ORAL ARGUMENT HEARD 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. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	No. 15-1363 (and consolidated cases)

RESPONDENT-INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' RESPONSE TO RESPONDENT'S FURTHER REQUEST TO HOLD CASE IN ABEYANCE

The Public Health and Environmental Respondent-Intervenors respectfully urge the Court to deny Respondent Environmental Protection Agency's ("EPA") latest request for indefinite abeyance of these consolidated challenges to the Clean Power Plan (CPP), as sought in EPA's Status Report at 5, ECF No. 1719161 (May 2, 2018). This Court heard extensive oral argument *en banc* in this expedited case more than 19 months ago and the case has been in abeyance for more than a year. EPA's further request for delay should be denied and the Court should issue its

decision – at least on the issues of "statutory authority" (*id*. at 3) that EPA cites as the basis for its languorous review and proposed repeal of the rule.[1]

If the Court nevertheless grants any further abeyance, it should do so for no longer than 60 days and require EPA to submit status reports every 30 days.

ARGUMENT

EPA has a present statutory obligation under the Clean Air Act to protect the public from carbon dioxide pollution, which the agency has repeatedly found, in accord with overwhelming scientific evidence, endangers public health and welfare.[2] The Clean Air Act imposes an affirmative duty, employing the mandatory term "shall," 42 U.S.C. § 7411(d)(1), to protect the public from health- and welfare-endangering pollution of this kind. *See Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 126-27 (D.C. Cir. 2012) (noting that Congress's use of term "shall" in section 202 of the Act "vested a non-discretionary duty to regulate," and that, once EPA has made an endangerment finding, it lacks

---

[1] Respondent-Intervenors' reasons for opposing continued abeyance are set out in more detail in our prior filings, *see*, *e.g*., Corrected Resp't-Intervenor Pub. Health and Envtl. Orgs.' Opp. to Mot. to Hold Cases in Abeyance, ECF No. 1669770 (Apr. 5, 2017); Supp. Br. of Pub. Health and Envtl. Org. Resp't-Intervenors, ECF No. 1675202 (May 15, 2017); Resp't-Intervenor Pub. and Envtl. Orgs.' Resp. to Resp't's Request to Hold Case in Abeyance, ECF No. 1713256 (Jan. 17, 2018).

[2] *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009); *see also* 80 Fed. Reg. 64,662, 64,517-24 (Oct. 23, 2015); 81 Fed. Reg. 73,478, 73,486-87 (Oct. 25, 2016); 81 Fed. Reg. 59,332, 59,337-41 (Aug. 19, 2016); 81 Fed. Reg. 54,422 (Aug. 15, 2016); 81 Fed. Reg. 35,824, 35,833-37 (June 3, 2016).

"discretion to defer" regulation), *rev'd in part on other grounds*, 134 S. Ct. 2427 (2014).

A Supreme Court stay meant to suspend the Rule *temporarily* pending expeditious judicial review in this Court, the deferral of litigation in this Court, and EPA's continued failure to control carbon dioxide emissions, combine to frustrate and evade that statutory obligation.

Delay in this context is not only a violation of the Clean Air Act; it causes irreversible harm to our members and to society at large. Carbon dioxide levels continued to rise perilously; levels measured over the past month at Mauna Loa Baseline Atmospheric Observatory in Hawaii exceeded 410 parts per million for the first time in recorded history.[3] Health and environmental hazards that EPA has previously described as "urgent and severe," 80 Fed. Reg. at 64,773, and "monumental," EPA Br. at 1, ECF No. 1609995 (Apr. 22, 2016), are only getting worse. As carbon dioxide accumulates in the atmosphere, it causes long-lasting damage: A substantial portion of every ton of carbon dioxide emitted today persists in the atmosphere for a century and longer, resulting in climate impacts

[3] National Oceanic and Atmospheric Administration, Earth System Research Laboratory, *Recent Monthly Average Mauna Lao CO_2,* https://www.esrl.noaa.gov/gmd/ccgg/trends/ (last visited May 8, 2018).

that persist for centuries to millenia.[4] Putting in place effective national limits on power plant emissions therefore is urgent because (1) power plants are the largest stationary sources of climate-destabilizing pollution; (2) the power sector has long planning horizons, necessitating a settled and stable emissions-control framework, and (3) the ability to achieve substantial reductions in emissions across the rest of the economy depends in part upon access to low-carbon electricity.

EPA has never laid out a clear legal basis for this delay but appears to invoke a discretionary doctrine of prudential ripeness and pragmatic considerations. *See* EPA Abeyance Mot. t 7-8, ECF No. 1668274 (Mar. 28, 2017). When it originally sought to place this case in abeyance more than a year ago, EPA alleged that abeyance would (1) "promote judicial economy by avoiding unnecessary adjudication" and (2) would "support the integrity of the administrative process" by freeing EPA from potentially having to brief the legal issues in response to potential certiorari petitions while the agency conducted a

[4] *See* EPA, *Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA Section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units* at 21-22 (Jan. 11, 2017) (discussing "carbon budget" associated with avoiding very large temperature increases and observing that "a delay in reducing emissions will lead to the budget being rapidly depleted, making achieving any given temperature target more difficult with each passing year."); United States Global Change Research Program, *Climate Science Special Report* at 31 (2017) ("Warming and associated climate effects from [carbon dioxide] emissions persist for decades to millennia.").

review of the CPP. EPA Abeyance Mot. at 2. EPA still relies on this rationale. *See* EPA's Status Report at 4 (May 2, 2018) (citing Abeyance Motion).

That these reasons have never justified the major countervailing public costs of putting this case in abeyance becomes clearer with every passing report that EPA files. But whatever limited merit they had more than a year ago, EPA's grounds for abeyance are unpersuasive today. First, there is nothing economical about the administrative and litigation path EPA is charting. EPA has proposed a complete repeal of the Clean Power Plan "on the grounds that it exceeds EPA's statutory authority under a proposed change in the Agency's interpretation of section 111 of the Clean Air Act," EPA's Status Report at 3 (May 2, 2018). That same core issue of statutory authority is fully briefed and argued in this case. And once EPA finalized a repeal on that basis (and no other has been proposed), the same issue will come before the Court again.[5] Judicial economy favors deciding this case now, not postponing decision until after years more of non-

[5] The proposal rests on purely legal arguments. EPA has not offered new factual arguments as justification for the proposed repeal. Indeed, EPA's docket for the proposed repeal was almost completely empty, reflecting no further policy analysis, public outreach, or information connection. The repeal proposal does, however, cite to criticisms of the CPP that appear to have been drawn from the administrative record before this Court, or from the briefs of the CPP petitioners in this case. *See* 82 Fed. Reg. 48,035 at 48,042 (citing "broad[] policy concerns" of "stakeholders").

implementation of the congressional directive to curb dangerous air pollution, and after the country has sunk even deeper into a climatic abyss.

EPA suggests that it may propose a replacement rule, but the agency is plainly not moving promptly to meet its mandatory Clean Air Act duty and to respond to the grave public hazard that EPA itself has identified. While EPA's recent submission notes (EPA's Status Report at 4 (May 2, 2018) that the April 26, 2018, public comment deadline on the repeal proposal has passed, EPA's own statements make clear that even final action on the proposed repeal is by no means imminent. The October 2017 proposed repeal notice acknowledged that the proposal is incomplete and requires further modeling and analysis – and another round of public comment – in order to assess the forgone benefits and avoided costs of the repeal of the CPP. *See* 82 Fed. Reg. at 48,043 n.22 ("The EPA plans to conduct a more robust analysis before any final action is taken by the agency and provide an opportunity for the public to comment on the re-analysis.").[6] EPA has

[6] *See also* 82 Fed. Reg. at 48,047 ("In addition, the EPA plans to perform updated modeling and analysis of avoided compliance costs, forgone benefits, and other impacts, which will be made available for public comment before any action that relates to the CPP is finalized."); EPA, *Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal* at 26 (2017) ("EPA plans to conduct a more robust analysis before any final action is taken by the agency and provide an opportunity for the public to comment on the reanalysis."); *id*. at 32, 58. Although the proposal stated that such analysis would be available for peer review within six months, 82 Fed. Reg. at 48,047, that has not come to pass.

given no indication when that additional analysis will be available and when public comment will be sought.

