

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,**

Respondent.

Case No. 13-1108 (and
consolidated cases)

On Petition for Review of Final Action of the
United States Environmental Protection Agency

**OPPOSITION OF STATE RESPONDENT-INTERVENORS
TO EPA’S MOTION TO HOLD CASES IN ABEYANCE**

The undersigned Respondent-Intervenor States and Municipalities (“State Intervenor”) oppose the U.S. Environmental Protection Agency’s (“EPA”) Motion to Hold Cases in Abeyance filed on April 7, 2017. EPA does not provide any basis for the Court to delay litigation of this matter for what is, in effect, an indefinite period of time while it conducts a “review” of the 2016 Oil & Gas New Source Performance Standards (“2016 Rule”). The 2016 Rule remains in force unless and until EPA lawfully changes it. Thus, the Petitioners’ claims in this action are neither moot nor unripe. And to the

extent any question exists about EPA's continuing commitment to defend the 2016 Rule, the State Intervenors stand ready to provide a robust defense of the 2016 Rule.

State Intervenors recognize, however, that litigation of these consolidated cases is in its early stages with no briefing schedule set. Therefore, State Intervenors would not oppose a 90-day extension of time to submit briefing schedules, which would provide EPA a reasonable amount of time to determine its course of conduct.

BACKGROUND

Under Section 111(b) of the Clean Air Act, when the EPA administrator determines that a category of sources "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," the Administrator "shall" include that category on a list of stationary sources. 42 U.S.C. § 7411(b)(1)(A). Pursuant to Section 111(b), EPA previously listed crude oil and natural gas production as a source category that contributes significantly to air pollution that may reasonably be anticipated to endanger public health and welfare. *See Priority List and Additions to the List of Categories of Stationary Sources*, 44 Fed. Reg. 49,222 (Aug. 21, 1979).

Numerous scientific assessments, including, but not limited to, EPA's 2009 endangerment determination,¹ establish that anthropogenic greenhouse gas emissions, including methane, may reasonably be anticipated to endanger public health or welfare. Although carbon dioxide is the most ubiquitous greenhouse gas, methane is far more potent on a per unit basis, with a 100-year global warming potential 28 to 36 times that of carbon dioxide according to studies cited by EPA. 81 Fed. Reg. at 35,837-35,838. The oil and natural gas sector is the largest industrial source of methane emissions, accounting for a third of total methane emissions in the U.S. *See* 80 Fed. Reg. 56,593.

As a result, in June 2016, pursuant to its authority under Section 111(b) of the Clean Air Act, EPA promulgated standards to reduce methane emissions from new, reconstructed, and modified sources in the oil and natural gas sector ("2016 Rule"). *See Oil and Natural Gas Sector Emission Standards for New, Reconstructed and Modified Sources*, 81 Fed. Reg. 35,824 (June 3, 2016). In addition to reducing methane emissions, the 2016 Rule also places limits on volatile organic compound ("VOC") emissions

¹ *See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

and, as an additional benefit, reduces hazardous air pollutant emissions to the benefit of many local communities near oil and gas operations. *See* 81 Fed. Reg. at 35,827. The 2016 Rule further complements state regulations to control methane emissions from the oil and natural gas sector. For example, California recently finalized a rule that requires new and existing oil and gas extraction and storage facilities to test for and control methane leaks and to restrict the flaring of natural gas.

In July 2016, a number of States and industry groups filed petitions for review of the 2016 Rule, *see e.g., North Dakota v. EPA*, No. 16-1242 (filed July 15, 2016). On January 4, 2017, the Court consolidated challenges to the 2016 Rule with challenges to two earlier final EPA actions: 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), and 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). ECF Dkt #1654072. The parties are required in these consolidated cases to submit a proposed briefing format to the Court by May 19, 2017. ECF Dkt #1668439. The 2016 Rule is currently in effect and continues to apply to this source category.

