ORAL ARGUMENT NOT YET SCHEDULED
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Lung Association, *et al.*, *Petitioners*, v. U.S. Environmental Protection Agency, *et al.*, *Respondents*.	No. 19-1140 (and consolidated cases)

ENVIRONMENTAL AND PUBLIC HEALTH PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION FOR ABEYANCE PENDING FINAL ACTION ON PROPOSED REVISIONS TO THE NEW SOURCE REVIEW PROGRAM AND FINAL ACTION ON PETITIONS FOR ADMINISTRATIVE RECONSIDERATION

EPA's opposition fails to answer the substance of Movants' request for abeyance. Movants do not, as EPA alleges, "request that these consolidated cases be brought to a halt," EPA Resp. at 1, ECF 1809478; rather, we request that the Court exercise its discretion to defer merits briefing in these cases until EPA takes actions entirely within its control to ensure that this litigation is resolved in an orderly and efficient manner. EPA's and the other parties opposing this motion fail to demonstrate any prejudice from deferring merits briefing until the whole case can be placed before the Court. And they cannot refute Movants' demonstrations

that abeyance until EPA completes ongoing agency actions would better serve the objectives of finality, efficiency, and judicial economy.

I. EPA Fails to Refute that Finalizing the NSR Proposal Would Be So Consequential for ACE as to Warrant Abeyance.

Our Motion demonstrates that EPA's still-pending proposal to change the New Source Review ("NSR") program—developed solely to facilitate efficiency upgrades at power plants by relaxing other pollution-control requirements—would substantially alter (1) how sources would comply with the so-called Affordable Clean Energy rule ("ACE"), (2) the pollution impacts of ACE, for both carbon dioxide and other, locally-harmful pollutants, and (3) the costs of ACE. All of these considerations would necessarily bear on the Court's review of the Final Rule.

EPA's Response disputes none of this. Instead, EPA protests that finalizing the NSR revisions may take longer than the agency initially projected, *see* Mot. at 9, n.2, ECF 1807492, and reiterates its claim that the NSR revisions and ACE are distinct rules. But EPA fails to dispute that it proposed the NSR revisions precisely because the heat-rate improvements ACE contemplates would, at some sources, cause pollution increases that trigger NSR "best available control technology" requirements. Thus, finalizing EPA's proposed NSR revisions would have direct and far-reaching implications for ACE itself, including what compliance measures sources choose to employ, how much pollution sources will emit, and the attendant

costs. The Agency itself asserted in both the proposed and final ACE rules that the NSR revisions will have a significant impact on ACE's economic and emissions consequences, and even on the very identity of the best system of emission reduction. *See* Mot. at 8, 14-16 (citing 83 Fed. Reg. at 44,774-75). Remarkably, EPA and other parties' responses fail to acknowledge the Agency's own record statements in this regard.

EPA also fails even to acknowledge its statement that ACE's "modelling assumptions will be revisited at [the] time" it finalizes the NSR proposal.[1] Mot. at 14. EPA has thus admitted that finalizing the NSR proposal would so substantially affect ACE as to require a renewed economic and emissions analysis. This is no mere technicality: the "degree of emission limitation," "cost" and "environmental impacts" of a system of emission reduction are mandatory considerations under section 111 of the Clean Air Act. 42 U.S.C. § 7411(a)(1). Thus, an action that undermines the regulatory analysis supporting ACE would presumably require EPA to reopen the rulemaking. If EPA failed to do so, petitioners may first have to seek revision of ACE based on the NSR changes before raising these issues on judicial review. *See Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, (D.C. Cir. 2019). This ungainly procedure makes no sense.

[1] EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, at 1-17, n.19 (June 2019) [hereinafter "Final RIA"].

EPA declares that "'the consequences' of NSR reform 'are no longer considered in parallel with ACE.'" EPA Resp. at 18-19, ECF 1809478. Yet this is precisely the problem Movants highlight. The Agency proposed and finalized the same system of emission reduction under ACE, including two measures that EPA concludes will only be undertaken if NSR revisions are finalized.[2] Because the NSR revisions were not finalized with ACE, EPA assumed in the Final Rule that those two measures will be undertaken *at no sources*, even while the Agency fully expected to finalize the NSR revisions in the near future and knew full well that those two measures likely *would* be adopted at some sources. This could change ACE's emission consequences and its attendant environmental and health impacts for the worse by significantly increasing the expected operation of those units. Mot. at 15-16 (citing EPA analysis of the ACE proposal). Bifurcating the two rulemakings artificially makes ACE's emissions consequences appear better than they really are, which bears directly on the question of whether ACE represents the *best* system of emission reduction.

