ORAL ARGUMENT HEARD EN BANC ON SEPTEMBER 27, 2016

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

STATE OF WEST VIRGINIA, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15-1363 (and consolidated cases)

STATE AND MUNICIPAL RESPONDENT-INTERVENORS' RESPONSE TO STATUS REPORT AND REQUEST FOR INDEFINITE ABEYANCE

The undersigned States and Municipalities (State Intervenors) respond to the Environmental Protection Agency's October 10, 2017 status report, in which it notified the Court that Administrator Pruitt has signed a proposed rule to repeal the Clean Power Plan. Although EPA requests these cases be held in abeyance until it finalizes that repeal, Administrator Pruitt has not proposed to replace the Clean Power Plan. In effect, EPA is asking the Court to refrain from ruling on the merits of Clean Power Plan—which the agency promulgated to fulfill its statutory duty to regulate carbon dioxide from existing power plants—so that it can eliminate that rule, with no concrete plans when it will act or how it will subsequently satisfy that legal duty. The Court should decline this request and decide the pending cases.

Although in previous requests for abeyance, EPA has always represented that "revision" of the Clean Power Plan was an option under consideration,[1] it is now requesting abeyance solely on the need for an unspecified amount of time to complete a *repeal* of the rule, without replacing it. *See* 82 Fed. Reg. 48,035 (Oct. 16, 2017). A pure repeal, however, would put the agency in violation of its statutory duty to regulate carbon dioxide from existing power plants under the Clean Air Act, a duty the agency is not contesting it must fulfill. *See* 42 U.S.C. § 7411(d); *see also* Order in *West Virginia v. EPA*, Case No. 15-1363 (Aug. 8, 2017), Doc. No. 1687838 (Tatel and Millet, JJ., concurring) (EPA has an "affirmative statutory obligation" to regulate greenhouse gases from power plants). The Court is not required to—and should not—sign off on a further abeyance with the knowledge that the agency's proposed path would end in a statutory violation.

The history of EPA's regulation in this field further underscores why granting further abeyance would be inappropriate. Instead of proposing a different way to limit carbon emissions from power plants, EPA proposes *no regulation at all*, which would leave the agency in the same place as when the Court remanded *New York v. EPA* more than ten years ago. *See* Order, *New York v. EPA* (D.C. Cir. 06-1322, Sept. 24, 2007). During that decade, our communities have suffered the

[1] *See, e.g.*, July 31, 2017 status report (Doc. No. 1686504), ¶¶ 2-3 (noting "revising" or "revision" of the Clean Power Plan as an option) & ¶ 5 (merely stating that a "proposed rule" had been sent to Office of Management and Budget).

impacts from more devastating storms, more destructive wildfires, and more extensive flooding attributable to climate change. *See* State Intervenors' Opp. to Motion for Abeyance at 16-17 (describing harms). As the agency told the Court last year, "[n]o serious effort to address the monumental problem of climate change can succeed without meaningfully limiting these plants' CO_2 emissions." EPA Op. Br. at 10. By proposing to repeal without a replacement, EPA has now told the Court that it has no plan to make any "serious effort," abdicating its statutory obligation to regulate greenhouse gases from power plants.

Nor does EPA's plan to issue an Advanced Notice of Proposed Rulemaking in the near future, Oct. 10 status rpt., ¶ 6, support further abeyance. That approach is, at best, a woefully inadequate response to "the Nation's most important and urgent environmental challenge." EPA Op. Br. at 1. Moreover, EPA *already* issued an advanced notice almost ten years ago seeking input on regulating greenhouse gas emissions under section 111 of the Act, *see* 73 Fed. Reg. 44,354, 44,386-93 (July 30, 2008). EPA stated even then that "[w]ith respect to GHGs, there has been a significant effort devoted to identifying and evaluating ways to reduce emissions within sectors such as the electricity generating industry." *Id.* at 44,489. EPA has comments received on that advanced notice, not to mention the more than *four million* comments it received more recently on the Clean Power Plan. *See* 80 Fed. Reg. at 64,672.

Furthermore, the reasons that State Intervenors have opposed previous abeyance requests still support our view that the Court should instead issue a merits ruling without further delay. The Court has a "virtually unflagging" obligation to decide live cases or controversies, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014), with very narrow exceptions. *See* State Intervenors' Supp. Br. (filed May 15, 2017, Doc. No. 1675252) at 12-14; State Intervenors' Opp. to Motion for Abeyance (filed April 5, 2017, Doc. No. 1669699) at 4-12. That obligation does not cease merely because an agency issues a proposed rule. *See Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1010-13 (D.C. Cir. 2001) (challenge to regulations that had been replaced by final rules were moot, but challenge to rules that were not changed remained live). Here, EPA has not taken final agency action or even committed to do so by a date certain. The agency's statement that it intends to take public comment on a yet-to-be issued cost-benefit analysis before finalizing the repeal, *see* 82 Fed. Reg. at 48,047, suggests that the process of repeal may be a lengthy one.

In addition, that judicial economy would be advanced by a ruling in these cases, *see* State Intervenors' Opp. to Motion for Abeyance at 12-15, is further borne out by EPA's disclosure that it intends to repeal the Clean Power Plan based on an interpretation of the statute that has been extensively briefed and argued before the Court. *Compare* 82 Fed. Reg. at 48,038 ("under the interpretation

proposed today, the second and third 'building blocks' exceed the EPA's authority under CAA section 111") *and* Pet. Op. Br. on Core Issues at 42 ("Section 111 unambiguously forecloses EPA's requirements based on generation shifting"). Given that some or all of State Intervenors will challenge the proposed repeal if EPA finalizes it, ruling on the merits will avoid requiring the parties to re-litigate the same issues. *See Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290 (D.C. Cir. 2000) (declining EPA request not to issue opinion on validity of regulation EPA intended to vacate because a merits ruling would meaningfully affect future rulemaking and settle open legal disputes between the parties that were likely to recur).

