ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, et al.,	
Petitioners,	
v.	**No. 13-1108 (and consolidated cases)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	
Respondents.	

STATE PETITIONERS' JOINT RESPONSE IN SUPPORT OF EPA's MOTION TO HOLD CASES IN ABEYANCE

The State Petitioners respectfully submit this Joint Response in Support of Respondents' April 7, 2017 motion to hold these consolidated cases in abeyance (ECF No. 1670157). As Respondent United States Environmental Protection Agency ("EPA" or "Agency") explained in the abeyance motion, EPA is formally reviewing "and, if appropriate, will initiate proceedings to suspend, revise, or rescind" 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"). *See* EPA Motion at 3 (quoting

Attachment B to EPA Motion, which is EPA's Federal Register Notice, "Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources," now at 82 Fed. Reg. 16331, 16332 (Apr. 4. 2017)). Because the 2016 NSPS Rule is under formal review by EPA, and because that review may lead EPA to substantially alter or even rescind the Rule, the Court should grant EPA's requested relief and hold these consolidated cases in abeyance until EPA's review is completed. State Petitioners are aware that these consolidated cases also challenge two related EPA rules, but State Petitioners are not parties to those separate challenges and take no position regarding the Motion to Hold Cases in Abeyance with regard to those challenges.

State Petitioners urge the Court, however, to hold the cases in abeyance but maintain them on the docket in case the parties need to request any form of interim relief.

ARGUMENT

The interests of justice and judicial economy counsel in favor of holding these cases in abeyance as EPA requests. Such abeyance would conserve judicial and party resources by deferring and perhaps eliminating the need for the parties to brief the many complex issues presented in these cases, and the need for the Court thereafter to consider the lawfulness of the 2016 NSPS Rule and the other two Rules at issue during the pendency of EPA's review.

The Court's authority "to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1888-89 (2016) (noting court's "inherent power … to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases") (citations omitted).

EPA's request is routine. The government frequently requests abeyances in pending litigation to address changes in policy due to changes in presidential administrations. *See, e.g., California et al. v. EPA*, No. 08-1178, ECF No. 1167136 (D.C. Cir., Feb. 25, 2009) (staying briefing for several months to permit President Obama to reconsider determinations promulgated by EPA under President Bush); *New Jersey v. EPA*, No. 08-1065, ECF No. 1108959 *ff.* (D.C. Cir.) (case held in abeyance for seven years during President Obama's administration to permit review of regulations promulgated under President Bush); *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (noting this Court's grant of motion to hold case in abeyance after change in administrations); Clerk's Order No. 08-1200 (D.C. Cir. Mar. 19, 2009) (granting abeyance after President Obama's election to permit agency to review and reconsider Bush Administration rule); Order, *Am. Petroleum Instit. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (holding case in abeyance

pending EPA reconsideration); Order, *Sierra Club v. EPA*, No. 09-1018 (D.C. Cir. Feb. 19, 2009) (similar); Order, *Natural Resources Defense Council v. EPA*, No. 08-1250 (D.C. Cir. Dec. 3, 2008) (similar); *see generally* Richard J. Lazarus, *The Transition and Two Court Cases*, 26 The Environmental Forum 12, at 14 (Feb. 2009).

More recently this Court acknowledged the propriety of the type of relief sought by EPA here by holding an Affordable Care Act challenge in abeyance when the incoming administration had signaled a change in policy that could affect the legal terrain on which the appeal had been argued. *See House of Representatives v. Burwell*, No. 16-5202, Order at 1, ECF No. 1649251 (Dec. 5, 2016) (granting motion to hold in abeyance challenge to the Affordable Care Act six weeks before presidential inauguration). And just last week this Court 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. Yet, this Court granted abeyance. *See Murray Energy Corp. v. EPA*, No. 15-1385, ECF No. 1670218 (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). The Court should do the same in this case.

Holding these consolidated cases in abeyance would not only conserve judicial and party resources but also avoid the possibility of the Court issuing an opinion that is then rendered both moot and advisory by EPA's taking action to revise or rescind the 2016 NSPS Rule. *See Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1107, 1010-11 (D.C. Cir. 2001) ("[t]he old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed" because "[a] new system is now in place" and "[a]ny opinion regarding the former rules would be merely advisory"). It is a fundamental Article III principle that "an actual controversy must be extant at all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997). It "is not enough that a dispute was very much alive when suit was filed;" the "parties must continue to have a personal stake in the outcome of the lawsuit" to prevent the case from becoming moot. *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477–78 (1990) (internal quotation marks omitted).

