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' OPPOSITION TO MOTION TO HOLD PROCEEDING IN ABEYANCE

The undersigned Intervenor-Respondent States and Municipalities (State Intervenors) oppose the motion of Respondents U.S. Environmental Protection Agency and Administrator Scott Pruitt (together, EPA) to hold these consolidated cases in abeyance. EPA fails to justify its unprecedented request for an open-ended abeyance at this late stage of litigation: more than six months after the *en banc* Court heard a full day of oral argument. This case is ripe for decision now, and nothing that EPA has proposed to do obviates the need for this Court's review. To the contrary, a decision from this Court will resolve critical live disputes over the scope of the Clean Air Act that will not only determine the enforcement of the

Clean Power Plan, but also affect any reconsideration or revision of the Rule that EPA may undertake. By contrast, indefinitely deferring a decision here, as EPA requests, would waste the substantial resources already expended in this litigation by the parties and this Court. Moreover, granting EPA's motion would prejudice State Intervenors' longstanding and compelling interest in addressing the largest sources of pollution that is causing climate-change harms now.

BACKGROUND

More than seventeen months ago, EPA promulgated the Clean Power Plan, which fulfilled its statutory duty under section 111 of the Clean Air Act to regulate the largest stationary source of domestic greenhouse gas emissions. 80 Fed. Reg. 64,661, 64,664 (Oct. 23, 2015) (the Rule). The Rule provides for a 32 percent reduction in carbon dioxide emissions from power plants by 2030, as compared to 2005 emission levels. *Id.* at 64,665.

A number of states and industry groups filed petitions for review of the Rule immediately after its publication in the Federal Register. Shortly thereafter, several petitioners brought motions to stay the Rule, which this Court unanimously denied. *See* Per Curiam Order (Jan. 21, 2016), ECF No. 1594951. But two weeks later, the Supreme Court, by a 5-4 vote, issued an order staying the Rule until "disposition of the applicants' petitions for review." Order, *West Virginia v. EPA*, No. 15A773.

This Court established an expedited briefing schedule, Per Curiam Order (Jan. 28, 2016), ECF No. 1595922, and, after the Supreme Court granted the stay, took the unusual step of ordering that the case be heard before the full *en banc* Court in the first instance. *See* Per Curiam *En Banc* Order (May 16, 2016), ECF No. 1613489. Briefing on the merits consumed more than a thousand pages, and drew participation from more than two hundred entities, including about two dozen groups of amici. The petitioners and petitioner-intervenors devoted hundreds of pages of briefing to what they described as "core" legal issues about the scope of EPA's authority under the Clean Air Act to address carbon dioxide emissions from power plants. In September 2016, the *en banc* Court held almost seven hours of oral argument.

EPA has since observed that trends in the power sector towards low- and zero-emitting energy since the promulgation of the Rule mean that states could meet their compliance targets at a significantly lower cost than EPA had initially projected.[1] Now, six months after oral argument on the petitions for review challenging the Clean Power Plan, EPA has notified this Court that it intends to "fully review the Clean Power Plan" and asks this Court for a "[d]eferral of further

[1] *See* 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), at 22-26, *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.

judicial proceedings . . . until 30 days after the conclusion of review and any resulting forthcoming rulemaking." Motion, at 1-2. The basis for EPA's request is an Executive Order directing EPA to "review" the Rule for "consistency" with various policies focusing on "energy independence and economic growth." Executive Order §§ 1, 4 (Mar. 28, 2017), Attachment 1 to Motion. Pursuant to that Executive Order, EPA published a "Notice of Review of the Clean Power Plan" in the Federal Register indicating that it was "reviewing" the Rule and would "if appropriate . . . initiate proceedings to suspend, revise or rescind" it. Notice of Review of Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017).

For the reasons discussed below, EPA's extraordinary request to delay the decision in this proceeding should be denied.

ARGUMENT

I. EPA Has Given this Court No Grounds to Indefinitely Defer a Decision in this Litigation.

EPA has asked this Court for an open-ended delay in the litigation, which, as explained below, would likely be lengthy, based on nothing more than its vague intent to review the Clean Power Plan and potentially undertake further rulemaking to some unspecified end. Neither EPA nor the Administration has proffered any concrete timelines for this ill-defined review process. Nor have they given any indication of the contours of this review or the focus of any future rulemaking.

