ORAL ARGUMENT REMOVED FROM CALENDAR

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

STATE OF NORTH DAKOTA, ET AL.,	)	
	)	
Petitioners,	)	No. 15-1381 (and
	)	consolidated cases)
v.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

REPLY IN SUPPORT OF EPA'S MOTION TO HOLD CASES IN ABEYANCE

INTRODUCTION

Two months after his inauguration, the President of the United States issued an Executive Order directing the Environmental Protection Agency ("EPA" or the "Agency") to immediately take all steps necessary to review the 111(b) Rule[1] at issue in these cases. The Executive Order also instructs EPA to, if appropriate and as soon as practicable, publish for notice and comment a proposed rule suspending, revising, or rescinding the 111(b) Rule.

[1] This Reply uses the same short forms and acronyms introduced by EPA's motion. *See generally* Notice of Executive Order, EPA Review of Rule and Forthcoming Rulemaking and Motion to Hold Cases in Abeyance, ECF No. 1668276 ("Motion") (filed March 28, 2017).

EPA immediately followed the direction of the Executive Order, as it must, by announcing its initiation of review of the 111(b) Rule and potential forthcoming rulemaking. As a result of these very consequential developments, further judicial proceedings are unwarranted at this time. Therefore, EPA immediately requested that these cases be held in abeyance to avoid unnecessary adjudication or interference with the current administrative process.

Respondent-Intervenors urge this Court to continue judicial proceedings and "provide clarity to EPA should it in fact seek to revise the Rule."[2] But it is not the proper role of this Court to try to shape a potential forthcoming rulemaking through an advisory opinion, particularly where doing so would intrude upon EPA's authority to interpret and implement a statute it administers and upon the new Administration's authority to change legal and policy positions. Abeyance will thus avoid an advisory opinion on issues that may become moot, preserve the integrity of the administrative process, and conserve judicial resources.

[2] Opposition of State Intervenors to EPA's Motion to Hold Cases in Abeyance, ECF No. 1669738 ("State Opp."), at 2. See also Respondent-Intervenor Public Health and Environmental Organizations' Opposition to Motion to Hold Cases in Abeyance, ECF No. 1669762 ("Envt'l Opp.").

ARGUMENT

I. The Executive Order and Current Review of the 111(b) Rule Warrant Abeyance.

Contrary to Respondent-Intervenors' claims, the Executive Order, EPA's current review of the 111(b) Rule, and its advanced notice of forthcoming rulemaking provide compelling grounds for abeyance. These are substantial new developments that relate directly to the subject matter of this litigation. Abeyance would allow EPA to properly conduct its review and any forthcoming rulemaking in accordance with the terms of the Executive Order and its obligations under the Clean Air Act, without continuing at this time with further judicial proceedings that may interfere with the current administrative process.

Environmental Respondent-Intervenors suggest that EPA's abeyance motion is "late" because it was filed after the completion of briefing and three weeks before the scheduled oral argument. Envt'l Opp. at 6. But as all parties are well aware, the current Administration took office on January 20, 2017, *after* all of the parties' proof briefs had been filed and oral argument had been scheduled. See ECF No. 1632712 (briefing schedule order); ECF No. 1649008 (order scheduling argument). A new administration is perfectly entitled to consider a change in policy course, even if there is pending litigation over the particular policy matter. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual

Auto. Ins. Co., 463 U.S. 29, 59 (1983) ("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.") (Rehnquist, J., concurring in part and dissenting in part). Here, the Executive Order and concomitant required review process constitute transformative developments on the matter at issue in these cases, rendering the present claims unfit for further judicial proceedings at this time.

EPA filed its abeyance motion at the earliest opportunity, and the fact that this litigation may be at a relatively advanced stage is immaterial. Abeyance would "protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interest in avoiding unnecessary adjudication." Am. Petroleum Inst. ("API") v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012); see also Devia v. Nuclear Regulatory Comm'n, 492 F.3d 421 (D.C. Cir. 2007) (dismissing challenge to agency action as not ripe following merits briefing and supplemental briefing).[3] In short, the Agency's policy with respect to the 111(b) Rule is under review and issues concerning the Rule are unfit for further judicial proceedings.