This Court has described as a "perfectly uncontroversial and well-settled principle of law" the proposition that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot." *Akiachak Native Community v. U.S. Dep't of Interior*, 827 F.3d 100, 113-14 (D.C. Cir. 2016) (citing cases). *See also id.* at 106 (noting that an order following withdrawal "would accomplish nothing—amounting to exactly the

type of advisory opinion Article III prohibits"); *Initiative & Referendum Institute v. U.S. Postal Service*, 685 F.3d 1066, 1074 (D.C. Cir. 2012) (mooting challenge because regulation was amended); *Larsen v. U.S. Navy*, 525 F.3d 1, 4-5 (D.C. Cir. 2008) (similar); *Coalition of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1190 (D.C. Cir. 2004) (mooting challenge after agency abandoned the regulation and resolved petitioners' objections); *Nat'l Mining Ass'n*, 251 F.3d at 1010-11 (*supra*); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1295–96 (D.C. Cir. 2000) (holding a challenge to regulation moot after agency clarified it); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (similar, as to an amended statute); *Freeport–McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992) (finding a case "plainly moot" where the challenged agency order had been "superseded by a subsequent order," and noting that such an occurrence was so routine that "[o]rdinarily, we would handle such a matter in an unpublished order"). A superseding rulemaking is sufficient to render review of the old regulation moot. *Gulf Oil Corp. v. Simon*, 502 F.2d 1154, 1156 (Temp. Emer. Ct. App. 1974) (cited in *Akiachak Native Community*, 827 F.3d at 114); *Freeport-McMoRan Oil & Gas Co.*, 962 F.2d at 46.

Respondent-Intervenor Environmental Groups' opposition to EPA's abeyance motion has no merit. Their principal argument in opposing the motion is that for this litigation to proceed would not "compromise EPA's regulatory

review." ECF No. 1671197 at 5. But the Environmental Groups do not – and cannot – deny that if EPA revises or rescinds the 2016 Rule, the work of the parties and the Court in briefing and deciding the complex issues presented here may be wasted, and those issues may even become moot. The Environmental Groups propose limiting the abeyance to 90 days, but EPA's motion already offers status reports on its review of the 2016 Rule every 60 days, and any fixed deadline for EPA's review would be arbitrary – if the review were not complete, EPA would seek to extend the abeyance for the same good and sound reasons advanced in its current motion. At bottom, the Environmental Groups provide no convincing reason to deny EPA's motion.

While EPA's abeyance motion is amply justified and should be granted, at the same time, it is important that this case remains on the Court's docket during EPA's review because the 2016 NSPS Rule remains in force and contains near-term compliance deadlines that potentially may interfere with State Petitioners' regulatory functions. Under the Clean Air Act, states have primary authority and responsibility for the implementation and enforcement of new source performance standards such as those set forth in the 2016 NSPS Rule. *See* 42 U.S.C. 7411 (c), (g). Provisions of that Rule that State Petitioners contend are unlawful are scheduled to take effect beginning in June 2017, and impose further obligations by the end of 2017, and unless those provisions are stayed, State Petitioners'

regulatory functions will be disrupted. State Petitioners are working with Industry Petitioners to encourage EPA to defer those compliance deadlines and to administratively stay other objectionable aspects of the 2016 NSPS Rule during the pendency of EPA's review. But if those efforts are unsuccessful, State Petitioners want to preserve the right to seek appropriate relief from this Court.

CONCLUSION

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

Dated: April 17, 2017

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

SCOTT KELLER
Solicitor General of Texas

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General

Court of Appeals – D.C. Circuit - Bar No. 56496
craig.pritzlaff@oag.texas.gov

MARK A. STEINBACH
Assistant Attorney General
Court of Appeals – D.C. Circuit - Bar No. 59880
mark.steinbach@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911
Counsel for Petitioner of State of Texas

STATE OF NORTH DAKOTA
WAYNE STENEHJEM
ATTORNEY GENERAL

/s/ *Paul M. Seby*
Paul M. Seby
Special Assistant Attorney General
State of North Dakota
Greenberg Traurig, LLP.
1200 17th Street, Suite 2400
Denver, CO 80202
Fax (303) 572-6540
sebyp@gtlaw.com