This Court should reject EPA's attempt to rely on its vague eleventh-hour representations to obtain an indefinite delay in this proceeding.

The Clean Power Plan is a final regulation that is the law of the land unless and until it is replaced by a new regulation, or vacated by this Court. Although the Supreme Court has stayed the Rule's enforcement, that stay does not affect the validity of the Rule or justify a delay in a ruling here—to the contrary, the stay expressly contemplates a ruling from this Court on the petitions for review. The issues in this case thus remain live until such time as EPA withdraws or replaces the Rule in accordance with the rulemaking requirements of the Clean Air Act. *See Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 251 F.3d 1007, 1010-13 (D.C. Cir. 2001) (industry challenge to regulations that had been replaced or substantially changed were moot, but challenge to rules that were not changed remained live); 42 U.S.C. § 7607(d) (setting forth rulemaking requirements for the "promulgation or revision" of any section 111 standard of performance). Indeed, even the promulgation of a new rule would not necessarily moot the live dispute between the parties in this proceeding, unless it replaced all of the challenged features of the Rule. *See Naturist Soc'y v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992).

Here, EPA has given no concrete indication whatsoever of any imminent change to the Clean Power Plan that would obviate the need for this Court's review of the important legal issues raised in this proceeding. The Executive Order that is

the basis of EPA's request for an abeyance refers only to commencing a review—a process that may or may not result in any change to the Rule. Moreover, neither the Executive Order nor EPA's recent "Notice of Review" includes timeframes for EPA to complete its review, propose any agency action to rescind or revise the Rule, or complete such rulemaking. *See* Motion, Attachments 1 & 2. The Notice does not even specify when EPA will *start* its rulemaking process. *See* 82 Fed. Reg. at 16,329 (EPA "if appropriate, will as soon as practicable . . . initiate proceedings to suspend, revise or rescind").[2]

This Court has warned against efforts by EPA to avoid rulings in ripe disputes even when the agency *has* proposed a concrete course of action that would alter the nature of the dispute between the parties, such as a new rulemaking. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking" because that would mean "a savvy agency could perpetually dodge review"); *see also Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (agency cannot "circumvent the rulemaking process through litigation concessions"). EPA's vague references to a forthcoming "review" of the Clean

[2] The Executive Order does not cite any legal authority for EPA to "suspend" a final rule, and under the Clean Air Act EPA is only authorized to stay a final rule for three months during administrative reconsideration. 42 U.S.C. § 7607(d)(7)(B).

Power Plan provide even less persuasive a basis to defer a decision in this litigation.

The concerns over staving off judicial review are particularly acute here, because the longer that this Court defers a ruling, the longer the hiatus during which the Clean Power Plan will not be in effect (due to the Supreme Court's stay) and will not be undergoing any active judicial review. Under the Administrative Procedure Act (APA), a court may stay a rule only until "conclusion of the review proceedings." 5 U.S.C. § 705. The practical effect of an abeyance would be to improperly delay the implementation of the Rule *indefinitely* without either timely completing the judicial review contemplated by the Supreme Court or engaging in the notice-and-comment procedures required to revoke or modify a regulation. *See Natural Resources Def. Council v. EPA*, 683 F.2d 752, 763 n.23 (3d Cir. 1982) ("To allow the indefinite postponement of a rule without compliance with the APA, when a repeal would require such compliance, would allow an agency to do indirectly what it cannot do directly").

The length of any delay is likely to be substantial. As the White House acknowledged in the press briefing on the recent Executive Order, the revision process for the Rule could take up to "three years." *See* Background Briefing on the President's Energy Independence Executive Order (Mar. 27, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/03/27/background-briefing-

presidents-energy-independence-executive-order. Even that estimate may be optimistic. The Clean Power Plan took EPA more than four years to promulgate after the settlement of the *New York v. EPA* (D.C. Cir. 06-1322) case became final in March 2011,[3] and any revision would have to undergo the same notice-and-comment process, *see* 42 U.S.C. § 7607(d).[4] Moreover, the rulemaking process likely will take even longer if, as Administrator Pruitt has suggested, EPA reverses or retreats from the overwhelming scientific, technical, and legal analysis that supports the Clean Power Plan.[5] If a change to the Rule "rests upon factual

[3] Notice of the proposed settlement agreement was published in the Federal Register in December 2010. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010). The settlement became effective on March 2, 2011, after completion of the notice and comment process pursuant to Clean Air Act § 113(g). Although EPA initially agreed to take final action on a section 111(d) rule for existing power plants by May 26, 2012, the timeframe was extended several times and EPA ultimately did not take final action on a 111(d) rule until August 2015.

