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' SUPPLEMENTAL BRIEF IN RESPONSE TO APRIL 28, 2017 ORDER

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Dated: May 15, 2017

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned State, District, and City Intervenor-Respondents adopt the certificate as to parties, rulings, and related cases in Respondent EPA's Final Brief (Mar. 22, 2016, Doc. No. 1609995) (EPA Merits Br.), with the following exception:

The State of North Carolina Department of Environmental Quality has withdrawn as a petitioner in No. 15-1363.

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GLOSSARY

APA	Administrative Procedure Act
CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
Recon. Denial	EPA, Basis for Denial of Petition to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions (Jan. 11, 2017)
Rule	Clean Power Plan, 80 Fed. Reg. 64,661 (Oct. 23, 2015)

PRELIMINARY STATEMENT

The undersigned Intervenor-Respondent States and Municipalities (State Intervenors) file this response to the Court's April 28 order seeking the parties' views on "whether these consolidated cases should be remanded to the agency rather than held in abeyance." Because either option would prejudice State Intervenors far more than a ruling on the merits would prejudice Petitioners or EPA, State Intervenors respectfully urge this Court to issue a ruling on the merits of the Clean Power Plan at or before the conclusion of the current sixty-day abeyance. Issuing a merits decision would represent the appropriate course in dealing with the dangerous carbon pollution EPA has described as "the Nation's most important and urgent environmental challenge." EPA Merits Br. at 1.

If the Court nonetheless does not decide the cases at this time, remand would be less detrimental because EPA's Clean Air Act obligation to limit carbon pollution from existing power plants would not be indefinitely delayed, as would be the effect of granting an open-ended abeyance. If the Court holds these cases in abeyance, it should accordingly limit the duration to mitigate the harm to State Intervenors and the public from further delays in limiting power plant pollution.

Because of the critical juncture of these cases and important consequences of the Court's ruling on how to proceed, State Intervenors request the Court schedule limited oral argument (30-40 minutes total for the parties) prior to ruling.

STATEMENT OF THE CASE

More than a decade ago, several State Intervenors and other parties sued EPA for failing to limit carbon dioxide (CO_2) from fossil-fueled power plants, the largest source of carbon pollution in the nation. As petitioners in *New York v. EPA* (D.C. Cir. 06-1322), they argued that because CO_2 from power plants endangers public health and welfare, section 111 of the Clean Air Act, 42 U.S.C. § 7411, compelled EPA to establish emission standards for new power plants and ensure that states put standards in place to limit CO_2 from existing plants.

Following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court remanded *New York v. EPA* in September 2007 for further proceedings consistent with *Massachusetts*. The parties eventually settled *New York* in 2011 based on EPA's agreement to undertake rulemaking under section 111 to limit power plant CO_2 emissions. Around the same time, the Supreme Court held that because section 111 "speaks directly" to limiting CO_2 emissions from existing power plants, parties (including several State Intervenors) were precluded from using federal common law nuisance actions to compel power plants to reduce CO_2 emissions that are causing climate change harms in their communities. *Amer. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

Four years later, following an unprecedented effort to seek input from states, industry, and the general public on how best to cost-effectively cut power plant

CO_2 emissions while maintaining a reliable electricity supply, EPA promulgated the Clean Power Plan. 80 Fed. Reg. 64,661 (Oct. 23, 2015) (the Rule). The Rule requires CO_2 emission reductions from power plants beginning in 2022, building on efforts already underway in many states across the country to power our homes and businesses with cleaner energy. In the aggregate, these reductions represent substantial cuts in carbon pollution from its largest source, and by 2030 will annually eliminate the equivalent of the yearly emissions from 166 million cars. EPA Fact Sheet, Clean Power Plan By the Numbers, at 1.[1]

For our communities already facing costly climate change harms, these long overdue reductions are critical to mitigating the even more dire threats to public health and welfare that scientists expect will occur if emissions continue unabated. *See, e.g.*, State Intervenors' Opp. to Mot. to Hold Proceeding in Abeyance at 16-17 (Apr. 5, 2017, Doc. No. 1669699). Every day these reductions are delayed exacerbates an already untenable situation. As EPA stated just a few months ago, "global surface temperatures, sea level rise, ice melt, and greenhouse gas concentrations continue to rise at record levels." EPA, Basis for Denial of Petition