Matthew A. Sagsveen
Assistant Attorney General
North Dakota Attorney General's Office
500 N. 9th Street
Bismarck, ND 58501
Tel. (701) 328-2925
masagsve@nd.gov
Counsel for Petitioner of State of North Dakota

/s/ Thomas M. Johnson, Jr.
Patrick Morrisey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Thomas M. Johnson, Jr.
Deputy Attorney General
Counsel of Record
Katlyn M. Miller
Assistant Attorney General
State Capitol Building 1, Room 26-E
Tel. (304) 558-2021
Fax (304) 558-0140
Email: thomas.m.johnsonjr@wvago.gov
Counsel for Petitioner State of West Virginia

/s/ Andrew Brasher
Steven T. Marshall
ATTORNEY GENERAL OF ALABAMA
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2609
abrasher@ago.state.al.us
Counsel for Petitioner State of Alabama

/s/ Dominic Draye
Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
Dominic Draye
Solicitor General
Counsel of Record
1275 West Washington St.
Phoenix, AZ 85007
Tel: (602) 542-8986
Fax (602) 542-8308
dominic.draye@azag.gov
Counsel for Petitioner State of Arizona

/s/ Jeffrey A. Chanay
Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
Counsel of Record
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor

/s/ Joseph A. Newberg, II
Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Mitchel T. Denham
Assistant Deputy Attorney General
Joseph A. Newberg, II
Assistant Attorney General
Counsel of Record
700 Capital Avenue

Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov
Counsel for Petitioner State of Kansas

Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov
Counsel for Petitioner Commonwealth of Kentucky

/s/ Elizabeth Murill
Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Elizabeth B. Murill
Solicitor General
Counsel of Record
Steven B. "Beaux" Jones
Assistant Attorney General
Environmental Section – Civil Division
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
Fax: (225) 326-6099
MurrillE@ag.louisiana.gov
Counsel for Petitioner State of Louisiana

/s/ Aaron D. Lindstrom
Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov
Counsel for Petitioner Attorney General Bill Schuette for the People of Michigan

/s/ Dale Schowengerdt
Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Dale Schowengerdt
Solicitor General
Counsel of Record
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov
Counsel for Petitioner State of Montana

/s/ Eric E. Murphy
Michael DeWine
ATTORNEY GENERAL OF OHIO
Eric E. Murphy
State Solicitor
Counsel of Record
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
eric.murphy@ohioattorneygeneral.gov
Counsel for Petitioner State of Ohio

/s/ P. Clayton Eubanks
Mike Hunter
ATTORNEY GENERAL OF OKLAHOMA
P. Clayton Eubanks
Deputy Solicitor General
Counsel of Record
Oklahoma Office of the
Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-3921
Fax: (405) 522-0608
clayton.eubanks@oag.ok.gov
docket@oag.ok.gov
Counsel for Petitioner State of Oklahoma

/s/ James Emory Smith, Jr.
Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
Counsel of Record
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov
Counsel for Petitioner State of South Carolina

/s/ Misha Tseytlin
Brad Schimel
ATTORNEY GENERAL OF WISCONSIN
Misha Tseytlin
Solicitor General
Counsel of Record
Delanie M. Breuer
Assistant Deputy Attorney General
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
Tel: (608) 267-9323
tseytlinm@doj.state.wi.us
Counsel for Petitioner State of Wisconsin

/s/ Jacquelyn A. Quarles
Charles G. Snavely
SECRETARY,
COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
John G. Horne, II
General Counsel
Office of General Counsel
Jacquelyn A. Quarles
Deputy General Counsel
Office of General Counsel
Counsel of Record
300 Sower Blvd., 3rd Floor
Frankfort, KY 40601
Tel: (502) 782-7043
Jackie.Quarles@ky.gov
Counsel for Petitioner Commonwealth Kentucky Energy and Environment Cabinet

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)(1)(2), I certify that the foregoing **STATE PETITIONERS' JOINT RESPONSE IN SUPPORT OF EPA's MOTION TO HOLD CASES IN ABEYANCE** contains 2,573 words, as counted by a Microsoft Office Word 2010 used to prepare the response.

/s/ Paul M. Seby
Paul M. Seby

Dated: April 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of April 2017, a copy of the foregoing **STATE 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/ Paul M. Seby
Paul M. Seby