

ORAL ARGUMENT SCHEDULED FOR MAY 8, 2017

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

WALTER COKE, INC., et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. 15-1166 (and
consolidated cases)

RESPONDENT EPA'S MOTION TO CONTINUE ORAL ARGUMENT

The Environmental Protection Agency ("EPA"), respondent in each of these consolidated cases, respectfully requests that the Court continue oral argument currently scheduled for May 8, 2017, on the petitions for review of the "SSM Action" issued by EPA in 2015. In light of the recent change in administration, EPA requests continuance of the oral argument to give the appropriate officials adequate time to fully review the SSM Action. EPA intends to closely review the SSM Action, and the prior positions taken by the Agency with respect to the SSM Action may not necessarily reflect its ultimate conclusions after that review is complete.

The undersigned counsel has contacted counsel or coordinating counsel for all of the petitioners and intervenors in these consolidated cases regarding this motion. The undersigned counsel has been authorized to state that the Industry Petitioners and Texas Petitioners consent to the relief requested.¹ The State Petitioners² consent to continuing oral argument, except the State of Delaware, which objects to continuing oral argument because briefing is completed and it is entitled to timely resolution of the disputed issues. The Environmental Intervenors in support of EPA oppose this motion and intend to file a response.³

¹ The Industry Petitioners are: the Utility Air Regulatory Group; SSM Litigation Group; Walter Coke, Inc.; Alabama Power Company; Southern Company Services, Inc.; Southern Power Company; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Georgia Coalition for Sound Environmental Policy; Georgia Industry Environmental Coalition; Georgia Power Company; Gulf Power Company; Mississippi Power Company; National Environmental Development Association's Clean Air Project; Luminant Generation Company, LLC; Oak Grove Management Company, LLC; Big Brown Power Company, LLC; Sandow Power Company, LLC; Union Electric Company, d/b/a Ameren Missouri; BCCA Appeal Group; and Texas Oil and Gas Association. The Texas Petitioners are: the State of Texas; Texas Commission on Environmental Quality; Luminant Generation Company, LLC; Big Brown Power Company, LLC; Oak Grove Management Company, LLC; Sandow Power Company, LLC; BCCA Appeal Group; and the Texas Oil & Gas Association.

² The State Petitioners are: the States of Florida, Alabama, Arizona, Arkansas, Delaware, Georgia, Kansas, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia and Texas; the Commonwealth of Kentucky and the North Carolina Department of Environmental Management and Natural Resources.

³ The Environmental Intervenors are: Sierra Club; Citizens for Environmental Justice; People Against Neighborhood Industrial Contamination; Natural Resources Defense Council; and Environmental Integrity Project.

EPA states the following in support of this motion:

1. Under the Clean Air Act, EPA has identified certain air pollutants that endanger public health and welfare and formulated National Ambient Air Quality Standards (“NAAQS”) for those pollutants. 42 U.S.C. §§ 7408-09.

Each State, through a State Implementation Plan (or “SIP”), must provide for “implementation, maintenance, and enforcement” of the NAAQS. *Id.* § 7410(a)(1). In nonattainment areas, SIPs must, among other things, include emission limitations as needed to provide for attainment of the NAAQS as expeditiously as practicable. *Id.* § 7502(c)(6). EPA must evaluate SIP submissions for compliance with the Act’s requirements and can approve, disapprove, or conditionally approve such submissions wholly or partially. *Id.* § 7410(k)(3)-(4). The Act authorizes EPA to issue a “SIP call” where, *inter alia*, EPA finds an approved SIP is “substantially inadequate ... to otherwise comply with any requirement” of the Act. *Id.* § 7410(k)(5).

2. Citing these authorities, EPA took final action on May 22, 2015, titled: “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction” (hereinafter the “SSM Action”). The Notice of Final Action was published in the Federal Register

at 80 Fed. Reg. 33,840 on June 12, 2015. This rulemaking was conducted during the prior Administration, and the SSM Action was finalized and promulgated by the prior Administration.