EPA's latest Status Report notes that the agency has taken comment on an Advance Notice of Proposed Rulemaking (ANPR) concerning a potential "replacement" for the CPP, but that proceeding is predicated upon the *assumption* that EPA will have lawfully repealed the CPP. *See* 82 Fed. Reg. at 61,512 (explaining that ANPR seeks comment on "how the program should be implemented assuming adoption of that proposed interpretation" underlying repeal proposal). Thus, if EPA's claim in the repeal rulemaking that the CPP exceeded EPA's statutory authority is wrong, any follow-on rulemaking predicated on the "assumption" that the repeal is lawful will also be invalid. And if a repeal based on Administrator Pruitt's claim that the CPP exceeds EPA's statutory authority is found unlawful, the Court would then have to revisit the mothballed challenges to the CPP anyway. This is not a model of economy, judicial or otherwise; it is the plot for a darker version of Dickens' *Bleak House*, where what is frittered away is not a single family's fortune, but the stable climate that is the foundation of our entire society. Judicial economy favors deciding this case.

In its March 2017 abeyance motion, EPA cited, in addition to professed concern for judicial economy, a concern about the "fairness and integrity" of the administrative process." In particular, EPA said:

> Abeyance is also warranted to avoid compelling the United States to represent the current Administration's position on the many substantive questions that are the subject of EPA's nascent review. A decision from the Court at this time would almost certainly generate a petition for writ of certiorari from some party to the litigation or another, thereby compelling further briefing on substantive questions prior to EPA's completion of its review. This could call into question the fairness and integrity of the ongoing administrative process.

Abeyance Mot. at 8.

This argument was always questionable, in part because the many respondent-intervenor states, companies and public health and environmental organizations still strongly support the legality of the CPP and would defend it before the Supreme Court regardless of what position EPA takes. And EPA's or the Environment Division's discomfort at potentially having to explain its position (or lack thereof) in a future response to cert petitions does not outweigh the strong public interests in execution of a statutory duty in the face of a serious, ever-growing health and environmental hazard.

In any event, Administrator Pruitt's strong and public views on the CPP's legality have been on constant display since EPA's initial abeyance motion, completely undercutting EPA's argument regarding the need to preserve of the "integrity and fairness" of the administrative process. Even as the CPP repeal rulemaking and the public comment process is proceeding, EPA Administrator Scott Pruitt has repeatedly expressed ardent views on the CPP's merits and has

even repeatedly described its repeal as a *fait accompli*.[7] The Administrator manifestly is not adhering to any standard of official agnosticism or open-mindedness about the CPP's merits. In this light, EPA cannot credibly rely upon a claimed need to preserve the "fairness and integrity" of the administrative process as a basis for abeyance.

For these reasons, combined with those raised in our prior filings, the Court should deny EPA's request for further abeyance and should decide the briefed and argued case.

---

[7] While the CPP public comment process was open, Scott Pruitt made public statements such as: "We've withdrawn the Clean Power Plan." (Welcome Video, Heartland Institute Energy Conference, Nov. 9, 2017); "[W]e're getting rid of" the Clean Power Plan. (Speech at National Association of State Departments of Agriculture conference in Washington, D.C, Feb. 1, 2018); "[W]ithdrawing the deficient 2015 rule, the Clean Power Plan, is absolutely an important thing." (interview with Michael Barbaro, Feb. 2, 2018); "[T]he Clean Power Plan is demonstrative of a violation of rule of law") (American Conservative Union, Conservative Political Action Conference, Feb. 23, 2018); "By repealing and replacing the so-called Clean Power Plan, we are ending a one-size-fits-all regulation on energy providers and restoring the rule of law." (testimony to House Energy & Commerce Subcommittee on Environment, Apr. 26, 2018). "the lawsuits that I was a part of, . . . it was all because the Agency didn't act consistent with statutory authority." (interview with News-4 Reno, Feb. 5, 2018). An EPA "Year In Review" publication released on March 5, 2018, says: "The Clean Power Plan (CPP) appears to have far exceeded the Agency's statutory authority, while imposing massive regulatory burdens on affordable energy for hardworking American families." Complete citations and links to these statements are provided in the Addendum.