[3] EPA appreciates a case may sometimes become unfit after the expenditure of party and court resources, but sunk costs, no matter how large, do not warrant an unnecessary judicial adjudication which may interfere with ongoing administrative proceedings and needlessly result in the further expenditure of resources.

II. Abeyance Will Conserve Judicial Resources.

There should also be no doubt that postponing judicial review will conserve judicial resources. Denying this motion as Respondent-Intervenors suggest would require the parties to argue, and this Court to hear argument of and then consider, numerous issues that may be rendered entirely moot by the outcome of EPA's review and further rulemaking proceedings. Abeyance would avoid compelling the United States to represent the current Administration's position on substantive questions that are being considered in an ongoing administrative process. Proceeding with the litigation and requiring the United States to prematurely opine on issues under review by the new Administration would prejudice EPA and could raise questions concerning the integrity of administrative proceedings.

Respondent-Intervenors speculate that if the issues raised by Petitioners' and Petitioner-Intervenors' filed briefs are not decided now, "[those issues] are likely to return in any future rulemaking and subsequent litigation." State Opp. at 8; see also Envt'l Opp. at 10-12. Whether any given issue will remain relevant will depend upon exactly what EPA does following its current administrative review, the basis for that action, and how that action affects interested parties. If the Court does face some of the same issues in the future, those issues might well be presented in a completely different context and posture, with potentially different administrative interpretations supporting

EPA's legal judgments and a different administrative record supporting revised scientific conclusions.

In any event, this Court should not weigh in on issues prematurely just because it might face them again in a different context, as doing so would amount to nothing more than an advisory opinion. Cf. Chamber of Commerce v. EPA, 642 F.3d 192, 199 (D.C. Cir. 2011) (noting that federal courts are "without authority to render advisory opinions") (internal quotation and citation omitted). Further, as this Court has acknowledged, because EPA's interpretations of the Clean Air Act are afforded significant deference, "[i]t is more consistent with the conservation of judicial resources to make that deference-bound review after the Agency has finalized its application of the relevant statutory text," which here will occur following the conclusion of EPA's review of the Rule, and, if appropriate, further administrative proceedings. API, 683 F.3d at 389.

III. Respondent-Intervenors Would Not Be Prejudiced by an Abeyance.

State Respondent-Intervenors do not claim hardship from the deferral of further judicial proceedings, other than a desire for "clarity." State Opp. at 2. Environmental Respondent-Intervenors, for their part, contend that granting abeyance would cause them prejudice because it would "leave a long-sought rule in legal limbo." Envt'l Opp. at 17. However, these concerns are

wholly insufficient to demonstrate meaningful harm, whereas the continuance of judicial proceedings raises the real prospect of prejudicing EPA and the current administrative process. Respondent-Intervenors cannot demonstrate any prejudice to their interests from granting an abeyance, and further judicial proceedings should be deferred.[4]

CONCLUSION

Wherefore, for the reasons set forth above and in EPA's opening motion, EPA's Motion to Hold Cases in Abeyance should be granted.

Respectfully submitted,

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DATED: April 12, 2017 BY: */s/ Brian H. Lynk*

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[4] Respondent-Intervenors claim EPA "may abandon[] its planned review," citing the circumstances of Mississippi v. EPA, 744 F.3d 1334 (D.C. Cir. 2013). State Opp. at 7-8; see also Envt'l Opp. at 9. However, the review of the 111(b) Rule is current and ongoing, not tentative or planned. Any suggestion that EPA would abandon this review is speculative and contradicts EPA's decision to adhere to the specific review terms of the Executive Order.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains approximately 1332 words according to the count of Microsoft Word and therefore is within the word limit of 2,600 words.

Dated: April 12, 2017

/s/ Brian H. Lynk
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in Support of EPA's Motion to Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 12th day of April, 2017.

/s/ Brian H. Lynk
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