[4] Among other things, EPA must establish a rulemaking docket, 42 U.S.C. § 7607(d)(2); publish a notice of proposed rulemaking that includes supporting factual data, methodology, legal interpretations, and policy considerations, *id.* § 7607(d)(3); and accept written and oral comments from members of the public, *id.* § 7607(d)(4), (5). The final rule must then be accompanied by another statement of basis, an explanation for any changes between the proposed and final rule, and a response to all significant comments. *Id.* § 7607(d)(6).

[5] *Compare* Interview with EPA Administrator on Squawk Box, CNBC (March 9, 2017) ("I would not agree that [carbon dioxide is] a primary contributor to the global warming that we see"), *available at* http://www.cnbc.com/2017/03/09/epa-chief-scott-pruitt.html *with* EPA, Causes of Climate Change, *available at* https://www.epa.gov/climate-change-science/causes-climate-change (last visited April 5, 2017) ("Carbon dioxide is the primary greenhouse gas that is contributing to recent climate change."); *see also* Transcript

findings that contradict those which underlay its prior policy," then EPA will be required to provide a "more detailed justification than what would suffice for a new policy on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Here, that justification would require a response to the lengthy legal memorandum and numerous technical documents underlying the Rule. The *index* to the certified record is more than 1,600 single-spaced pages. ECF No. 1589852. EPA received over four million comments and responded to them in a more than 7,500-page Response to Comments document. *See* EPA Docket No. EPA-HQ-OAR-2013-0602-36876. EPA would have to explain any reversal of the positions it has previously stated in this extensive record.[6]

EPA cites no precedent for holding a case in abeyance for such a lengthy and open-ended period at such a late stage in the Court's proceedings, based on so

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of Interview with Administrator Pruitt by Chris Wallace (April 2, 2017), *available at* http://www.foxnews.com/transcript/2017/04/02/scott-pruitt-on-balancing-environmental-economic-priorities-mitch-mcconnell-on-gorsuch-nomination-health-care-reform.html (stating, with respect to Rule, that the "past administration just made it up").

[6] It is unclear that EPA will even have the scientific, legal, and technical staff necessary to undertake a new rulemaking. To meet President Trump's proposed decrease in EPA's fiscal year 2018 budget by 31 percent from 2017, EPA is seeking to eliminate hundreds of employees working on climate change, including twenty lawyers in the Office of General Counsel who provide support for the Clean Power Plan. *See* EPA Memorandum, FY 2018 President's Budget: Major Policy and Final Resource Decisions (Mar. 21, 2017), *available at* http://www.eenews.net/assets/2017/04/04/document_cw_02.pdf.

preliminary a promise of review. *See* Motion at 7. In *American Petroleum Institute v. EPA*, by contrast, the case was held in abeyance because EPA had already published a proposed rule that revised the regulation being challenged, after briefing but before oral argument. 683 F.3d at 386. The Court in that case warned about the possibility of a "savvy agency" using the initiation of a "new proposed rulemaking" to "perpetually dodge review," but found that the risk of abuse was not present because EPA had agreed to finalize the proposed rule by the end of the year. *Id.* at 388-89. Here, there is no proposed rule let alone a "definite end date" for a new final rule. *Id.* at 389. Indeed, there is no definite date to even *begin* the process of a new rulemaking.

The other cases cited by EPA are also readily distinguishable. In *Sierra Club v. EPA*, the Court granted EPA's unopposed motion to hold the case in abeyance before briefing had even begun, while EPA reconsidered and accepted additional comments on the challenged rule. 551 F.3d 1019, 1023 (D.C. Cir. 2008); *see* Order (Jan. 2, 2004), D.C. Cir. No. 02-1135, ECF No. 794211 (establishing briefing schedule); Order (Feb. 19, 2004), *id.*, ECF No. 804148 (holding case in abeyance). Likewise, in *New York v. EPA*, the Court held the case in abeyance prior to briefing to allow EPA to complete reconsideration, which EPA represented would take less than a month from the date of the Court's order. Order, 2003 WL 22326398, at *1 (Sept. 30, 2003); *see* Per Curiam Order (Feb. 24, 2004), D.C. Cir.

