14, 2020, EPA promulgated under Section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b), a rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review" (the "2020 Rule" or the "Rule"). 85 Fed. Reg. 57,018. The 2020 Rule sought to repeal aspects of EPA's 2012 and 2016 rulemakings concerning the regulation of pollutants, including methane, from the oil and gas industry. *See id.* at 57,019 (citing 77 Fed. Reg. 49,490 (August 16, 2012) and 81 Fed. Reg. 35,824 (June 3, 2016)). The 2020 Rule made three specific determinations. First, it determined that the transmission and storage segment of the oil and gas industry should not be grouped in the same "source category" as the production and processing segments of the oil and gas industry. Having made this determination, EPA withdrew all regulation of transmission and storage sources – including methane regulations. Second, EPA withdrew methane controls on the production and processing segments of the industry, which had been established in 2016, on the grounds that these controls were duplicative of separate

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and Gas Association; Michigan Oil and Gas Association; Ohio Oil and Gas Association; Pennsylvania Independent Oil & Gas Association; Texas Alliance of Energy Producers; Texas Independent Producers and Royalty Owners Association; West Virginia Oil and Natural Gas Association; Western Energy Alliance; International Association of Drilling Contractors; North Dakota Petroleum Council; National Stripper Well Association; and Petroleum Alliance of Oklahoma.

controls for volatile organic compounds. Third, EPA withdrew methane controls on the production and processing segments, in the alternative, because it determined that the statutorily-required "endangerment finding" supporting these controls was flawed. *See generally* 85 Fed. Reg. 57,018.

The Rule was immediately challenged by twenty states and three municipalities, and eleven environmental and public health organizations. These parties' three petitions for review were consolidated under the lead case *State of California v. Wheeler*, D.C. Cir. No. 20-1357. On October 27, 2020, the Court denied Petitioners' request for summary vacatur and stay, but set an expedited briefing schedule. ECF No. 1868350. That briefing schedule was extended on December 22, 2020, and January 22, 2021. ECF Nos. 1876779 & 1881379. Merits briefing is presently ongoing, with the next briefs due on March 23rd (Respondent-Intervenors' briefs) and April 6th (Petitioners' reply briefs). Merits briefing is currently scheduled to conclude on April 20, 2021. ECF No. 1881379. Oral argument has not yet been scheduled.

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 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.*

In a list of agency actions accompanying the Executive Order, the President specifically identified the 2020 Rule as falling within the scope of the Executive Order, requiring that it be reviewed "in accordance with the Executive Order: 'Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'" Ex. 1, "Fact Sheet: List of Agency Actions for Review," at "U.S. Environmental Protection Agency" § 23. The Executive Order itself also directed EPA to consider "proposing new regulations to establish comprehensive standards of performance and emission guidelines for methane and volatile organic compound emissions from existing operations in the oil and gas sector, including the exploration and production, transmission, processing, and storage segments, by September 2021." 86 Fed. Reg. at 7038 (Section 2(c)(i)). Under the terms of the Act, promulgating such

regulations for existing oil and gas sources under Clean Air Act Section 7411(d) presumes that the Agency has in place such regulations for new sources – many of which were withdrawn by the 2020 Rule. *See* 42 U.S.C. § 7411(d).

In consideration of the Executive Order and accompanying list of agency actions, 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. 2, Letter from Melissa A. Hoffer, Acting General Counsel.

ARGUMENT

The Executive Order and accompanying list of agency actions subject to review mark 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 2020 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 2020 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 2020 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. None of the Petitioners challenging the 2020 Rule opposes the requested abeyance of judicial proceedings. Respondent-Intervenors do not oppose or have reserved the right to respond after reviewing this motion, but, 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,

JEAN E. WILLIAMS
Deputy Assistant Attorney General

DATED: February 1, 2021

/s/ *Chloe H. Kolman*
CHLOE H. KOLMAN
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U.S. Department of Justice

[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.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion to Hold Cases in Abeyance complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, 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 2,089 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 Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 1st day of February, 2021.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN