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)

RESPONSE OPPOSING REQUESTS FOR FURTHER ABEYANCE COMBINED WITH MOTION TO DECIDE THE MERITS OF CASE

This case has been in abeyance for almost one and a half years, during which time the Environmental Protection Agency (EPA) has not implemented any regulation to fulfill its mandatory duty to protect the public from dangerous air pollution. EPA and Petitioners now ask this Court to grant them even more time. This Court should reject this bid and decide the live controversy before it. As Petitioners highlight in their most recent request, their case "has not been mooted." Pet'rs' & Pet'r-Intervenors' Status Report in Support of Continued Abeyance at 2, ECF 1747382 (Aug. 24, 2018). As such, an opinion from this Court could not be advisory. Holding a case in abeyance is an "exercise [of] discretion" that this Court may "decline" to take, as it underscored just two weeks ago when it denied EPA's

request for abeyance in an analogous case. *Utility Solid Waste Activities Group v. EPA*, No. 15-1219, 2018 WL 4000476, at *7 (D.C. Cir. Aug. 21, 2018) ("*Utility Solid Waste*").

EPA and Petitioners bear a heavy burden to persuade this Court to exercise its discretion to grant further abeyance where, as here, abeyance allows the agency to delay fulfilling a mandatory duty without going through the statutory procedures and providing an adequate explanation for doing so. EPA is using abeyance to circumvent the requirement—also emphasized by this Court weeks ago—that an agency must give good reasons to delay implementation of a regulation; its mere desire to reconsider the regulation is insufficient. *See Air Alliance Houston v. EPA*, No. 17-1155, 2018 WL 4000490, at *12 (D.C. Cir. Aug. 17, 2018); *see also Utility Solid Waste*, 2018 WL 4000476, at *9 (discussing the damage that can occur through delay).

Here, EPA, with Petitioners' support, has taken undue advantage of the abeyance, prolonging the delay through a series of notices that do not come close to fulfilling EPA's statutory obligations. EPA's latest proposal (which relies on the very legal interpretations that Petitioners advocated in this litigation) would not mandate any carbon dioxide pollution reductions from power plants and could actually *increase* overall emissions of carbon dioxide and other pollutants. Deciding the case would not limit EPA's ability to pursue a new rulemaking within

the bounds of the statute, and EPA should not be granted further abeyance merely because it prefers here to avoid this Court performing its assigned role in our system of government to say what the law is.

Holding litigation in abeyance is an act of the Court's discretion, which in this case is not warranted. Not deciding the case will lead to a significant waste of resources and, more importantly, critical time, in realizing Congress's directive to EPA to protect our residents and members from the urgent and severe endangerment caused by carbon pollution. As demonstrated again by this summer's extreme heat, storms, and wildfires occurring across this country and around the world, the dangers of climate change are no longer only in the future, and the commitment to even more dangerous impacts deepens with each year of delay in curbing emissions of carbon dioxide and other heat-trapping pollutants. More than a decade has already been lost since the Supreme Court decided *Massachusetts v. EPA*, 549 U.S. 497 (2007), confirming EPA's authority under the Clean Air Act to regulate greenhouses gases, and seven years have passed since the Court recognized in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), that carbon pollution from existing power plants is subject to regulation under section 111(d) of the Act.

The undersigned states, cities, and organizations, all intervenor-respondents in this case, urge the Court to deny EPA's and Petitioners' requests for additional delay, and issue its merits decision forthwith. [1]

Undersigned counsel contacted liaison counsel for the other parties in this case regarding their positions on this motion. Respondent-Intervenor Power Companies support the motion for the reasons stated in their Opposition to Motion for Abeyance, ECF 1669991 (April 6, 2017). Respondent-Intervenors American Wind Energy Association and Solar Energy Industries Association support the motion for the reasons stated in their Opposition to Motion to Hold Proceeding in Abeyance, ECF 1669985 (April 6, 2017). Respondent-Intervenor Advanced Energy Economy supports the motion for the reasons stated in its Opposition to Motion to Hold Case in Abeyance, ECF 1669885 (April 6, 2017). EPA, Petitioners and Petitioner-Intervenors oppose the relief sought in the motion.

