ORAL ARGUMENT SCHEDULED FOR MAY 8, 2017

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

WALTER COKE, INC., *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 15-1166 (and consolidated cases)

ENVIRONMENTAL INTERVENORS' OPPOSITION TO MOTION TO POSTPONE ORAL ARGUMENT

In yet another case, 14 business days before oral argument, EPA seeks to delay the argument indefinitely because it wants time to consider whether to reconsider the rule at issue. EPA has failed to provide the requisite "extraordinary cause" for postponing argument. Postponement would be hugely inefficient. The scope of EPA's authority and responsibility over exemptions from emission standards, citizen enforcement of health-protective emission standards, and emendations of state implementation plans (SIPs) is squarely at issue in this case and is likely to recur. Further, granting EPA's request would prejudice Environmental Intervenors[1] by delaying judicial review of legal issues affecting health protections vital to the heavily-burdened communities who live and work

[1] Environmental Intervenors are Sierra Club, Citizens for Environmental Justice, People Against Neighborhood Industrial Contamination (PANIC), Natural Resources Defense Council (NRDC), and Environmental Integrity Project.

near and downwind of industrial facilities that emit huge bursts of harmful air pollution during startup, shutdown, and malfunction (SSM) events. EPA's motion should be denied. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) ("a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." (internal quotation marks omitted)).

I. EPA'S MOTION DOES NOT SATISFY THE STANDARDS FOR POSTPONEMENT.

EPA's motion satisfies neither this Circuit's Rules' nor the Federal Rules of Appellate Procedure's requirements for winning a continuance of oral argument. Fatally, EPA does not (and cannot) even claim to satisfy these requirements. EPA's only basis for postponing argument is to give the new Administration a chance to review the SSM SIP Call at issue in this case, noting (at 6) also that one party, which joined only Texas Petitioners' arguments, filed a petition for reconsideration with the agency in mid-March. This bare intention to review the SSM SIP Call falls far short of the "extraordinary cause" the Circuit Rules require. D.C. Cir. R. 34(g); *see Handbook of Practice and Internal Procedures* 49 (Jan. 26, 2017) ("The Court disfavors motions to postpone oral argument….").

Further, weighed in the balance, EPA's desire does not justify delaying this case's resolution. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (in

reviewing motion to hold case in abeyance,[2] Court "may also take account of the traditional factors in granting a stay," which include prejudice to parties other than movant). Environmental Intervenors will suffer prejudice from delay, as discussed below. EPA identifies no countervailing harm to it from resolving this litigation, and there is none.

EPA's claimed concern (at 7) that, without delay, its lawyers "may be unable to represent the current Administration's conclusive position" on various issues lacks merit. This is a record review case, where other positions the agency might have taken are irrelevant. *See Mexichem Specialty Resins 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."). Moreover, as discussed in Environmental Intervenors' merits brief, the fundamental issues in this case are statutory ones that can be resolved in most instances under *Chevron* step one and controlling case law regardless of evolving EPA positions. *E.g.*, *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842-83 (1984).

Nor would a judicial decision foreclose other statutorily reasonable options the agency might take under new leadership. To the extent the Court upholds the SSM SIP Call under *Chevron* step two, the agency is free to revisit those statutory interpretations if it can provide the necessary rational explanation under the Act.

[2] Though EPA does not say so, it effectively seeks abeyance of this case.

See, e.g., *FCC v. Fox Television Stations*, 556 U.S. 502, 514-15 (2009); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). That the agency may have to defend a rule that may not entirely accord with the new Administration's views is ordinary under the rule of law.[3] Thus, EPA fails to provide the extraordinary basis that would justify delaying consideration of this case.

This Court has already warned of the danger of approving the course EPA seeks to follow here. In *American Petroleum Institute v. EPA (API)*, the Court cautioned that "an agency can[not] stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." 683 F.3d 382, 388 (D.C. Cir. 2012). Unlike in *API*, EPA has not proposed a new rule, nor is there any indication how long potential reconsideration proceedings could drag on. This Court should heed *API*'s concern.

