

ORAL ARGUMENT HEARD ON SEPTEMBER 27, 2016**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| STATE OF WEST VIRGINIA, <i>et al.</i> , |) | |
| |) | |
| <i>Petitioners,</i> |) | |
| |) | |
| v. |) | No. 15-1363 |
| |) | (and consolidated cases) |
| U.S. ENVIRONMENTAL |) | |
| PROTECTION AGENCY, <i>et al.</i> , |) | |
| |) | |
| <i>Respondents.</i> |) | |
| |) | |

**PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS’
RESPONSE TO EPA’S REQUEST TO HOLD CASE IN ABEYANCE**

The Public Health and Environmental Respondent-Intervenors respectfully urge the Court to deny Respondent Environmental Protection Agency’s latest request for indefinite abeyance, EPA’s Status Report, ECF No 1712376 (Jan. 10, 2018). Having heard extensive oral arguments *en banc* in this expedited case 16 months ago, the Court should issue its decision in the case.¹ If the Court nevertheless decides to place the case in further abeyance, it should do so for no

¹ Our reasons for opposing abeyance are set out in more detail in, *e.g.*, Corrected Resp’t-Intervenor Public Health and Env. Orgs.’ Opp. to Mot. to Hold Cases in Abeyance, ECF No. 1669770 (April 5, 2017); Supp. Br. of Pub. Health and Env’tl. Org. Resp’t-Intervenors, ECF No. 1675202 (May 15, 2017).

longer than 60 days, and should continue to require EPA to submit status reports every 30 days.

ARGUMENT

EPA issued the Clean Power Plan in 2015, eight years after the Supreme Court confirmed the agency's authority and responsibility to regulate carbon dioxide and the other heat-trapping pollutants that are driving increasingly dangerous climate change, *Massachusetts v. EPA*, 549 U.S. 497 (2007), eight years after this Court remanded to EPA petitions from many of the state and environmental intervenors here challenging the agency's failure to regulate power plant carbon dioxide emissions, Order, *New York v. EPA*, No. 06-1322 (Sept. 24, 2007) (Ex. 2 to NGO Resp't-Intervenors' Supp. Br., ECF No. 1675202 (May 15, 2017)), and four years after the Supreme Court confirmed EPA's specific authority over carbon dioxide pollution from power plants, *American Electric Power v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). Two and a half more years have now passed.

While abeyance might be benign in other circumstances where the underlying rule remains in effect, that is emphatically not so regarding the Clean Power Plan. The Supreme Court stayed implementation of this rule in the knowledge that this Court had scheduled the case for expedited consideration on the merits. The Supreme Court's stay imposed only a temporary halt in the

enforcement of the Clean Power Plan pending judicial review; the stay was not supposed to last indefinitely, but only through this Court's merits decision and an opportunity for Supreme Court review. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016). The stay has persisted much longer than anticipated.

The present EPA Administrator, Scott Pruitt, seeks to exploit the stay well beyond its intended effect, pursuing a repeal of the Clean Power Plan based on the same legal arguments that the petitioners (including Mr. Pruitt himself, as Oklahoma Attorney General) made in this fully briefed case, while indefinitely fending off this Court's decision on the merits of those legal arguments.² In particular, Administrator Pruitt is proposing to repeal the Clean Power Plan on the basis that it is beyond EPA's Clean Air Act *authority*, so that the Plan must be rejected without regard to its public health and environmental merits or record support. Yet at the same time, the Administrator seeks to preclude this Court from resolving that fully briefed and argued authority question.

² *Proposed Rule, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035 (Oct. 16, 2017). The proposal claims that the Clean Power Plan "is not within Congress's grant of authority to the Agency under the governing statute," because the best system of emissions reduction identified in the rule "exceeds the bounds of the statute," which is properly limited to "emission reduction measures that can be *applied to or at* an individual stationary source." *Id.* at 48,037-38 (emphasis in original). Accord Opening Br. of Petitioners on Core Legal Issues, at 41-61 ECF No. 1610010 (filed April 22, 2016).