For these reasons, the Court should reject EPA's request and rule on the merits of the Clean Power Plan. If the Court disagrees, and decides that further abeyance is appropriate, State Intervenors request that in light of the agency's long overdue obligation to address the critical problem of power plant carbon pollution, any abeyance be of limited duration (no more than 120 days), with a requirement that EPA provide regular status reports every 60 days.

Dated: October 17, 2017

Respectfully Submitted,

FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

/s/ Michael J. Myers[2]

Barbara D. Underwood
Solicitor General
Steven C. Wu
Deputy Solicitor General
David S. Frankel
Assistant Solicitor General
Michael J. Myers
Senior Counsel
Morgan A. Costello
Brian Lusignan
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2400

[2] Counsel for the State of New York represents that the other parties listed in the signature blocks below consent to the filing of this motion.

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
ATTORNEY GENERAL
Robert W. Byrne
Sally Magnani
Senior Assistant Attorneys General
Gavin G. McCabe
David A. Zonana
Supervising Deputy Attorneys General
Jonathan Wiener
M. Elaine Meckenstock
Deputy Attorneys General
1515 Clay Street
Oakland, CA 94612
(510) 879-1300

Attorneys for the State of California, by and through Governor Edmund G. Brown, Jr., the California Air Resources Board, and Attorney General Xavier Becerra

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN
ATTORNEY GENERAL
Matthew I. Levine
Scott N. Koschwitz
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

FOR THE STATE OF DELAWARE

MATTHEW P. DENN
ATTORNEY GENERAL
Valerie S. Edge
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3d Floor
Dover, DE 19904
(302) 739-4636

FOR THE STATE OF HAWAII

DOUGLAS S. CHIN
ATTORNEY GENERAL
William F. Cooper
Deputy Attorney General
465 S. King Street, Room 200
Honolulu, HI 96813
(808) 586-4070

FOR THE STATE OF ILLINOIS

LISA MADIGAN
ATTORNEY GENERAL
Matthew J. Dunn
Gerald T. Karr
James P. Gignac
Assistant Attorneys General
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

FOR THE STATE OF IOWA

THOMAS J. MILLER
ATTORNEY GENERAL
Jacob Larson
Assistant Attorney General
Office of Iowa Attorney General
Hoover State Office Building
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5341

FOR THE STATE OF MAINE

JANET T. MILLS
ATTORNEY GENERAL
Gerald D. Reid
Natural Resources Division Chief
6 State House Station
Augusta, ME 04333
(207) 626-8800

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
ATTORNEY GENERAL
Steven M. Sullivan
Solicitor General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6427

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL
Melissa A. Hoffer
Christophe Courchesne
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2423

FOR THE STATE OF MINNESOTA

LORI SWANSON
ATTORNEY GENERAL
Karen D. Olson
Deputy Attorney General
Max Kieley
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1244

Attorneys for State of Minnesota, by and through the Minnesota Pollution Control Agency

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
ATTORNEY GENERAL
Joseph Yar
Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 490-4060

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
ATTORNEY GENERAL
Paul Garrahan
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN
ATTORNEY GENERAL
Gregory S. Schultz
Special Assistant Attorney General
Rhode Island Department of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL
Nicholas F. Persampieri
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

FOR THE COMMONWEALTH OF VIRGINIA

MARK HERRING
ATTORNEY GENERAL
John W. Daniel, II
Deputy Attorney General
Donald D. Anderson
Sr. Asst. Attorney General and Chief
Matthew L. Gooch
Assistant Attorney General
Environmental Section
900 East Main Street
Richmond, VA 23219
(804) 225-3193

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
ATTORNEY GENERAL
Katharine G. Shirey
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
ATTORNEY GENERAL
James C. McKay, Jr.
Senior Assistant Attorney General
Office of the Attorney General
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

FOR BROWARD COUNTY, FLORIDA

JONI ARMSTRONG COFFEY
COUNTY ATTORNEY
Mark A. Journey
Assistant County Attorney
Broward County Attorney's Office
155 S. Andrews Avenue, Room 423
Fort Lauderdale, FL 33301
(954) 357-7600

FOR THE CITY OF NEW YORK

ZACHARY W. CARTER
CORPORATION COUNSEL
Carrie Noteboom
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319

FOR THE CITY OF BOULDER

TOM CARR
CITY ATTORNEY
Debra S. Kalish
City Attorney's Office
1777 Broadway, Second Floor
Boulder, CO 80302
(303) 441-3020

FOR THE CITY OF CHICAGO

EDWARD N. SISKEL
Corporation Counsel
BENNA RUTH SOLOMON
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764

FOR THE CITY OF PHILADELPHIA

SOZI PEDRO TULANTE
CITY SOLICITOR
Scott J. Schwarz
Patrick K. O'Neill
Divisional Deputy City Solicitors
The City of Philadelphia
Law Department
One Parkway Building
1515 Arch Street, 16th Floor
Philadelphia, PA 19102-1595
(215) 685-6135

FOR THE CITY OF SOUTH MIAMI

THOMAS F. PEPE
CITY ATTORNEY
City of South Miami
1450 Madruga Avenue, Ste 202
Coral Gables, Florida 33146
(305) 667-2564

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Michael J. Myers, hereby certifies:

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/s/ *Michael J. Myers*
MICHAEL J. MYERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State and Municipal Respondent-Intervenors' Response to Status Report and Request for Indefinite Abeyance was filed on October 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/ Michael J. Myers
MICHAEL J. MYERS