No. 02-1387 (Complex), ECF No. 805148 (establishing briefing schedule). In all these cases, EPA was expected to act within a reasonable time frame, and the abeyance was accomplished with minimal disruption of the litigation. Here, the opposite is true: there is no time frame for EPA's review of the Rule, and an abeyance would upend a fully briefed and argued case.

Earlier this week, the U.S. Supreme Court denied a similar motion by the Federal Government to hold in abeyance a proceeding challenging a regulation interpreting "waters of the United States" under the Clean Water Act. *See* Order, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, Case No. 16-299 (Apr. 3, 2017). The Government's motion there, similar to the one here, was based on a recent Executive Order requiring EPA and the U.S. Army Corps of Engineers to "'publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law,'" and a related administrative notice of the agencies' intent to review the rule. *See* Notice of Executive Order and Related Agency Action and Motion of the Federal Respondents to Hold the Briefing Schedule in Abeyance, Supreme Court Case No. 16-299, at 2-3 (Mar. 2017) (attached as Exhibit 1), quoting Executive Order, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The Supreme Court's decision to adjudicate the dispute before it, despite the agencies' expressed intent to rescind or revise the regulation at issue,

undermines EPA's claim here that its mere intent to review the Clean Power Plan warrants an indefinite delay in this proceeding.

II. Holding the Case in Abeyance Would Frustrate Judicial Economy.

Contrary to EPA's claim, Motion at 6, holding these cases in abeyance would frustrate, not promote, judicial economy, given the advanced stage of the litigation. These consolidated cases have been fully briefed on an expedited basis, with more than one thousand pages of briefing submitted by more than two hundred parties, intervenors, and amici; and the *en banc* Court heard seven hours of oral argument more than six months ago. This proceeding is thus ripe for a decision from this Court. By contrast, granting an open-ended, years-long abeyance at the eleventh hour would render meaningless the extraordinary efforts exerted by both this Court and the litigants over the past year.[7] There is no basis for this Court to delay issuing its ruling while EPA decides what, if anything, to do next.

In addition to directly affecting the Clean Power Plan, this Court's ruling will also resolve legal issues that will define certain boundaries of any new rulemaking that EPA undertakes in this area, reducing the prospect for future

[7] At the end of oral argument, Judge Henderson recognized the tremendous resources dedicated to this case: "Let me just say on behalf of the whole Court, I feel like we've all been through a marathon today. . . . I can't imagine the hours and days and weeks you've put into this case, and you have given us all we need and more, probably, to work on it, so now it's up to us." Oral Argument Tr. at 319.

litigation over the same legal issues in response to any new rulemaking. In an analogous situation, this Court declined EPA's request to defer issuing an opinion on the validity of a regulation that the agency intended to vacate, holding that a merits decision on the soon-to-be-vacated rule would meaningfully affect EPA's future rulemaking and settle open legal disputes between the parties that were likely to recur. *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290 (D.C. Cir. 2000). Similar reasoning supports issuing a decision here.

Specifically, there are a number of "core" legal issues that not only affect the validity of the Clean Power Plan, but also will almost certainly arise in any subsequent EPA action to rescind or revise the Rule (and any litigation challenging such action). For example, this Court is currently considering whether to uphold EPA's longstanding interpretation that it can regulate different pollutants from the same source under section 111(d) and section 112. *See* EPA Br. at 96-97 (ECF No. 1609995) (discussing EPA's longstanding interpretation of section 111(d)). Because the section 112 issue concerns EPA's threshold authority to regulate greenhouse gas emissions from power plants at all, it is almost certain to arise again in future rulemaking and litigation, and the parties would benefit from a definitive ruling on this fully briefed issue in this proceeding.