EPA's recent practice confirms both the prescience of *API* and that EPA lacks extraordinary cause here. Counting this case, EPA has now moved to continue oral argument in five cases within 30 days of their argument date, all

[3] *See, e.g.*, *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (resolving, under second Bush Administration, legality of rules made by Clinton Administration); *NRDC v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994) (resolving, under Clinton Administration, legality of SIP-related actions taken under first Bush Administration).

because of the agency's desire to allow the new Administration time to review rules at issue in them.[4] These requests seek to deprive litigants of their right to judicial hearing and have become the opposite of extraordinary—routine.

Further, EPA's motion is hardly "filed reasonably in advance of the hearing date." Fed. R. App. P. 34(b). EPA's motion comes only 14 business days before the argument—but a month after receiving a reconsideration petition, nearly three months after Inauguration Day, and five months after Election Day. EPA identifies no reason why it required so much time just to decide it wanted time to review the SSM SIP Call. EPA does not and cannot explain why it needs yet more time.

II. POSTPONEMENT OF ORAL ARGUMENT WOULD BE INEFFICIENT.

A continuance at this late date would disserve the parties and judicial economy. This case has been fully briefed since October 2016, and the parties—certainly Environmental Intervenors—have already begun preparing for argument and have made arrangements to travel across the country to it. The Court likely also already has "taken up the case for preparation and argument." *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.l (D.C. Cir. 1990).

[4] *See* Motions in *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Mar. 28, 2017) (argument scheduled for April 17); *Murray Energy v. EPA*, No. 15-1385 (D.C. Cir. Apr. 7, 2017) (argument scheduled for April 19); *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. Apr. 18, 2017) (argument scheduled for May 18); *Murray Energy v. EPA*, No. 16-1127 (D.C. Cir. Apr. 18, 2017) (argument scheduled for May 18).

Further, the deadline for states to submit SIP revisions responding to the SSM SIP Call passed long ago, on November 22, 2016. 80 Fed. Reg. 33,840, 33,840/2 (June 12, 2015), JA0122. Many states have already submitted revisions; others continue to prepare them, and EPA continues to process those submissions. *See, e.g.*, 82 Fed. Reg. 16,770 (Apr. 6, 2017) (proposing to approve removal of exemptions from Montana SIP); 82 Fed. Reg. 13,084 (Mar. 9, 2017) (proposing to approve removal of affirmative defenses from Arizona SIP); Ind. Reg. LSA Doc. No. 15-326 (Mar. 30, 2016), http://www.in.gov/legislative/iac/20160330-IR-326150326SNA.xml.html (proposing to amend Indiana SIP in response to SSM SIP Call). As these processes continue, all parties are "entitled to timely resolution of the disputed issues," as Petitioner Delaware says. EPA Mot. 2.

This Court's resolution of the important legal arguments that are already fully briefed could increase efficiency by clarifying the extent and limitations of the agency's authority and responsibility. For example, among the issues in this case are whether the Clean Air Act allows EPA to approve state-created exemptions for stationary sources of air pollution (like power plants and oil refineries) from complying with emission limitations when they emit huge bursts of harmful air pollution, whether EPA may approve state-created "affirmative defenses" that purport to limit citizens' rights to obtain from federal courts the full range of redress Congress provided in the Act, and whether EPA may require

states to fix their SIPs so they comply with the Act's bedrock enforcement requirements. *See* Brief of Environmental Intervenors (Environmental Int. Br.) 26-58. If EPA reviews the SSM SIP Call and decides to weaken it in some way, it will face suit from community, environmental, and public health groups, and these issues will return to the Court. Maintaining or somehow strengthening the SSM SIP Call would similarly return these issues to the Court. It would thus be appropriate to resolve them now. *See, e.g.*, *AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) ("[J]udicial economy suggests that we address some of AT&T's other arguments to avoid re-litigation of identical issues in a subsequent petition.").[5]

Even if EPA took the extreme step of declining to zealously defend the SSM SIP Call, Environmental Intervenors will offer such a defense. Non-governmental entities can and do stand in successfully for agencies that decline to defend their regulations.[6] This is particularly true here, where the fundamental issues are purely

[5] Even though no merits briefs have been filed yet, the Supreme Court recently denied a government motion to stay a pending case with far-reaching, important effects, which involves another Obama-era environmental rule the new administration is reviewing and potentially seeking to revise. Order, *Nat'l Ass'n for Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. Apr. 3, 2017).