STATEMENT

Through Clean Air Act section 111, Congress required EPA to regulate pollution from stationary sources that EPA concludes endanger human health and welfare. 42 U.S.C. § 7411. In 2009, EPA concluded that greenhouse gases pose

[1] Because EPA's and Petitioners' requests for affirmative relief (additional abeyance) were included in status reports, not formal motions, intervenor-respondents have not styled this filing as a "cross-motion."

grave dangers to human health and welfare, a determination that this Court upheld in *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part on other grounds*, 134 S. Ct. 2427 (2014). *See* 80 Fed. Reg. 64,510, 64,530-31 (Oct. 23, 2015) (reaffirming endangerment finding); 74 Fed. Reg. 66,496 (Dec. 15, 2009) (endangerment finding). Power plants account for 28 percent of U.S. greenhouse gases, second only to the transportation sector in their contribution to the pollution that drives destructive climate change.[2]

Notwithstanding the Clean Air Act's clear mandate, and the more than fifteen-year effort of States and public health and environmental organizations to get EPA to fulfill its duty, no federal limits on greenhouse gas emissions from existing fossil-fueled power plants have been implemented. States and environmental groups first petitioned EPA to limit power plant carbon pollution in 2002, and filed suit in this Court in 2006 over the agency's refusal to do so in the course of revising its power plant standards. *See* State & Municipal Resp't-Intervenors' Supp. Br. at 2-3, ECF 1675252 (May 15, 2017). Following remand of that rule to EPA in 2007 for action consistent with *Massachusetts v. EPA*, EPA promulgated the Clean Power Plan, which promised substantial reductions in

[2] https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks (last visited Sept. 3, 2018).

greenhouse gas emissions from existing sources. *Id.*; 80 Fed. Reg. 64,662 (Oct. 23, 2015).

A group of states and industry groups challenged the Clean Power Plan in this litigation. After this Court denied a stay and ordered that the appeals be expedited, the Supreme Court stayed the regulation by a 5-4 vote while this Court and, potentially, the Supreme Court, adjudicated its legality. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016) (enforcement stayed "pending disposition of the applicants' petitions for review" in this Court and "disposition of" any petition for certiorari). Subsequently, this Court, on its own motion, held argument before the en banc court on September 27, 2016—almost two years ago.

Almost one and a half years ago, after the change of presidential administrations, EPA made a bid for delay, asking this Court not to issue its decision, but to hold the case in abeyance for as long as the agency took to review, repeal, or revise the Clean Power Plan. Motion to Hold Cases in Abeyance, ECF 1668274 (Mar. 28, 2017). Petitioners supported EPA in the request. Pet'rs' & Pet'r-Intervenors' Resp. in Support of EPA's Motion to Hold Cases in Abeyance, ECF 1669984 (Apr. 6, 2017). EPA urged the Court to grant abeyance because "only abeyance is certain to maintain … the Supreme Court's stay of the Rule."

Supp. Br. of Resp't EPA in Support of Abeyance at 4, ECF 1675243 (May 15, 2017).

This Court declined to issue the long-term abeyance EPA sought. Instead, it has issued a series of 60-day abeyances. *See* Order, ECF 1673071 (Apr. 28, 2017); Order, ECF 1687838 (Aug. 8, 2017); Order, ECF 1703889 (Nov. 9, 2017); Order, ECF 1720228 (Mar. 1, 2018); Order, ECF 1737735 (June 26, 2018).

In the last year and a half, EPA has issued four different Federal Register notices related to the Clean Power Plan, but has not finalized nor even committed to finalize any new regulation to fulfill its mandatory obligation to curb emissions of carbon dioxide from these sources. EPA has presented each notice to this Court in seeking additional abeyance. While this Court was considering EPA's initial motion for abeyance, EPA put before this Court a "review." Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, ECF1668274 (Mar. 28, 2017); *see* 82 Fed. Reg. 16,329 (Apr. 4, 2017). Later EPA pointed to its proposed repeal. *See, e.g.*, EPA Supp. Status Report at 3-4, ECF 1679311 (June 12, 2017); *see* 82 Fed. Reg. 48,035 (Oct. 16, 2017). Later still, EPA advocated for continued abeyance by citing its Advanced Notice of Proposed Rulemaking (ANPRM) of a possible replacement rule. EPA Status Report at 4, ECF 1712376 (Jan. 10, 2018); *see* 82 Fed. Reg. 61,507 (Dec. 28, 2017). EPA most recently presented its fourth Federal

Register notice on the subject, now proposing to "possibly replace" the Clean Power Plan. EPA Status Report at 4-5, ECF 1747298 (Aug. 24, 2018); *see* 83 Fed. Reg. 44,746, 44,748 (Aug. 31, 2018) ("Proposed Revision").