Likewise, a ruling on whether EPA can consider generation-shifting in determining the "best system of emission reduction," or is specifically limited to

"inside-the-fenceline" measures, is likely to determine the course of future rulemaking and litigation. In this proceeding, EPA and Respondent-Intervenors have argued that restricting the Rule to "inside-the-fenceline" measures would improperly ignore systems of emissions reduction that are already being used by industry and regulators. *See* EPA Br. at 29-31 (ECF No. 1609995); State Intervenors Br. at 28-29 (ECF No. 1610024); Calpine et al. Br. at 2-9 (ECF No. 1609980); Environmental and Public Health NGOs Br. at 7-10 (ECF No. 1610004). If EPA can lawfully consider these measures, ignoring them would be arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action that "entirely failed to consider an important aspect of the problem" would be arbitrary and capricious).

Finally, petitioners in this litigation have asserted that the Clean Power Plan interferes with state regulatory authority in ways that trigger both statutory and constitutional concerns. EPA and Respondent-Intervenors have argued in response that Petitioners mischaracterize the effect of the Rule and that the Clean Air Act authorizes the Rule's methods of reducing greenhouse gas emissions from existing power plants. A resolution of these arguments will settle the parties' dispute over the limits on EPA's authority under the Clean Air Act, and determine whether EPA can rely on such limitations if it subsequently decides to revise the Rule.

In short, an abeyance is not warranted in light of the enormous efforts that this Court and the litigants have already invested in the litigation, and the important effect that any ruling will have both on the Clean Power Plan itself and on any future rulemaking by EPA.

III. Holding the Proceeding in Abeyance Would Harm State Intervenors.

Delaying a decision here would concretely harm State Intervenors, many of whom have sought for more than a decade to compel EPA to regulate carbon dioxide emissions from power plants. Ever since the Supreme Court's stay of the Clean Power Plan, a decision from this Court has been an essential prerequisite to clearing the way for enforcement of the Rule's urgently-required pollution guidelines.

EPA argues that Intervenors will not be harmed by abeyance because "no carbon dioxide emission reductions are required from sources until 2022 at the earliest" (Motion at 8), but this argument ignores the Administrator's recent statement to 47 governors that he will support "day-to-day" tolling of compliance deadlines under the Clean Power Plan while this litigation remains pending. *E.g*, Letter from Administrator Pruitt to New York Governor Cuomo (Mar. 30, 2017) (attached as Exhibit 2). Under such an approach, every day of delay in this case would postpone when the Rule's significant emission reduction benefits are realized.

Such delays harm State Intervenors and their residents, who have waited years to obtain relief—under this provision of the Clean Air Act in particular—from carbon dioxide emissions by power plants. EPA found that greenhouse gases, including carbon dioxide, pose a serious danger to public health and welfare in 2009. 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). The experience of State Intervenors bears out this finding. State Intervenors have experienced increased temperatures, leading to increased ozone levels that exacerbate breathing conditions such as asthma and can lead to health problems or death. *See* Declarations in Joint Addendum in Opposition to Stay, ECF No. 1587530, at A3 (California), A61 (Connecticut), A101-02 (Oregon), A243 (Boulder). They have experienced more severe storms, wildfires, and droughts. *See id.* at A2-6 (California), A28-29 (Washington), A60-61 (Connecticut), A101-02 (Oregon), A112-13 (New York), A156-57 (Minnesota), A161 (New Hampshire), A236-38 (Boulder). Coastal areas have experienced higher sea levels, while increased ocean acidity caused by absorption of carbon dioxide has hurt fisheries and coastal wildlife. *Id.* at A5-6 (California), A29 (Washington), A101-102 (Oregon), A112-13 (New York). In South Florida, flooding exacerbated by rising seas is now commonplace, adversely impacting homes, roads, bridges, drinking water, and sewage systems. *Id*. at A249-53 (South Miami), A266-70 (multi-city letter discussing similar hardships faced by other South Florida municipalities, including

Respondent-Intervenor Broward County). These harms have continued since the Rule was stayed. *See, e.g., Our Changing Planet*, U.S. Global Change Research Program for FY 2017 at 2, *available at* https://downloads.globalchange.gov/ocp/ocp2017/Our-Changing-Planet_FY-2017_full.pdf (climate-driven impacts include risks to human health; more frequent and intense storms that threaten food security, infrastructure, and livelihoods; sea level rise and coastal flooding; international stability; and U.S. national security).