EPA suggests that if the Court finds that "action on the NSR reform proposal could impact the emission guidelines and implementing regulations"—which the Agency, in fact, concedes in its regulatory impact analysis—then the Court should

[2] *See* Final RIA at 1-16–1-17 ("None of the Groups were assumed to adopt the last two HRIs as it was assumed … that they are less likely to be installed to the extent they could trigger NSR permitting.").

not hold issues associated with the Clean Power Plan Repeal in abeyance. EPA Resp. at 19. This is wrong; it would be incongruous and inefficient for the Court to review EPA's Repeal in isolation from the rule that replaced it. First, the same legal issues and interpretive theories concerning the meaning of section 111 underlie both the Repeal and ACE; the same panel should consider these pervasively overlapping issues in one proceeding. In determining whether EPA has permissibly identified the "best" system of emission reduction, it is important for the Court to consider alternative systems. Second, in assessing the consequences of repeal or replacement of the Clean Power Plan—including the emissions, health, environmental and economic impacts—the Clean Power Plan establishes a critically important benchmark, such that considering ACE without the rule it replaces would be artificial and unworkable. *See Air All. Houston v. EPA*, 906 F.3d 1049, 1068 (D.C. Cir. 2018) ("[T]he baseline for measuring the impact of a change or rescission of a final rule is the requirements of the rule itself, not the world as it would have been had the rule never been promulgated").

No party has moved to bifurcate review of the related agency actions at issue here, and properly so: the repeal and replacement rules are so closely interrelated that they should be plainly considered together.

II. Holding the Case in Abeyance Pending Administrative Reconsideration Advances the Interests in Judicial Economy.

EPA and its supporters likewise fail to offer any persuasive rebuttal to Movants' (and state petitioners') demonstrations that the case should be held in abeyance pending EPA's resolution of their petitions for administrative reconsideration.

EPA opines that Movants' petitions for reconsideration are not meritorious. EPA Resp. at 11-15. Movants disagree, but the ultimate merit of that petition is beside the point: Movants seek abeyance only *until* EPA decides whether or not to grant reconsideration, and the Agency controls the timing of that decision. If EPA concludes that Movants' reconsideration petition lacks merit, the Agency can deny the petition, thereby removing potential statutory impediments to petitioners' ability to litigate some of the challenges to the rule.[3]

If EPA believed it essential to proceed with merits briefing now, the Agency could have waived any reliance upon the section 307(d)(7)(B) exhaustion defense, *see* Mot. at n.13 (citing *EME Homer City Gen. v. EPA*, 134 S. Ct. 1584 (2014) and discussing waiver), a step EPA's Response does not take.

[3] If EPA denies the reconsideration petition, Movants will petition this Court for relief expeditiously—well before the 60-day deadline under 42 U.S.C. § 7607(b)—and seek to consolidate the issues before the Court, so that it may take up all parties' claims and defenses together.

The issues Movants raise in petitions for reconsideration, *see* Mot. at 11-13, go to the core of the rulemaking. To give just one example, in the Final Rule, EPA reached the same legal conclusion as in the proposal regarding section 111, but its argument relied on entirely different statutory language than what it analyzed in the proposal—either different words in section 111 or a different section of the Act altogether. Because EPA must provide "the major legal interpretations . . . underlying the proposed rule," 42 U.S.C. § 7607(d)(3)(C), the Final Rule's brand new legal arguments are not a logical outgrowth of the proposal, even if they arrive at the same outcome as the proposal. Movants were unable to comment on EPA's major legal interpretations for ACE, and reconsideration—as well as abeyance—is appropriate. *See* Mot. 11-13 (describing reconsideration issues and attaching petition).

EPA's assertion that "[t]here is simply no authority requiring abeyance in circumstances analogous to those here," EPA Resp. at 11, is beside the point. Certainly, the Court is not *required* to grant abeyance, but it indisputably has the *authority* to do so, and has done so in analogous circumstances.[4] Abeyance here

[4] *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. EPA*, 1998 WL 65651, at *1 (D.C. Cir. Jan. 21, 1998) (severing, despite EPA's opposition, issue subject to yet-to-be-filed reconsideration petition and holding case in abeyance).

would avoid prejudice and ensure fully informed, orderly, and efficient disposition of these challenges.

NRDC v. EPA, cited by EPA, Resp. at 6-7, is readily distinguishable. There, the Court denied an abeyance motion pending disposition of a petition for reconsideration because a different agency was reviewing a study EPA relied on in its rulemaking. *NRDC v. EPA,* 902 F.2d 962, 974 (D.C. Cir. 1990). The Court found that the study was one of many supporting the rulemaking and expressed "considerable doubt about whether the [study was] actually infected with error." *Id*. Here, Movants seek reconsideration of issues of central relevance which were not noticed in the proposal, not questions of "the validity of EPA's scientific analysis." EPA Resp. at 7.

Even less convincing is EPA's position that because some Movants opposed abeyance of the Clean Power Plan litigation, *West Virginia v. EPA*, D.C. Cir. 15-1363, abeyance should not be granted here. In *West Virginia*, the Clean Power Plan, which aimed to achieve significant pollution reduction, had been judicially stayed and so any delay in adjudication would also delay critical health and welfare protections; here, the ACE rule is not stayed, so whatever benefits EPA may claim for it would not be delayed by abeyance. Moreover, when abeyance was first sought in *West Virginia*, the case had been fully briefed and argued. The circumstances here are starkly different: litigation has just begun, and no briefing

has even been scheduled, let alone completed. Petitioners seek abeyance only to ensure orderly and definitive resolution of this matter, and EPA fully controls the timing of the reconsideration process.