In opinions accompanying the latest abeyance, Order, ECF 1737735 (June 26, 2018), three judges of this Court expressed concerns about "petitioners' and EPA's treatment of the Supreme Court's order staying implementation of the Clean Power Plan pending judicial resolution … as an indefinite license for EPA to delay compliance" with its mandatory obligations (Tatel, J. and Millet. J., concurring) or their efforts to "hijack[] the Court's equitable power for their own purposes," (Wilkins, J. and Millet, J., concurring).

Public Health and Environmental Intervenor-Respondents filed a letter with the Supreme Court providing an update on proceedings before EPA and before this Court, in response to the suggestion of Judges Tatel and Millett that the parties had a "continuing duty to inform the [Supreme] Court of any development which may conceivably affect the outcome of [a] litigation." *Id.* (Tatel, J. and Millett, J., concurring) (internal quotation marks and citations omitted). Letter from Sean H. Donahue to Honorable John G. Roberts, Jr. (July 27, 2018) (attached to EPA's and Petitioners' August 24, 2018 filings).

On August 31, 2018, EPA published the Proposed Revision, which actually contains three distinct proposals:

- a proposed 111(d) emission guideline that does not require any carbon dioxide reductions from power plants, but instead merely lists potential ways to achieve heat rate improvements at coal-fired steam-generating plants that States can elect to incorporate into state plans;[3]
- a proposal to exempt significant power plant upgrades, including heat rate improvements, from the Clean Air Act's New Source Review program that would allow aging coal- and natural gas-fired plants to extend their lives and increase their total annual pollution without incorporating modern pollution controls; and
- a proposal to revise EPA's existing regulations to significantly lengthen the time it will take to implement existing source standards for this and all future rulemakings under section 111(d).

See 83 Fed. Reg. at 44,746. Unlike the Clean Power Plan, the Proposed Revision entirely fails to address emissions from natural gas-fired combined cycle power plants. *See id.* at 44,761, 44,810.

[3] *See* Ledyard King, *Trump's plan for coal-fired power plants: key takeaways about the EPA clean air proposal*, USA TODAY (August 21, 2018), (quoting EPA's Assistant Administrator for Air and Radiation William Wehrum as saying: "So at the end of the day, there's no floor, there's no maximum…"), *available at* https://www.usatoday.com/story/news/politics/2018/08/21/trumps-plan-coal-plants-key-takeaways-epa-proposal/1052390002 (last visited Sept. 3, 2018).

Because the Proposed Revision does not require any particular degree of emission reduction by any particular deadline, EPA's Regulatory Impact Analysis (RIA) for the Proposed Revision projects possible emissions levels based only upon EPA's speculation about what carbon dioxide reductions *could* occur.[4] It speculates the proposed rule may reduce power sector carbon dioxide emissions by only 1-2 percent below business as usual without the Clean Power Plan. *See* RIA at Table ES-6. Relative to the Clean Power Plan, EPA's analysis forecasts that carbon dioxide emissions will be significantly higher under each of the three policy scenarios it analyzed—up to over 100 million tons greater in 2030. *See* RIA at ES-7, ES-8, Table ES-5 (power sector emissions under Proposed Revision) and 3-40, Table 3-41 (power sector emissions under the Clean Power Plan implemented as contemplated in the 2015 RIA). EPA's RIA further acknowledges that the Proposed Revision will result in increased hospital admissions due to respiratory illness, increased asthma-related emergency room visits, and exacerbation of asthma, and may result in over 1,000 more premature deaths per year by 2030 relative to the Clean Power Plan. *See* RIA at 4-33, Table 4-6. Notably, none of

[4] EPA, Regulatory Impact Analysis for the Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program (Aug. 2018), *available at* https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf (last visited Sept. 3, 2018).

these projections account for pollution increases that could result from the sweeping proposed changes to the New Source Review program, which would affect modifications that are not even undertaken to comply with this proposed rule; as a result of those changes, the Proposed Revision may in fact *increase* carbon pollution and other health-harming pollutants even relative to business as usual without the Clean Power Plan.