Moreover, State Intervenors have worked to reduce domestic greenhouse gas emissions.[8] Nine northeast and mid-Atlantic States—all Respondent-Intervenors here—formed the Regional Greenhouse Gas Initiative, which created a trading program through which power plants can buy and sell allowances to meet agreed-upon limits. State Intervenors Br. at 27 (ECF No. 1610024). California and Minnesota have implemented some of the same measures EPA included in the Rule to reduce emissions in those states. *Id.* at 28. These emissions reductions have

[8] *See, e.g.*, Cal. Code Regs. tit. 17, §§ 95801-96022; Conn. Gen. Stat. § 22a-200c & Conn. Agencies Regs. § 22a-174-31; Del. Code Ann. tit. 7, § 6043 & Del. Admin. Code tit. 7, ch. 1147; Me. Rev. Stat. Ann. tit. 38, ch. 3-B; Md. Code Ann., Envir., § 2–1002(g); Mass. Gen. Laws ch. 21A, § 22 & 310 Mass. Code Regs. 7.70; N.Y. Comp. Codes R. & Regs. tit. 6, Part 251; Or. Rev. Stat. § 469.503(2); R.I. Gen. Laws. § 23-82-4; Vt. Stat. Ann. tit. 30, § 255; Wash. Rev. Code § 80.80.040(b).

been accomplished cost-effectively within growing state and regional economies, without hurting the reliability of the electric grid. *Id.* at 28-29.

But more must be done. The nature of climate change means State Intervenors are harmed by emissions from other states that have not been as proactive. State Intervenors have persistently sought remedies for those harms on a variety of fronts for more than a decade. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*); *New York v. EPA* (D.C. Cir No. 06-1322); *Massachusetts v. EPA*, 549 U.S. 497 (2007). A decision from this Court on the scope of EPA's authority under the Clean Air Act would affect the States' ability to pursue relief from such emissions through the Act or through other means, such as public nuisance suits. *See AEP*, 564 U.S. at 423; Oral Argument Tr. at 172 (comment by Judge Millet expressing concern of a "bait-and-switch" to avoid regulation of existing power plants in private nuisance actions *or* section 111(d)). If these cases are held in abeyance for the foreseeable future, carbon dioxide emissions from power plants – the largest domestic stationary source of such emissions – would remain unregulated, further harming State Intervenors.

The Clean Power Plan is an important step towards fulfilling EPA's obligation to address the ongoing harm caused by global climate change, pursuant to the Clean Air Act section that "speaks directly" to carbon dioxide emissions from power plants. *See AEP*, 564 U.S. at 424. Clean Air Act section 111(d)

preserves a special role for the States, which are responsible for developing standards of performance according to EPA guidelines. *See* Pets. Br. on Core Legal Issues at 75 (ECF No. 1610010) ("It is States that are to submit plans establishing standards of performance . . ."). Accordingly, if EPA no longer will defend the Rule as promulgated, State Intervenors are ideally situated to defend it, as intervenors have done in similar cases involving agency regulations. *See, e.g.*, *Envt'l Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007); *Wyoming v. U.S. Dept. of Agriculture*, 662 F.3d 1209, 1225-26 (10th Cir. 2011), *cert denied* 133 S. Ct. 417 (2012); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F.Supp.2d 3, 5 (D.D.C. 2009).

CONCLUSION

This Court should deny the Motion.

Dated: April 5, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Brian Lusignan, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 4,447 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ *Brian Lusignan*

BRIAN LUSIGNAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Motion to Hold Proceeding in Abeyance was filed on April 5, 2017 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Brian Lusignan
BRIAN LUSIGNAN

EXHIBIT 1

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-299

NATIONAL ASSOCIATION OF MANUFACTURERS, PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOTICE OF EXECUTIVE ORDER AND RELATED AGENCY ACTION AND MOTION OF THE FEDERAL RESPONDENTS TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE

Pursuant to Rule 21.1 of the Rules of this Court, the Acting Solicitor General, on behalf of the federal respondents, provides this notice of an Executive Order and related agency action that may affect this case, and respectfully moves that the briefing schedule be held in abeyance.