MARCH 28, 2017 EXECUTIVE ORDER

While the 2016 Rule remains in effect, President Trump directed EPA to review it “for consistency with” his March 28, 2017 Executive Order. Mot., attach. A (“the Executive Order”). According to EPA, pursuant to the Executive Order it “will assess whether this Rule or alternative approaches would appropriately promote cooperative federalism and respect the authority and powers that are reserved to the States,” and it will “determine whether [this Rule or alternative approaches] will provide benefits that substantially exceed their costs.” *Id.* President Trump directed EPA to “publish for notice and comment proposed rules suspending, revising, or rescinding” the 2016 Rule if EPA determines that it is inconsistent with these policies.² Executive Order § 7(a).

ARGUMENT

Pointing to the Executive Order, EPA now asks this Court to put the entire litigation in abeyance while the agency conducts a “review” of the 2016 Rule. Mot. at 1, 3 ECF No. 1670157 (Apr. 7, 2017). The requested abeyance will last “until 30 days after EPA completes its review of [the 2016

² The Executive Order does not cite any legal authority for EPA to “suspend” a final rule, and under the Clean Air Act, EPA is only authorized to stay a final rule for three months during administrative reconsideration. 42 U.S.C. § 1607(d)(7)(B).

Rule] in light of the Executive Order.” *Id.* at 1. EPA does not provide an anticipated timeframe for its review.

EPA fails to identify any reason why this Court should hold these cases in abeyance. The Executive Order does not alter EPA’s obligation to regulate methane and VOC emissions under the Clean Air Act. Nor does it change the extensive technical record supporting the 2016 Rule. The only new development is that the President has directed EPA to review the 2016 Rule. That is not enough to justify a request that this Court suspend its review of the Rule.

As a matter of law, EPA cannot predetermine the result of whatever review the agency may undertake. Rather, the record before EPA must drive the result, and the record here strongly supports the 2016 Rule, which makes it doubtful that EPA can adequately support a different or weaker rule. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (“[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”); *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (“[E]ven when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.”), *cert. denied sub nom. Alaska v. Organized Vill. of Kake, Alaska*, 136 S. Ct. 1509 (2016).

Moreover, the record supporting the 2016 Rule demonstrates that it is entirely consistent with the policy proclamations in the Executive Order. Fugitive methane emissions from the oil and natural gas sector not only contribute to climate change, but also result in lost revenue for producing states, producers, transporters, and distributors of natural gas. Every ton of methane leaked to the atmosphere is a ton of methane that cannot be sold, and for producing states, may result in lost tax and royalty benefits. The 2016 Rule will therefore deliver significant climate protection and public health benefits at a favorable benefit-cost ratio. *See* 81 Fed. Reg. at 35,828, 35,886, 35,889 (by 2025, the rule will result in an estimated reduction of 510,000 tons of methane and 210,000 tons of VOCs, and result in net benefits over costs quantified at \$170 million annually.) It is thus speculative at this point to determine whether EPA's "review" will ultimately result in any change to the 2016 Rule.

Further, the 2016 Rule remains in effect unless and until EPA lawfully changes it, so the Petitioners' claims are neither moot nor unripe. And even if EPA eventually does repeal and replace the 2016 Rule, at least some of the issues presented by this litigation are likely to return in any future rulemaking and subsequent litigation. (*See Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004) ("[D]efendants cannot usually

shelter their actions from judicial scrutiny simply by claiming that they will stop the challenged conduct.”). This is so even when an agency disclaims its previous position. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (“The court is not bound to accept, and indeed generally should not uncritically accept, an agency’s concession of a significant merits issue.”) Accordingly, EPA’s indefinite abeyance requested here should be denied.

CONCLUSION

For the foregoing reasons, EPA’s motion should be denied.

Dated: April 17, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Opposition of State Respondent-Intervenors to EPA's Motion to Hold Cases in Abeyance, dated April 17, 2017, complies with the type-volume limitations of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure and this Court's Circuit Rules. I certify that this brief contains 1,480 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e).

/s/ Kavita Lesser

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed on April 17, 2017, using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Kavita Lesser
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