[1] *Available at* https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-numbers_.html.

to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions (Jan. 11, 2017) ("Recon. Denial"), at 21.[2]

The current litigation is now at a crossroads. At stake is whether the statutory remedy singled out by the Supreme Court as the means to address dangerous CO_2 emissions from its largest source will finally be implemented or confined to legal limbo while climate change harms continue to worsen.

ARGUMENT

As discussed below in Points I and II, remand or abeyance would both be prejudicial to State Intervenors, many of whom have sought to reduce pollution from existing power plants for over a decade. Fundamentally, neither remand nor abeyance would resolve any of the legal issues that have been central to that decade-long pursuit, including questions regarding EPA's authority to regulate CO_2 from its largest source. All of these issues have been fully addressed by the agency and the public as part of the rulemaking, presented to this Court in extensive briefing and argument, and will arise again regarding any future alternative means of regulating CO_2 emissions from power plants. Further, because of the Supreme Court stay, an abeyance would, in effect, vacate the rule without a

[2] *Available at* https://www.epa.gov/sites/production/files/2017-01/documents/basis_for_denial_of_petitions_to_reconsider_and_petitions_to_stay_the_final_cpp.pdf.

decision on the merits: an outcome that cannot be justified on any basis, legal or factual.

Accordingly, as discussed in Point III, State Intervenors urge the Court to decide this case at or before the end of the sixty-day abeyance. If, however, the Court declines to do so, and abeyance and remand are the only options, State Intervenors submit that remand is the less prejudicial of the two. *See* Point I, *infra*. If the Court instead grants abeyance, it should limit the duration to six months to mitigate the harm to State Intervenors and the public. *See* Point II, *infra*.

I. Remand of These Cases Is More Appropriate than Abeyance.

If the Court declines to issue a merits ruling, despite the substantial resources already expended by the litigants and the *en banc* Court, these cases should be remanded to the agency. Remand is appropriate in light of Petitioners' decision to have their concerns with the Rule dealt with administratively, not through this litigation. *See* Petitioner and Petitioner-Intervenors' Response in Support of EPA's Mot. to Hold Cases in Abeyance at 2 (Apr. 6, 2017, Doc. No. 166984) (supporting abeyance so EPA may afford them relief by "repeal[ing] or substantially alter[ing]" the Rule). And despite the fact that EPA is purportedly reviewing the Rule to decide whether to continue to defend it, public statements by EPA Administrator Pruitt that the Rule is "unlawful" make it difficult to envision

he will decide to maintain the current Rule.[3] State Intervenors and the other Intervenor-Respondents stand ready to step into EPA's shoes if the agency does abandon its defense of the Rule. However, if the Court decides not to allow the litigation to proceed to its conclusion, remand rather than abeyance would be more appropriate given EPA's and Petitioners' statements and legal position.[4]

Remand would also mitigate further harm to State Intervenors and other parties by triggering the process to dissolve the Supreme Court's stay of the Rule. The Supreme Court's stay expires upon the "disposition of the applicants' petitions

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[3] *See e.g.*, Transcript of Interview with Scott Pruitt on This Week, ABC News (Mar. 26, 2017), *available at* http://abcnews.go.com/Politics/week-transcript-26-17-sen-chuck-schumer-rep/story?id=46372022 (Clean Power Plan is "unlawful"). Although Administrator Pruitt has now recused himself from participation in this litigation, the terms of his recusal agreement do not apply to EPA's review of the Rule and any subsequent administrative action to replace or rescind it.

[4] To the extent Petitioners (or EPA) argue that the Rule should be vacated prior to remand, vacatur would be improper when this Court has issued no ruling on the merits at all—let alone a decision finding the Rule to be invalid. Nothing in the Clean Air Act or the Administrative Procedure Act permits a court to vacate a rule based on an agency's decision to revisit it. *See* 42 U.S.C. § 7607(d)(9) & 5 U.S.C. § 706; *see also Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (refusing to vacate rule because "granting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits."). Even if EPA were to profess error now, that would not justify vacatur of a rule. *See Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (agency cannot "circumvent rulemaking process through litigation concessions"). Such litigation concessions would be particularly meaningless here, where multiple other parties—including State Intervenors—stand ready to defend the Rule.

for review . . . and disposition of the applicants' petition for writ of certiorari, if such a writ is sought." *See* Order, *West Virginia v. EPA*, No. 15A773 (S. Ct. Feb. 9, 2016). Under this Court's rules, remand would fully dispose of the petitions here because "if the case is remanded, this court does not retain jurisdiction." Circuit Rule 41(b). The Supreme Court's stay would automatically dissolve after expiration of the period for filing of (or resolution of) petitions for writ of certiorari.

Such a result would be consistent with the grounds on which the Supreme Court originally issued its stay: to pause compliance with the Rule while it underwent *judicial* review. But based on their previous filings with the Court supporting abeyance, petitioners and EPA seek to suspend the Rule to accommodate ongoing *agency* review and revision of the Rule. That basis for a stay was not contemplated either by the parties or by the Supreme Court when it issued its order.

Starting the process to terminate the Supreme Court's stay would also hold EPA to its legal obligation to address greenhouse gas emissions under the Clean Air Act and to its commitment in *New York* to undertake rulemaking to address carbon pollution from existing power plants, consistent with the Supreme Court's recognition in *AEP* of section 111(d) as the provision that "speaks directly" to power plant CO_2 emissions. Once the Rule is back in effect, EPA could satisfy its

statutory duty either by implementing the Rule or by devising a lawful substitute through notice-and-comment rulemaking. By contrast, as explained in Point II, *infra*, with the Supreme Court's stay in effect, the open-ended abeyance that EPA and Petitioners apparently favor would allow EPA to improperly defer action for some unknown and perhaps indefinite duration in contravention of the Clean Air Act and the Administrative Procedure Act, to the substantial prejudice of State Intervenors.[5]

II. The Court Should Limit the Duration of Any Abeyance to Mitigate the Harm to State Intervenors and the Public from Further Delays in Regulation of CO_2 Emissions from Existing Power Plants.

If this Court instead decides to hold these cases in abeyance, it should not adopt an open-ended abeyance. Such an abeyance, combined with the Supreme Court's stay of the Rule, would give EPA no incentive to timely complete any replacement rulemaking, and would accordingly prejudice State Intervenors and other parties that have sought for more than a decade to compel power plants to cut

[5] Although a remand is preferable to an abeyance, Administrator Pruitt's statements that the Rule is "unlawful" and his letter, *see* State Intervenors' Opp. to Abeyance Mot., Ex. 2, erroneously advising our Nation's governors that they can assume now that the Rule's compliance deadlines will be extended if the Rule is ultimately upheld in the courts, strongly suggest that the inevitable result of remand will be more litigation over the status of the Rule and its deadlines. As a practical matter, therefore, remand would be far less efficient than a decision on the merits to ensure that EPA fulfills its long overdue duty under the statute to regulate CO_2 emissions from existing power plants.

carbon pollution.[6] Therefore, if the Court declines to issue a decision on the merits now or remand the case to EPA, it should limit the duration of the abeyance to six months. At the conclusion of the abeyance period, the Court should either issue its merits decision or remand the cases if EPA has not yet taken final action to revise the Rule.[7]

By contrast, granting EPA's requested abeyance would improperly delay the implementation of the Rule for an indefinite period without requiring the agency to follow notice-and-comment procedures required under the Clean Air Act and

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[6] In State Intervenors' experience, the obligation to file periodic status reports with the Court during abeyance provides little incentive for EPA to take final action to resolve a case. *See*, *e.g.*, May 8, 2017 Status Report in *Nat'l Cattlemen's Beef Ass'n v. EPA*, Case No. 07-1227 (Doc. No. 1674247), at 2 (abeyance granted in February 2008 directing EPA to file reports every 60 days; agency proceedings still ongoing); May 8, 2017 Status Report in *Newmont USA Ltd. v. EPA*, Case No. 04-1069 (Doc. No. 1674244), ¶ 7 (March 2009 abeyance order required 60-day status reports; agency proceedings still ongoing).

[7] If EPA takes final agency action to replace (or rescind) the Rule within the abeyance period, the Court could follow the approach in *Alabama Envtl. Council v. EPA*, 711 F.3d 1277 (11th Cir. 2013). There, the court considered together challenges to an initial EPA rule and subsequent rule issued after reconsideration. Here, the Court could adopt a similar approach by considering these cases together with future challenges to any replacement rule (or rescission). This approach also would be consistent with case law recognizing that invalidation of an agency action seeking to rescind or revise an existing regulation results in reinstatement of the original rule. *See Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("by vacating or rescinding the rescissions proposed by [CAB's rule], the judgment of this court had the effect of reinstating the rules previously in force"); *Alaska v. USDA*, 772 F.3d 899 (D.C. Cir. 2014) (district court's invalidation of agency action withdrawing rule had legal effect of reinstating it).

Administrative Procedure Act to revoke or modify a regulation. *See* State Intervenors' Opp. to Abeyance Mot. at 7. Furthermore, the Clean Air Act authorizes EPA to administratively stay a rule for only ninety days if EPA decides to reconsider it—evincing Congress's judgment that EPA may not indefinitely stay implementation of a duly promulgated rule simply because it has second thoughts. *See* 42 U.S.C. § 7607(d)(7)(B).

Moreover, limiting the duration of abeyance is necessary to mitigate the harm to State Intervenors and other parties. The delay from abeyance would prejudice our ability to obtain long overdue relief from existing power plant carbon pollution, which is a major cause of climate change harms threatening our residents and natural resources. *See* State Intervenors' Opp. to Abeyance Mot. at 16-17. As EPA noted in the Rule, time is of the essence in acting to reduce greenhouse gas emissions because "[d]elays in reducing emissions could commit the planet to a wide range of adverse impacts." 80 Fed. Reg. at 64,686.

Prompt action by EPA is also essential to mitigate these harms. Although State Intervenors have taken actions to reduce power plant pollution within our own borders, *see* State Intervenors' Opp. to Abeyance Mot. at 17-18, we have limited recourse against power plants in other jurisdictions in light of the Supreme Court's ruling in *AEP*. *See* 564 U.S. at 424. Indeed, EPA itself has acknowledged that "one purpose of section 111 is to assure national uniformity, so as to prevent

some states from becoming pollution havens while other states impose regulatory costs on polluters." Recon. Denial at 28. An indefinite delay of further rulemaking action by EPA, coupled with an indefinite stay of the Rule, would prevent urgently needed federal action to fulfill the purposes and obligations of section 111.

There is good cause for concern that, unless the Court limits the time for abeyance, EPA will do nothing to limit CO_2 emissions from existing power plants.[8] The Trump Administration has expressed overt hostility to climate change programs in general, and has proposed substantial cuts to funding for EPA for fiscal year 2018, including discontinuing funding for the Clean Power Plan and climate change research programs. *See* Office of Mgmt. & Budget, *America First, A Budget Blueprint to Make America Great Again*, at 41-42, *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.[9] Moreover, there has been no indication that EPA has even begun

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[8] By contrast, in situations in which EPA has explicitly recognized the need to promptly act and has provided the Court with a deadline for doing so, directing the agency to act by a date certain (or face consequences) has not been necessary to resolve outstanding legal issues in a case. *See, e.g.*, Order in *White Stallion Energy Ctr., LLC v. EPA*, Case No. 12-1100 (Doc. No. 1588459) (Dec. 15, 2015), (remanding Mercury and Air Toxics Standards rule to EPA without vacatur and noting "In so doing, we note that EPA has represented that it is on track to issue a final [cost] finding under [the statute] by April 15, 2016.").