ARGUMENT

I. This Court Should Decide the Ripe and Urgent Controversy Before It.

The Clean Air Act requires EPA to promulgate regulations to protect the public from pollution that endangers their health and welfare. As EPA concluded almost a decade ago, greenhouse gas pollution "endangers the public welfare of both current and future generations," and "[t]he risk and the severity of adverse impacts on public welfare are expected to increase over time." 74 Fed. Reg. at 66,498-499. And yet, EPA is currently not implementing any regulations for the largest existing stationary sources of this dangerous pollution.

A. EPA and Petitioners are abusing the Court's abeyance.

Rather than fulfill its obligation to protect the public from this threat, EPA continues to delay action. EPA, with the cooperation of Petitioners, has taken advantage of this Court's abeyances to avoid fulfilling this statutory duty. Almost a year and a half ago, in order to persuade this Court to hold off its decision in this

fully argued case, EPA promised "prompt[]" action by the agency in the "near future." Supp. Br. of Resp't EPA in Support of Abeyance at 4, 6, ECF 1675243 (May 15, 2017). Five months later, EPA issued a proposal to completely repeal the Clean Power Plan, which would leave the agency's statutory obligation unfulfilled. 82 Fed. Reg. 48,035. Through ten status reports, from June 2017 until June 2018, EPA touted the interagency review, comment period, hearings, and consideration of comments on that repeal proposal.

Months after the repeal proposal, EPA changed course, issuing an Advanced Notice of Proposed Rulemaking for a possible replacement rule, but leaving open the possibility that EPA might not propose to do anything. EPA Status Report at 4, ECF 1712376 (Jan. 10, 2018); *see* 82 Fed. Reg. 61,507. Now, almost 18 months after its first abeyance request, EPA has issued a proposal to "possibly replace" the Clean Power Plan, 83 Fed. Reg. at 44,748, with guidelines that actually require no emission reductions and that may in fact increase emissions of carbon dioxide and other harmful pollutants. Each of these steps has had the effect of "stav[ing] off judicial review," *Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012), of the Clean Power Plan—which is the one action currently on the books aimed at actually reducing emissions of carbon dioxide from these sources in order to protect the public from severe endangerment.

EPA's actions constitute precisely the kind of perpetual dodging of judicial review that this Court has warned against. *See id*. EPA has taken advantage of the Court's equitable powers to forestall the emissions reductions required by the Clean Air Act for a year and a half already, and is now asking for considerably more time. It is self-evident that the abeyances have not "ensure[d] that EPA acts in a timely fashion" to fulfill its obligations. *See* Pet'rs' & Pet'r-Intervenors' Resp. in Support of EPA's Mot. to Hold Cases in Abeyance at 4, ECF 1669984 (Apr. 6, 2017). Indeed, in their latest request, Petitioners underscore the "possibility that EPA could decide not to finalize its proposed rules," as well as the fact that complex rulemakings, such as the one EPA has just proposed, can take years to complete. Pet'rs' & Pet'r-Intervenors' Status Report in Support of Continued Abeyance at 3, 7-8, ECF 1747382 (Aug. 24, 2018). This is all the more true considering that EPA's latest proposal is essentially composed of three separate complex rulemakings.[5]

In light of the mandatory duty that EPA is currently flouting and the urgency of the endangerment to human health and welfare, this Court should fulfill its

[5] The inclusion of New Source Review (NSR) as a key feature in the replacement proposal sheds further doubt on the agency's ability to meet its latest pledge to "expeditiously" complete a rulemaking. EPA Status Report at 1, 5, ECF 1747298 (Aug. 24, 2018). NSR is an area in which EPA concedes that prior similar rulemakings took years to complete (and were then either partially or wholly vacated by this Court). *See* 83 Fed. Reg. at 44,779-80.

"'virtually unflagging'" "'obligation to hear and decide' cases within its jurisdiction…." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)) (additional citations omitted). The Petitioners who brought this case have never suggested that the controversy is unripe and, to the contrary, have highlighted "this Court's responsibility to consider the legality of the Rule." Supp. Br. of Pet'rs & Pet'r-Intervenors at 2, ECF 1675250 (May 15, 2017). In their most recent request, they insist that their case "has not been mooted." Pet'rs' & Pet'r-Intervenors' Status Report in Support of Continued Abeyance at 2, ECF 1747382 (Aug. 24, 2018). There is no law, rule, or practice that precludes this Court from deciding a live case before it—especially one fully briefed and argued—because an agency may or may not elect to revise the subject rule. Rather, holding a case in abeyance is an "exercise [of] discretion" that this court may "decline" to take. *Utility Solid Waste*, 2018 WL 4000476, at *7.