3. The SSM Action involves a large and complex body of prior EPA guidance documents and technical provisions, as well as legal positions concerning the proper interpretation and application of the relevant Clean Air Act provisions and regulations. As EPA merits brief explains, the SSM Action concerns how provisions in existing EPA-approved SIPs for 36 States treat emissions from sources that exceed otherwise applicable limits during startup, shutdown or malfunction (“SSM”) events or other modes of operation. In the SSM Action EPA provided interpretations of the Act regarding requirements for SIP provisions applicable during SSM events. In addition, EPA analyzed specific SIP provisions and issued a finding that provisions in 36 States fail to meet CAA requirements. Accordingly, EPA issued a “SIP call” requiring each of those 36 States to cure identified legal inadequacies in their respective SIPs.

5. Numerous parties have challenged the SSM Action in these consolidated cases. On October 31, 2016, the parties completed merits briefing. Oral argument is currently scheduled to occur on May 8, 2017. Order dated December 2, 2016 (Document #1649018).

6. On April 4, 2017, the parties submitted their joint proposal for oral argument format. Document #1669486. In the proposal, EPA noted that “it will advise the Court promptly if there are further developments affecting the argument.” EPA is providing such notice at this time, for the reasons explained below.

7. 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). 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 & Telecomms. 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)).

8. The Agency proceedings developing the SSM Action and the issuance of that action were undertaken by the prior Administration. EPA requests that the Court continue the oral argument currently scheduled for May 8, 2017 in these consolidated cases to allow the new Administration adequate time to review the SSM Action to determine whether it will be reconsidered. This continuance is appropriate because recently-appointed EPA officials in the new Administration will be closely scrutinizing the SSM Action to determine whether it should be maintained, modified, or otherwise reconsidered. In this regard, EPA notes that on March 15, 2017, the Texas Commission on Environmental Quality filed with EPA an administrative petition requesting that EPA reconsider the SSM Action. EPA recently has begun the process of reviewing this administrative petition.

9. EPA needs sufficient time to complete this review in an orderly fashion because the SSM Action is based on an extensive administrative record encompassing a complex body of prior EPA guidance documents and technical provisions, as well as legal positions concerning the proper interpretation and application of the relevant Clean Air Act provisions and regulations. Additional time for the new Administration to determine whether it will reconsider the SSM Action is also important because that action implicates significant Clean Air Act legal and policy issues of national importance. These include questions regarding the appropriate, respective roles of the States and of EPA under the CAA scheme,

within the context of the specific State Implementation Plans for 36 States. Given the importance and complexity of these issues, new EPA officials will need time to carefully review the SSM Action.

10. A continuance is also warranted to avoid holding oral argument in the midst of the new Administration's review of the SSM Action. Were the Court to hold oral argument as scheduled on May 8, 2017, the counsel for EPA may be unable to represent the current Administration's conclusive position on the SSM Action. Nor would it be proper for counsel for EPA to speculate as to the likely outcome of the current Administration's review.

11. Finally, to the extent that EPA ultimately elects to reconsider all or part of the SSM Action, and/or ultimately grants all or some portion of the relief requested by the State of Texas in its administrative petition for reconsideration, continuing the oral argument would conserve the resources of the parties and the Court. Accordingly, to permit the Agency's review to proceed in an orderly fashion, EPA requests that the oral argument be continued.

WHEREFORE, EPA respectfully requests that the Court order the following: (1) that the oral argument currently scheduled for May 8, 2017, is continued; (2) that EPA is directed to file a status update in these consolidated cases within 90 days of the Court's order granting a continuance and every 90 days thereafter; and (3) within 30 days of EPA notifying the court and the parties of any

action it has or will be taking with respect to the SSM Action, the parties are directed to file motions to govern future proceedings in these consolidated cases.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,579 words, excluding the parts of the motion exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ David Kaplan
Counsel for Respondent EPA

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2017, the foregoing Motion was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

/s/ Dustin J. Maghamfar
Counsel for Respondent EPA