1. This case arises from a challenge to the Clean Water Rule, which the United States Environmental Protection Agency (EPA) and the Department of the Army, Army Corps of Engineers (the Army) promulgated respecting the statutory term "waters of the United States" in the Clean Water Act, 33 U.S.C. 1251 et

seq. See 80 Fed. Reg. 37,054 (June 29, 2015). On January 13, 2017, this Court granted a petition for a writ of certiorari to address the question whether the court of appeals erred when it held that it has jurisdiction under 33 U.S.C. 1369(b)(1) to decide petitions to review the Clean Water Rule.

2. On February 28, 2017, the President of the United States signed an Executive Order directing the Administrator of the EPA and Assistant Secretary of the Army for Civil Works to review the Clean Water Rule and to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." A copy of the Executive Order, which has been published at 82 Fed. Reg. 12,497 (Mar. 3, 2017), is attached to this motion. An electronic copy of the Executive Order is available at https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic.

Also on February 28, 2017, the EPA and the Army signed a Federal Register notice announcing their intent to review the Clean Water Rule and to "provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order." A copy of the notice, which has been published at 82 Fed. Reg. 12,532 (Mar. 6, 2017), is attached to this motion. An electronic copy of the notice is available at

https://www.epa.gov/cleanwaterrule/notice-intention-review-and-rescind-or-revise-clean-water-rule.

3. Under the current briefing schedule, petitioner's brief on the merits is due on March 29, 2017, and the government's brief on the merits is due on May 31, 2017. Petitioner has filed an unopposed request for an extension of time to file its opening brief to and including April 13, 2017, to provide an opportunity to consider the effect of the Executive Order and related agency action on this litigation.

Given the circumstances described above, the government respectfully requests that the Court hold the briefing schedule in abeyance. In light of the Executive Order and the notice issued by EPA and the Army, and the attendant prospect that the 2015 Clean Water Rule may be rescinded or revised, the determination whether the court of appeals erred in asserting jurisdiction to review that Rule may ultimately have little significance for the Rule that is currently under review by the court of appeals. Given that possibility, it would be wasteful for the parties and potential amici to brief the jurisdictional issue at this time. Because the court of appeals has issued a nationwide stay of the Clean Water Rule, the Rule will not place any burden on regulated entities while the briefing schedule is held in abeyance.

We have consulted with counsel for petitioner, who has informed us that petitioner has not determined its position on this motion at this time.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record

MARCH 2017

Federal Register
Vol. 82, No. 41
Friday, March 3, 2017

Presidential Documents

Title 3—

The President

Executive Order 13778 of February 28, 2017

Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.

Sec. 2. *Review of the Waters of the United States Rule.* (a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) shall review the final rule entitled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 *Fed. Reg.* 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

(b) The Administrator, the Assistant Secretary, and the heads of all executive departments and agencies shall review all orders, rules, regulations, guidelines, or policies implementing or enforcing the final rule listed in subsection (a) of this section for consistency with the policy set forth in section 1 of this order and shall rescind or revise, or publish for notice and comment proposed rules rescinding or revising, those issuances, as appropriate and consistent with law and with any changes made as a result of a rulemaking proceeding undertaken pursuant to subsection (a) of this section.

(c) With respect to any litigation before the Federal courts related to the final rule listed in subsection (a) of this section, the Administrator and the Assistant Secretary shall promptly notify the Attorney General of the pending review under subsection (b) of this section so that the Attorney General may, as he deems appropriate, inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule.

Sec. 3. *Definition of "Navigable Waters" in Future Rulemaking.* In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos* v. *United States,* 547 U.S. 715 (2006).

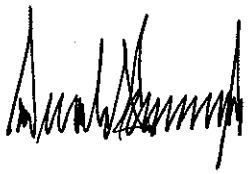
Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
February 28, 2017.

[FR Doc. 2017–04353
Filed 3–2–17; 11:15 am]
Billing code 3295–F7–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[FRL–9959–93–OW]

Intention To Review and Rescind or Revise the Clean Water Rule

AGENCY: U.S. Army Corps of Engineers (Corps), Department of the Army, Department of Defense; Environmental Protection Agency (EPA).

ACTION: Notice of intent.

SUMMARY: In accordance with a Presidential directive, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) announces its intention to review and rescind or revise the Clean Water Rule.

DATES: March 6, 2017.