Finally, EPA selectively quotes the opposition of some Movants to a motion to sever and hold in abeyance certain issues in *West Virginia*. EPA Resp. at 16. EPA tellingly omits the very next sentence in that response, which recognized that section 307(d)(7)(B) "bars immediate review only of objections 'raised for the first time' in reconsideration petitions." Resp. to LKE Abeyance Mot. at 1-2, ECF 1594442. Here, EPA failed to provide notice of the centrally relevant issues described in Movants' motion, so Movants had no opportunity to raise them prior to their administrative reconsideration petition. Without further action by EPA, those issues are not ripe for judicial review, and abeyance is appropriate.

III. Abeyance Would Not Cause Hardship for the Public or Other Parties.

No party opposing abeyance has demonstrated any "immediate and significant" hardship from a limited delay. *See Devia v. Nuclear Reg. Comm'n*, 492 F.3d 421, 427-28 (D.C. Cir. 2007) (internal citations omitted). In fact, whatever interests opponents have in regulatory certainty are advanced by resolving all of the issues together rather than piecemeal. EPA's desire to press forward regardless of pending actions appears to be tied to the interests of other petitioners *challenging* EPA's rule. EPA Resp. at 8. However, those parties' professed desire for an

expeditious resolution of the issues they intend to raise, several of which were entirely briefed and argued in *West Virginia*, is newfound. For example, Westmoreland Mining claims to be aggrieved at having to litigate EPA's authority to issue emission guidelines under section 111(d) for a source category that is regulated under section 112 "over, and over, and over again," Westmoreland Opp. at 11, ECF 1808726, yet its opposition to this motion is the *first* time it has ever weighed in on this issue—it was not a party to *West Virginia* or the premature Clean Power Plan cases in which this question arose.

Other opposing petitioners, such as Competitive Enterprise Institute and North American Coal Corporation, supported indefinite abeyance in *West Virginia* at the latest possible stages of litigation pending the completion of an entirely new rulemaking. Resp. in Supp. of EPA's Mot. to Hold Cases in Abeyance, ECF 1669984 (Apr. 6, 2017).

Finally, opposing states' claim that abeyance will cause undue hardship is contradicted by a larger number of state petitioners who have also sought abeyance in this case, *see* States Mot. for Abeyance at 11-12, ECF 1808103, and is in any event misplaced. EPA included two measures in the best system of emission reduction that it says will not be undertaken *anywhere* without NSR revisions, and the availability *vel non* of those measures will bear on the development of state plans. Thus, it is EPA's failure to determine whether to finalize the NSR revisions,

not Movants' proposed abeyance, that creates uncertainty for the state plan process. Besides, states have three years to develop plans that require extraordinarily little from regulated sources: EPA's regulatory impact analysis predicts that ACE will result in a mere 1.5 percent efficiency increase at those electric generating units predicted to make *any* improvements (41 units do *nothing*). 40 C.F.R. § 60.5745a; Final RIA at 1-14–1-18. Moreover, states have the option to do nothing under this rule. 40 C.F.R. § 69.5720a. ("If you do not submit a complete . . . plan the EPA will develop a Federal plan for your state."). The opposing states' claim that a short delay in litigation will lead to hardship in developing plans for a minimally demanding rule over the course of three years is untenable.

Opposing states also highlight Movants' opposition to abeyance in *West Virginia*; however, in that case, we urged that "this case should be briefed and argued expeditiously *in one round addressing all issues*."[5] As opposing states concede, "judicial efficiency is better served by considering all issues together." States Resp. at 21. Movants agree.

[5] *See* States' Resp. at 12 (quoting and omitting italicized words from Joint Resp. to Mot. to Establish Briefing at 1, *West Virginia v. EPA*, ECF 1589874 (Dec. 21, 2015)).

CONCLUSION

For the foregoing reasons, Movants request that these consolidated cases be placed in abeyance pending (1) final agency action on the NSR proposal, and (2) final agency action on the pending administrative reconsideration petitions.

Respectfully submitted,

Dated: October 11, 2019

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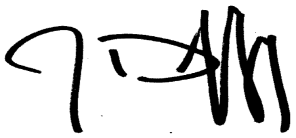
CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 11th day of October 2019, I caused the foregoing **Environmental and Public Health Petitioners' Reply in Support of their Motion for Abeyance Pending Final Action on Proposed Revisions to the New Source Review Program and Final Action on Petitions for Administrative Reconsideration** to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.



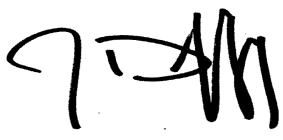
James P. Duffy

CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that **Environmental and Public Health Petitioners' Reply in Support of their Motion for Abeyance Pending Final Action on Proposed Revisions to the New Source Review Program and Final Action on Petitions for Administrative Reconsideration** complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 2,513 words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that **Environmental and Public Health Petitioners' Reply in Support of their Motion for Abeyance Pending Final Action on Proposed Revisions to the New Source Review Program and Final Action on Petitions for Administrative Reconsideration** complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: October 11, 2019



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