

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

ENVIRONMENTAL DEFENSE)	
FUND, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	
v.)	No. 18-1149
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
<i>Respondents,</i>)	
)	

UNOPPOSED MOTION TO HOLD CASE IN ABEYANCE

Petitioners Environmental Defense Fund (EDF), Natural Resources Defense Council (NRDC), and Sierra Club request that this case be held in abeyance. EPA is preparing a formal rulemaking that is likely to substantially affect the issues in this case. Consequently, and so long as the rulemaking proceeds expeditiously, Petitioners seek to hold this case in abeyance until that rulemaking is complete. Counsel for

respondents U.S. Environmental Protection Agency, *et al.* (EPA) have indicated that EPA does not oppose this motion.¹

This petition challenges a memorandum issued by EPA Administrator E. Scott Pruitt on March 13, 2018, titled “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program.” EPA published notice of its action in the Federal Register on March 30, 2018. 83 Fed. Reg. 13745 (Mar. 30, 2018) (the “Project Emissions Accounting Memo”). EPA’s memorandum “addresses the accounting of emissions changes,” for purposes of determining the applicability of New Source Review (NSR) under the Clean Air Act, and EPA’s regulations implementing the Act; in particular, it establishes that “emissions decreases as well as increases are to be considered at Step 1 of the NSR applicability process.” *Id.* at 13,745-46. EPA issued the Project Emissions Accounting Memo without utilizing the notice and comment rulemaking process contained in the Clean Air Act, 42 U.S.C. § 7607(d).

¹ Respondent-Intervenor-Applicant National Environmental Development Association’s Clean Air Project has indicated that it does not oppose the relief requested by this motion. Respondent-Intervenor-Applicants Air Permitting Forum, *et al.*, have not indicated their position as to this motion.

EPA is currently planning to propose a formal rule, to be promulgated pursuant to those notice-and-comment procedures, that will address, *inter alia*, the same subject matter as that addressed by the Project Emissions Accounting Memo. According to EPA's Spring 2018 Regulatory Agenda, the rule is titled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Project Emissions Accounting" (herein, "the Project Emissions Accounting Rule"), and will "propose the consideration of emissions increases and decreases ... in Step 1 of the NSR major modification applicability test." Spring Regulatory Agenda, RIN 2060-AT89.² The Regulatory Agenda indicates that EPA intends to propose this Project Emissions Accounting Rule in September 2018 (though that schedule is not binding, and may be superseded).

The proposed Rule, if finalized, could moot or substantially alter the procedural and substantive issues presented by this petition. The Project Emissions Accounting Memorandum purports to interpret regulatory text which the Project Emissions Accounting Rule may modify. The proposed rulemaking may include notice-and-comment

² <https://resources.regulations.gov/public/custom/jsp/navigation/main.jsp>

procedures, whose absence Petitioners currently intend to challenge. And the record of decision for the Rule may affect Petitioners' substantive challenges to the legal conclusions contained within the Project Emissions Accounting Memo.

Given the parties' expectation that a rule will be finalized, and the general timeframe by which the rulemaking is likely to occur, Petitioners believe that it would serve the parties' and the Court's interests to hold this case in abeyance. Petitioners reserve their right to move the Court to lift the requested order if the rulemaking does not proceed according to a reasonably prompt schedule, or if abeyance is no longer warranted for some other reason.

Petitioners therefore respectfully request that this Court order that: (1) this case be held in abeyance; (2) EPA submit status reports at 90-day intervals, regarding its progress towards finalization of the Project Emissions Accounting Rule; and (3) the parties file motions to govern future proceedings within the 30 days of the completion of the Agency's rulemaking process.

DATED: July 2, 2018

Respectfully submitted,

/s (by permission)

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 2018, I have served a copy of Unopposed Motion to Hold Case in Abeyance upon all registered counsel through the Court's electronic filing system (ECF).

/s/ Sanjay Narayan
Sanjay Narayan