FOR FURTHER INFORMATION, CONTACT: Ms. Donna Downing, Office of Water (4502–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number 202–566–2428; email *CWAwaters@epa.gov*, and Mr. Gib Owen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 104 Army Pentagon, Washington, DC 20310–0104; telephone number 703–695–4641; email *gib.a.owen.civ@mail.mil*.

SUPPLEMENTARY INFORMATION: The Federal Water Pollution Control Act, originally enacted in 1948, most comprehensively amended in 1972, and known as the Clean Water Act (CWA), seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251 *et seq.* Among other provisions, the CWA regulates the discharge of pollutants into "navigable waters," defined in the CWA as "the waters of the United States." The question of what is a "water of the United States" is one that has generated substantial interest and uncertainty, especially among states, small businesses, the agricultural communities, and environmental organizations, because it relates to the extent of jurisdiction for federal and relevant state regulations.

The EPA and the Department of the Army (collectively, the agencies) have promulgated a series of regulations defining "waters of the United States." The scope of "waters of the United States" as defined by the prior regulations has been subject to litigation in several U.S. Supreme Court cases, most recently in *Rapanos* v. *United States*, 547 U.S. 715 (2006) ("*Rapanos*"). In response to that decision, the agencies issued guidance regarding CWA jurisdiction in 2007, and revised it in 2008.

In response to that guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation. At the conclusion of that rulemaking process, the agencies issued the "Clean Water Rule: Definition of 'Waters of the United States.'" 80 FR 37054 ("2015 Rule") (found at 40 CFR 110, 112, 116, 117, 122, 230, 232, 300, 302 and 401, and 33 CFR 328).

Due to concerns about the potential for continued regulatory uncertainty, as well as the scope and legal authority of the 2015 Rule, 31 states and a number of other parties sought judicial review in multiple actions. Seven states plus the District of Columbia, and an additional number of parties, then intervened in those cases. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court.

On February 28, 2017, the President of the United States issued an Executive Order directing the EPA and the Army to review and rescind or revise the 2015 Rule. Today, the EPA and the Army announce their intention to review that rule, and provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order. In doing so, the agencies will consider interpreting the term "navigable waters," as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*. It is important that stakeholders and the public at large have certainty as to how the CWA applies to their activities.

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *Motor Vehicle Manufacturers Ass'n of the United States, Inc., et al*, v. *State Farm Mutual Automobile Insurance Co., et al.* 463 U.S. 29, 42 (1983) ("*State Farm*"). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *National Ass'n of Home Builders* v. *EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514–15; quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

Through new rulemaking, the EPA and the Army seek to provide greater clarity and regulatory certainty concerning the definition of "waters of the United States," consistent with the principles outlined in the Executive Order and the agencies' legal authority.

Dated: February 28, 2017.

E. Scott Pruitt,

Administrator, Environmental Protection Agency.

Dated: February 28, 2017.

Douglas W. Lamont,

Senior Offical Performing the Duties of the Assistant Secretary of the Army for Civil Works, Department of the Army.

[FR Doc. 2017–04312 Filed 3–3–17; 8:45 am]

BILLING CODE 6560–50–P

EXHIBIT 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

March 30, 2017

The Honorable Andrew Cuomo
Governor of New York
State Capitol
Albany, New York 12224

Dear Governor Cuomo:

On February 9, 2016, the Supreme Court of the United States stayed implementation of the Clean Power Plan (CPP) effectively "suspend[ing] administrative alteration of the status quo." *Nken v. Holder,* 556 U.S. 418, 428 n.1 (2009). Further, pursuant to the Administrative Procedure Act, the Supreme Court has authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Under that precedent, States and other interested parties have neither been required nor expected to work towards meeting the compliance dates set in the CPP. It is the policy of the Environmental Protection Agency (EPA) that States have no obligation to spend resources to comply with a Rule that has been stayed by the Supreme Court of the United States. To the extent any deadlines become relevant in the future, case law and past practice of the EPA supports the application of day-to-day tolling.

The days of coercive federalism are over. Accordingly, I look forward to working with you, your state experts and local communities as we develop a path forward to improve our environment and bolster the economy in a manner that is respectful of and consistent with the rule of law.

Respectfully yours,

E. Scott Pruitt