B. EPA and Petitioners have not demonstrated that further abeyance is warranted.

EPA's and Petitioners' original reasons for holding this case in abeyance, viewed in light of the passage of a year and a half, simply do not hold. They argued that abeyance would conserve judicial resources and would promote the fairness and integrity of the ongoing administrative process. *See* Mot. to Hold Cases in Abeyance at 7, ECF 1668274 (Mar. 28, 2017). Not so. EPA has now proposed a

new rule based upon the premises that the Clean Air Act (1) requires the regulation of greenhouse gas pollution from power plants, but (2) prohibits the "best system of emission reduction" identified in the Clean Power Plan. 83 Fed. Reg. at 44,748, 44,751. These are the same legal questions that have been fully briefed and argued to this Court.

There is nothing efficient about delaying the disposition of fully-briefed legal issues in a live case to await the outcome of a lengthy new rulemaking involving the same issues, and the inevitable court challenges that will follow. Nor is there anything unfair about this Court explicating the applicable law in the present case. *See Utility Solid Waste*, 2018 WL 4000476, at *15 (declining EPA's request for a remand to reconsider its interpretation of a statute because the claim "involve[d] a question—the scope of the EPA's statutory authority—that is intertwined with any exercise of agency discretion going forward"); *cf. Air Alliance Houston*, 2018 WL 4000490, at *12 ("EPA nowhere explains how the effectiveness of a rule would prevent EPA from undertaking notice and comment or other tasks for reconsideration [or] why delay is necessary to EPA's process."). Indeed, given the years to complete complex rulemakings and judicial review, coupled with the four-year Presidential term, a practice of holding cases in abeyance pending reconsideration threatens to grind the key judicial function of

saying what the law is to a halt and ultimately lead to significant delays in rulemaking due to uncertainty about the state of the law.

II. The Other Alternatives Before the Court—Abeyance and Remand—Prejudice the Parties, While Deciding the Case Does Not.

Deciding the case now will not prejudice any party. The Petitioners who brought this case have not sought to withdraw it; indeed, they continue to insist it presents a live controversy. While their latest filing requests continued abeyance, nowhere do they argue that they would be prejudiced by the Court issuing its decision. That decision might influence EPA's ongoing administrative process by explicating the relevant law, but it would not block EPA from revising or replacing the Clean Power Plan consistent with its statutory obligations. If a party appeals this Court's decision to the Supreme Court, that Court has significant experience adjudicating cases where an agency no longer defends a law; it can, at any rate, determine the best course forward in light of its own stay. Meanwhile, this Court will have fulfilled its obligation to decide the ripe case before it, and have followed the course set by the Supreme Court when it issued its stay of the Clean Power Plan pending expedited litigation.

Unlike deciding the case, the other alternatives before the Court are prejudicial to the parties and the public interest. Continued abeyance would permit Petitioners and EPA to continue to improperly use the Court's equitable authority to avoid the agency's obligation to reduce emissions without finalizing a lawful

rule achieving that result (something EPA could not do under the statute). *See* Order, ECF 1737735 (June 26, 2018) (Wilkins, J., and Millett, J., concurring). As described below, continued abeyance is prejudicial to the states and cities and their residents, and to public health and environmental groups and their members, contrary to Petitioners' blithe contention that there is "no prejudice to the parties" from further abeyance. Pet'rs & Pet'r-Intervenors' Status Report in Support of Continued Abeyance at 5, ECF 1747382 (Aug. 24, 2018). Combined with the stay, further abeyances would ensure that these residents and members continue to be denied regulatory protection from severe endangerment—protection promised to the American people by Congress—even though no court has ruled on the merits of the Clean Power Plan.

Petitioners' latest filing suggests that abeyance "is the Court's ordinary practice" where an agency decides to review a challenged rule. *Id.* But this is no ordinary case. Petitioners do not point to a single other instance in which this Court has held a challenge in abeyance where the challenged rule was judicially stayed, much less one where the combination of stay and abeyance resulted in an unmet mandatory statutory obligation.