[6] *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2684-89 (2013); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456-60, 463 (D.C. Cir. 1991); *Wyoming v. USDA*, 661 F.3d 1209, 1225-26 (10th Cir. 2011).

of statutory interpretation. Moreover, this Court has already given Environmental Intervenors permission to participate in oral argument.

III. DELAY OF THIS CASE IS INAPPROPRIATE BECAUSE IT WOULD PREJUDICE ENVIRONMENTAL INTERVENORS.

Environmental Intervenors explained how the eruptions of air pollutants like benzene, sulfur dioxide, fine particulate matter, and sulfuric acid during SSM events burden community members near and downwind of large industrial sources by forcing them to endure acute adverse health impacts. Environmental Int. Br. 1-3, 7-13. Accordingly, public interest groups like Environmental Intervenors have worked for years to close loopholes that allow these harms—including filing the petition that led EPA to issue the SSM SIP Call. *Id.* 21.

As well as delaying judicial resolution of issues of grave concern to Environmental Intervenors, EPA's review of its position is likely to lead to delay in closing those loopholes, resulting in more harmful emissions. For example, when EPA reviewed and abruptly withdrew its reconsideration of the 2008 ozone standards, implementation of those standards was delayed by at least two years, without any change in them. *See Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 148 (D.C. Cir. 2015); 80 Fed. Reg. 75,706, 75,712/3 (Dec. 3, 2015) (describing how EPA paused implementation of 2008 standards pending reconsideration). Because of the harms to Environmental Intervenors resulting

from delayed litigation, and the absence of any identified harm to any other party, EPA's motion must be denied. *See Belize Social Dev't Ltd. v. Gov't of Belize*, 668 F.3d 724, 732 (D.C. Cir. 2012) (to issue "indefinite stay order," court must find "pressing need"); *Dellinger v. Mitchell*, 442 F.2d 782, 786 (D.C. Cir. 1971) ("'The suppliant for a stay [of litigation] must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.'").

CONCLUSION

For the foregoing reasons, EPA's request for postponement of oral argument should be denied.

DATED: April 20, 2017

Respectfully submitted,

/s/Andrea Issod (with permission)
Andrea Issod
Joshua D. Smith
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5544
andrea.issod@sierraclub.org
joshua.smith@sierraclub.org

Counsel for Sierra Club, Citizens for Environmental Justice, and PANIC

/s/Patton Dycus (with permission)
Patton Dycus
Environmental Integrity Project
1000 Vermont Ave., NW, Ste. 1100
Washington, DC 20005
(202) 296-8800
pdycus@environmentalintegrity.org

Counsel for Environmental Integrity Project

/s/Seth L. Johnson
Seth L. Johnson
James S. Pew
Earthjustice
1625 Massachusetts Ave., NW, Ste, 702
Washington, DC 20036-2212
(202) 667-4500
sjohnson@earthjustice.org
jpew@earthjustice.org

Paul Cort
Earthjustice
50 California Street, Ste. 500
San Francisco, CA 94111
(415) 217-2000
pcort@earthjustice.org

Counsel for Sierra Club

/s/John Walke (with permission)
John Walke
Emily Davis
Natural Resources Defense Council
1152 15th Street, NW, Ste. 300
Washington, DC 20005
(202) 289-2406
jwalke@nrdc.org

Counsel for Natural Resources Defense Council

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2)(C), that the foregoing **Environmental Intervenors' Opposition to Motion to Postpone Oral Argument** contains 1,939 words, as counted by counsel's word processing system, and thus complies with the 5,200 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **size 14 Times New Roman** font.

DATED: April 20, 2017

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2017, I have served the foregoing **Environmental Intervenors' Opposition to Motion to Postpone Oral Argument** on all registered counsel through the court's electronic filing system (ECF).

/s/Seth L. Johnson
Seth L. Johnson