This is an unsubtle and intolerable strategy of delay. Absent this Court's decision of the pending case, the Administrator's delay will continue at least through 2018 – 11 years after the *Massachusetts* decision and seven years after the *AEP* decision – and perhaps far longer.

After filing the Status Report, the Administrator extended the public comment deadline on the repeal proposal to April 26, 2018.³ Given the need to respond to hundreds of thousands of comments,⁴ a final decision is certain to take considerable additional time. The Administrator also issued an “advanced notice of proposed rulemaking,” 82 Fed. Reg. 61,507 (Dec. 28, 2017), that marks just the beginning of a proceeding to consider *whether* to issue a replacement rule. The advance notice notably does not commit EPA even to *proposing* any replacement rule at all; indeed, the agency has repeatedly explained that it may issue no replacement.⁵ The focus of the advance notice is on minor “heat rate improvements” at the individual sources – steps that EPA determined in the CPP

³ See EPA, Web Posting, *Public Hearing: Repealing the Clean Power Plan* (“EPA will accept comment on the proposal until April 26, 2018.”), <https://www.epa.gov/stationary-sources-air-pollution/public-hearing-repealing-clean-power-plan> (last accessed Jan. 16, 2018) (Ex. A hereto).

⁴ More than 204,000 comments have already been made as of the date of this filing. See <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-0002>.

⁵ The advance notice states that EPA merely “continues to consider the possibility of replacing certain aspects of the CPP,” 82 Fed. Reg. at 61,509, and repeatedly refers to the replacement as a “potential” or “possible” rule, *e.g.*, 82 Fed. Reg. at 61,508/1; 61,509/1; 61,510/1; 61,510/3; 61,511/1; 61,511/2; 61,512/1; 61,512/2; 61,513/1; 61,517/3; 61,518/3.

would at best reduce coal-fired power plant carbon dioxide emissions rates by only a few percentage points, and, alone, could *increase* carbon dioxide emissions by making coal-fired plants more attractive to run. *See* 80 Fed. Reg. 64,662, 64,745, 64,748 (Oct. 23, 2015). Moreover, any rulemaking following the advance notice would require a proposal, another round of hearings and public comment, and a final decision – steps that are likely to take well beyond this year.⁶

Repealing the Clean Power Plan without an effective replacement would leave the Administrator’s Clean Air Act duties unfulfilled and would leave the public unprotected from the dangers of climate change due to power plant emissions. *See* Order, ECF No. 1687838 (Aug. 8, 2017) (concurring statement of Judges Tatel and Millett) (observing that EPA’s 2009 endangerment finding “triggered an affirmative statutory obligation to regulate greenhouse gases”).

The prudential ripeness doctrine that EPA has obliquely invoked as the basis for abeyance, *Mot. to Hold Cases in Abeyance*, ECF No. 1668274 at 7 (March 28, 2017), is a doctrine of discretion that turns on the specific circumstances, including the public interest. Here, compelling considerations counsel strongly against further abeyance.

⁶ *Cf.* Opinion of Tatel, J., concurring in part and dissenting in part from Order of June 26, 2008, in *Massachusetts v. EPA*, No. 03-1361 (EPA’s plan to proceed via Advance Notice of Rulemaking “essentially postpones regulation indefinitely”).

This case concerns urgent, existential threats to public health and welfare from the increasingly evident and dire impacts of climate change, as exemplified by the loss of life and property caused by the four powerful hurricanes and numerous massive wildfires that hit this country in the last six months.