[9] In defending these proposed cuts to climate change programs, the Director of the Office of Management and Budget (OMB) stated "We're not spending money on that anymore. We consider that to be a waste of your money." Press Briefing by Mick Mulvaney, Director of OMB (Mar. 16, 2017), *available at*

the process of reviewing the voluminous scientific and technical evidence supporting the Rule, a necessary step if it is to lawfully replace it. The circumstances presented in this case thus justify limiting any abeyance.

In light of the critical need of reducing CO_2 emissions from existing power plants, and the fact that the new Administration has already had nearly four months to review the Rule, the Court should limit any abeyance to an additional six months. At the end of the period, the Court should issue its merits decision or remand the cases if EPA has not yet taken final action to revise the Rule.[10]

III. When the Temporary Abeyance Ends, the Court Should Issue its Merits Decision.

Instead of choosing between the two flawed alternatives discussed above, the Court should issue its merits decision at or before the close of the current sixty-day abeyance. A court's "virtually unflagging" obligation to hear and decide cases, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014), cannot be supplanted by an executive order directing an agency to review an existing regulation. That principle should carry even greater weight here, given that a

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https://www.c-span.org/video/?c4661465/omb-director-mulvaney-consider-spending-climate-change-waste-money.

[10] The Court could also direct the parties to file motions to govern at the end of the six-month abeyance to determine whether circumstances have changed relevant to issuing a merits decision, remanding the cases, or taking any other procedural steps.

decade after the remand in *New York*, no federal emission standards are in effect to limit CO_2 from existing power plants and important legal issues regarding EPA's authority to regulate those emissions under section 111(d) continue to be unresolved. One of these issues—the question of the relationship between sections 112 and 111 in limiting power plant pollution—has now been fully briefed and argued *twice* to the Court and is plainly ripe for decision.

A decision by this Court not to adjudicate this live controversy on the scope of section 111(d) of the Clean Air Act and power plant CO_2 emissions would block State Intervenors' principal statutory remedy to protect our residents from climate change harms by effectively foreclosing Supreme Court review of the Rule. At the same time, the lack of a definitive ruling on that statutory remedy would keep the door barred to pursuing federal common law to obtain similar relief. The Court need not—and should not—choose that course.

Furthermore, contrary to EPA's and Petitioners' contentions, the mere prospect that EPA may later rescind or replace the Rule would not transform a decision on the merits here into an advisory opinion. The decision will concretely affect a live Rule that remains the law of the land, unless and until EPA is able to successfully withdraw or replace the Rule in accordance with the rulemaking requirements of the Clean Air Act and the Administrative Procedure Act.

Finally, no party would be prejudiced by the issuance of a merits decision. EPA would remain free to take subsequent action to attempt to modify, replace, or rescind the Rule through notice-and-comment rulemaking, within the bounds of the law. Nor would Petitioners suffer prejudice from a merits ruling. Indeed, a significant number of Petitioners sought a ruling from this Court on the legal issues presented in this appeal *before the Rule was even promulgated*. *See In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015). In light of their conceded interest in a judicial resolution of these disputed questions, they can hardly complain if this Court decides these issues now.

CONCLUSION

For the reasons set forth above, at or before the conclusion of the temporary abeyance, the Court should issue a decision on the merits of the Clean Power Plan. Otherwise, a remand of these cases is a better option than an open-ended abeyance to ensure that EPA proceeds with its obligation under the Clean Air Act to limit CO_2 from existing power plants. If the Court instead grants abeyance, it should limit the duration to six months to limit the harm to State Intervenors and the public from further agency delays.

State Intervenors respectfully request that the Court schedule limited oral argument (30-40 minutes total) to allow the parties to be heard on these issues.[11]

Dated: May 15, 2017

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[11] The Court followed a similar approach in *White Stallion Energy*, *see supra* n. 8, where it heard argument from the parties prior to deciding whether to remand or vacate EPA's Mercury and Air Toxics Standards following the Supreme Court's ruling in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

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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' Supplemental Brief in Response to April 28, 2017 Order was filed on May 15, 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