

ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN PETROLEUM INSTITUTE,)
 et al.,)
)
 Petitioners,)
)
 v.)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY, et al.,)
)
 Respondents.)
 _____)

No. 13-1108
(and consolidated cases)

**NOTICE OF EXECUTIVE
ORDER AND MOTION TO
HOLD CASES IN
ABEYANCE**

Notice of Executive Order and Motion to Hold Cases in Abeyance

Respondents United States Environmental Protection Agency et al.

(collectively, “EPA”) hereby provide notice of an Executive Order that addresses one of the final agency actions that is the subject of this case, and request that the Court hold these consolidated cases in abeyance until 30 days after EPA completes its review of that rule in light of the Executive Order. Petitioners have confirmed through counsel that they do not oppose the relief sought in this motion.

Respondent-Intervenors have represented that they will oppose this motion.

In support of this motion, EPA states as follows:

1. These consolidated cases involve challenges to three final EPA actions: (1) the rule entitled “Oil and Natural Gas Sector: New Source Performance

Standards and National Emission Standards for Hazardous Air Pollutants Reviews,” 77 Fed. Reg. 49,490 (Aug. 16, 2012) (“2012 NSPS Rule”); (2) the rule entitled “Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards,” 79 Fed. Reg. 79,018 (Dec. 31, 2014) (“2014 NSPS Rule”); and (3) the 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”).

2. Challenges to those final rules were consolidated under case No. 13-1108 on January 4, 2017. ECF Dkt #1654072.¹ Pursuant to EPA’s Motion to Extend Briefing Format Deadline (Dkt. #1666167), the Court ordered the parties to submit a proposed briefing format by May 19, 2017. Dkt. #1668439.

3. On March 28, 2017, the President signed an Executive Order entitled *Promoting Energy Independence and Economic Growth* (hereinafter “Executive Order”). See Attachment A hereto. The Executive Order establishes the policy of the United States that executive departments and agencies “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree

¹ In that Order, the Court severed a challenge to the 2012 NSPS Rule brought by environmental groups and held that challenge (No. 16-1425) in abeyance.

necessary to protect the public interest or otherwise comply with the law.” Id., Section 1(c). The Executive Order further instructs EPA, *inter alia*, to “review” the 2016 NSPS Rule as well as “any rules and guidance issued pursuant to it, for consistency with th[is] policy” Id., Section 7. The Executive Order further provides that “if appropriate, [the agency] shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.” Id.

4. In accordance with the Executive Order, on March 28, 2017, the EPA Administrator signed a Federal Register notice announcing that the Agency is “reviewing the 2016 Oil and Gas New Source Performance Standards (Rule), 81 FR 35,824 (June 3, 2016), and, if appropriate, will initiate proceedings to suspend, revise, or rescind it.” See Attachment B hereto, page 1. EPA further explained that: “Pursuant to the Executive Order, EPA is initiating its review of this Rule and providing advanced notice of forthcoming rulemaking proceedings consistent with the President’s policies. If EPA’s review concludes that suspension, revision, or rescission of this Rule may be appropriate, EPA’s review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law.” Id., page 3.

5. 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 & Telecomm. 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). In light of EPA’s pending review of the 2016 NSPS Rule, abeyance of

these consolidated cases until 30 days after EPA's review of the rule pursuant to the Executive Order is warranted.

6. While these consolidated cases include previously-filed challenges to the 2012 and 2014 NSPS Rules, abeyance of these cases as a whole is appropriate given that the 2016 NSPS Rule modified the regulatory text enacted in 2012 and 2014, and therefore these three rulemakings logically should be considered together. In any event, once EPA has determined whether it will initiate a rulemaking addressing the 2016 Rule, the parties can consider what course is appropriate for whatever remains of Petitioners' challenges to the 2012 and 2014 Rules and file a motion to govern accordingly.

7. No party will be prejudiced by the relief requested in this motion. This is particularly clear given the current posture of the case here. Briefing has not yet commenced and the requested abeyance will preserve Petitioners' challenges and the parties' respective positions while EPA conducts the review of the 2016 NSPS Rule mandated by the Executive Order. Once that review concludes, the agency will move for any additional relief appropriate in light of its planned course of action.

For these reasons, EPA respectfully requests that the Court hold this case in abeyance until 30 days after EPA completes its review of the 2016 NSPS Rule

pursuant to the Executive Order. EPA would be willing to submit status reports every 60 days during the abeyance period if that would be helpful to the Court.

Respectfully submitted,

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DATED: April 7, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Notice of Executive Order and Motion to Hold Cases in Abeyance complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains 1,080 words according to the count of Microsoft Word and therefore is within the word limit of 5,200 words.

Dated: April 7, 2017

/s/ Amanda Shafer Berman
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Executive Order and Motion to Hold Cases in Abeyance was today served electronically through the court's CM/ECF system on all registered counsel.

/s/ Amanda Shafer Berman
Counsel for Respondent

DATED: April 7, 2017