As Administrator Pruitt delays, the danger to public health and welfare continues to mount. The concentration of carbon dioxide in the atmosphere was approximately 325 parts per million (ppm) in 1970, when Congress enacted the Clean Air Act provisions at issue; about 383 ppm in 2007,⁷ when the Supreme Court decided *Massachusetts v. EPA*; and well over 400 ppm when the Administrator proposed to repeal the Clean Power Plan.⁸ Last year was the third hottest year on record (after 2016 and 2015), and 17 of the 18 hottest years on record have occurred since 2000.⁹ Existing power plants are the largest stationary

⁷ See National Atmospheric and Space Administration, “Global Mean CO₂ Mixing Ratios (ppm) — Observations”, <https://data.giss.nasa.gov/modelforce/ghgases/Fig1A.ext.txt> (last visited Jan. 16, 2018); see also Ex. 1 to Supp. Br. of Pub. Health and Env'tl. Resp't-Intervenors, ECF No. 1675202 (May 15, 2017).

⁸ National Oceanic and Atmospheric Administration, “Recent Global CO₂,” <https://www.esrl.noaa.gov/gmd/ccgg/trends/global.html> (last visited Jan. 16, 2018).

⁹ Scott Waldman, *2017 Was the Third Hottest Year on Record for the U.S.*, SCIENTIFIC AMERICAN, available at <https://www.scientificamerican.com/article/2017-was-the-third-hottest-year-on-record-for-the-u-s/>. See also Jugal K. Patel, How 2016 Became the Earth's Hottest Year on Record, N.Y. TIMES (Jan. 18, 2017) available at <https://www.nytimes.com/interactive/2017/01/18/science/earth/2016-hottest-year-on-record.html> (last visited Jan. 16, 2018).

sources of carbon dioxide pollution, responsible for approximately 30 percent of the nation's total greenhouse gas emissions (a total of over 1.9 billion metric tons in 2015).¹⁰ It has been over eight years since EPA determined that greenhouse gases “endanger public health, now and in the future,” 74 Fed. Reg. 66,496 (Dec. 15, 2009) – a finding that the current repeal proposal leaves undisturbed, *see* 82 Fed. Reg. at 48,037.

Administrator Pruitt's request for abeyance, coupled with his proposed repeal and equivocal statements about a possible replacement rule, would leave EPA's statutory duty to curb this grave and urgent threat completely unfulfilled and in intolerable limbo.

These considerations cry out for the Court to decide the pending case, in order to resolve the legal challenges that are fully briefed. Decision in the case will obviate years of additional delay before the same legal questions are presented in challenges to the Administrator Pruitt's eventual actions.

¹⁰ EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2015*, at ES-5, ES-6 (2017).

CONCLUSION

The Court should deny EPA's request for further abeyance and should decide the case. If the Court does not decide the case now, at a minimum it should limit abeyance to another period of no more than 60 days. The Court should continue to require regular status reports every 30 days.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 1580 words.

CERTIFICATE OF SERVICE

I certify that on January 17, 2018, the foregoing Response was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue

EXHIBIT A

We've made some changes to EPA.gov. If the information you are looking for is not here, you may be able to find it on the EPA Web Archive or the January 19, 2017 Web Snapshot.



Public Hearing: Repealing the Clean Power Plan

Listening Sessions

EPA will hold three listening sessions on the proposed repeal of the Clean Power Plan.

- February 21, 2018 – Kansas City, MO
- February 28, 2018 – San Francisco, CA
- March 27, 2018 – Gillette, WY

EPA held a public hearing November 28 -29, 2017, in Charleston, W.Va, on the proposed repeal of the Clean Power Plan. EPA has proposed that the Clean Power Plan is not consistent with the Clean Air Act. Preliminary speaker lists for the public hearing are posted below.

EPA will accept comment on the proposal until April 26, 2018.

You may need Adobe Reader to view files on this page. See EPA's About PDF page to learn more.

- Public Hearing on the Proposed Repeal of the Clean Power Plan: Preliminary Speaker List for Tuesday, Nov. 28, 2017 (PDF) (4 pp, 103 K)
- Public Hearing on the Proposed Repeal of the Clean Power Plan: Preliminary Speaker List for Wednesday, Nov. 29, 2017 (PDF) (3 pp, 91 K)

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