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, it should limit abeyance to another period of no more than 60 days and continue to require status reports every 30 days.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue
Susannah L. Weaver
Donahue & Goldberg, LLP
1111 14th Street, N.W., Suite 510A
Washington, D.C. 20005
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street, N.W., Suite 300
Washington, D.C. 20005
(202) 513-6256
Counsel for Natural Resources Defense Council

Tomás Carbonell
Vickie Patton
Martha Roberts
Benjamin Levitan
Environmental Defense Fund
1875 Conn. Avenue, N.W. Ste. 600
Washington, D.C. 20009
(202) 572-3610
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
114 State Street, 6th Fl.
Boston, MA 02109
(617) 624-0234, ext. 156
Counsel for American Lung Association, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, and The Ohio Environmental Council

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Massachusetts Avenue, N.W., Suite 702
Washington, D.C. 20036
(202) 667-4500
Counsel for Sierra Club

Vera P. Pardee
Howard M. Crystal
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
Counsel for Center for Biological Diversity

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
(304) 342-5588
Counsel for West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Coal River Mountain Watch, Kanawha Forest Coalition, Mon Valley Clean Air Coalition, and Keepers of the Mountains Foundation

ADDENDUM: FULL CITATIONS AND LINKS FOR QUOTATIONS IN FOOTNOTE 7

"We've withdrawn the Clean Power Plan."

> -Administrator Scott Pruitt ,Welcome Video, Heartland Institute Energy Conference, (Nov. 9, 2017), https://www.youtube.com/watch?v=OpGYQ3W9tF4 (at 1:04-1:08)

"[W]e're getting rid of" the Clean Power Plan.

> -Administrator Scott Pruitt, quoted in Niina Heikkinen, *Pruitt publicly lauds Trump after 2016 criticisms resurface*, E&E News Climatewire (Feb. 1, 2018), https://www.eenews.net/climatewire/2018/02/01/stories/1060072579, (quoting speech made at National Association of State Departments of Agriculture conference in Washington, D.C.)

"[W]ithdrawing the deficient 2015 rule, the Clean Power Plan, is absolutely an important thing."

> -Administrator Scott Pruitt, on Michael Barbaro, *Listen to 'The Daily': A Conversation With Scott Pruitt*, at 16:11-16:18 (Feb. 2, 2018), https://www.nytimes.com/2018/02/02/podcasts/the-daily/scott-pruitt-epa.html linked at Scott Pruitt (@EPAScottPruitt), Twitter (Feb. 2, 2018, 7:54 AM) (linking to 'The Daily' interview with Michael Barbaro), https://twitter.com/EPAScottPruitt/status/959454892351000577

"[T]he Clean Power Plan is demonstrative of a violation of rule of law."

> -Administrator Scott Pruitt, at American Conservative Union, Conservative Political Action Conference (Feb. 23, 2018) (video available at https://www.c-span.org/video/?441474-1/epa-administrator-pruitt-addresses-cpac&start=265) (*see* video at 5:44-5:49)

"By repealing and replacing the so-called Clean Power Plan, we are ending a one-size-fits-all regulation on energy providers and restoring the rule of law."

> -*The Fiscal Year 2019 Environmental Protection Agency Budget: Hearing Before H. Comm. on Energy & Commerce, Subcomm. on Environment*, 115th Cong. (Apr. 26, 2018) (testimony of Scott Pruitt, EPA Administrator) (video available at https://www.c-span.org/video/?444370-1/epa-administrator-pruitt-pressed-concerns-expenses-management&vod) (*see* video at 22:25-22:32)

"[T]he lawsuits that I was a part of, . . . it was all because the Agency didn't act consistent with statutory authority."

> -Administrator Scott Pruitt, Interview with Bill Frankmore, News-4 Reno (Feb. 5, 2018) (video available at http://mynews4.com/news/local/exclusive-head-of-epa-scott-pruitt-sits-down-for-in-studio-interview) (*see* video at 1:52-2:17), cited and linked in EPA, *EPA Year in Review: 2017-2018*, at 27 (Mar. 5, 2018), https://www.epa.gov/sites/production/files/2018-03/documents/year_in_review_3.5.18.pdf

"The Clean Power Plan (CPP) appears to have far exceeded the Agency's statutory authority, while imposing massive regulatory burdens on affordable energy for hardworking American families."

> -Environmental Protection Agency, *EPA Year in Review: 2017-2018*, at 7 (Mar. 5, 2018), https://www.epa.gov/sites/production/files/201803/documents/year_in_review_3.5.18.pdf

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 2256 words.

CERTIFICATE OF SERVICE

I certify that on May 9, 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