As the delay in implementing the Clean Power Plan continues, the mounting impacts from more devastating storms, more destructive wildfires, and more extensive flooding attributable to climate change continue to harm our residents

and members. *See, e.g.*, State & Municipal Resp.-Intervenors' Opp. to Mot. to Hold Proceedings in Abeyance at 16-17, ECF 1669699 (Apr. 5, 2017).[6] Once in the atmosphere, power plant emissions will persist for a century or longer, imposing severe climate impacts on today's children and future generations as well.[7] As EPA previously told this Court, "[n]o serious effort to address the monumental problem of climate change can succeed without meaningfully limiting these plants' CO_2 emissions." Resp. EPA's Final Br. at 10, ECF 1609995 (Apr. 22, 2016).

Although remand would constitute a "disposition of the applicants' petitions for review," Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016), which might eventually lead to the stay being lifted, that remedy would result in a significant waste of time and resources. If the Court remands the case, questions that are ripe for decision now will be presented again, but only after EPA has wasted years of time while climate pollution accumulates in the atmosphere—

[6] According to the RIA accompanying the Proposed Revision, the Clean Power Plan—if implemented today—would achieve as much as an additional 117 million tons of carbon pollution reduction in 2030 relative to "business as usual" trends. *See* EPA, RIA at 3-40, Table 3-41.

[7] *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), *available at* https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/basis_for_denial_of_petitions_to_reconsider_and_petitions_to_stay_the_final_cpp.pdf (last visited Sept. 3, 2018).

and after the public, EPA, and this Court have devoted considerably more resources towards continuing to debate and consider the very questions that have been fully briefed and argued to the Court in this case.[8] In the context of this dangerous pollution, those lost years are highly consequential.

[8] If the Court remands the case, Petitioners could lose their ability to challenge the Clean Power Plan in the future by operation of the Clean Air Act's requirement, 42 U.S.C. § 7607(b), that challenges be filed within 60 days of the agency action's publication, which in this case was October 23, 2015. *See Utility Solid Waste*, 2018 WL 4000476, at *16 ("When combined with the statutory provision requiring any challenge to be brought within 90 days of the Rule's promulgation, the legal effect of remand without vacatur is simple: The Rule remains in force and Industry Petitioners cannot bring another challenge until and unless the EPA takes additional regulatory action."). This result, however, would not be unfair to Petitioners, who, while insisting that they have not abandoned their claims, have chosen not to press them for over a year and a half. Petitioners should not be allowed to delay regulation for years via abeyance while they seek their preferred resolution with EPA *and then*, if EPA's resolution does not satisfy them, obtain further delay via a stay pending actual court review.

CONCLUSION

This Court should reject EPA's and Petitioners' requests for further abeyance and should proceed to decide the case.

Dated: September 4, 2018

Respectfully Submitted,

FOR ENVIRONMENTAL DEFENSE FUND

Susannah L. Weaver
Sean H. Donahue
Donahue, Goldberg & Weaver, LLP
1111 14th Street, N.W., Suite 510A
Washington, D.C. 20005
(202) 569-3818
susannah@donahuegoldberg.com

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

FOR THE STATE OF NEW YORK

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

/s/ Brian Lusignan[9]

Steven C. Wu
Deputy Solicitor General
David S. Frankel
Assistant Solicitor General
Michael J. Myers
Senior Counsel for Air Pollution and Climate Change Litigation
Morgan A. Costello
Brian M. Lusignan
Assistant Attorneys General
The Capitol
Albany, NY 12224
(518) 776-2400

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

FOR THE STATE OF CALIFORNIA

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

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

FOR THE STATE OF CONNECTICUT

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

FOR THE STATE OF DELAWARE

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

FOR THE STATE OF HAWAII

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

FOR THE STATE OF ILLINOIS

LISA MADIGAN
ATTORNEY GENERAL
Matthew J. Dunn
Gerald T. Karr
Daniel I. Rottenberg
Assistant Attorneys General
69 W. Washington Street, 18th Floor
Chicago, IL 60602
(312) 814-3816

FOR THE STATE OF IOWA

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

FOR THE STATE OF MAINE

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

FOR THE STATE OF MARYLAND

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

FOR THE COMMONWEALTH OF MASSACHUSETTS

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

FOR THE STATE OF MINNESOTA, BY AND THROUGH THE MINNESOTA POLLUTION CONTROL AGENCY

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

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

FOR THE STATE OF NEW MEXICO

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

FOR THE STATE OF OREGON

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

FOR THE STATE OF RHODE ISLAND

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

FOR THE STATE OF VERMONT

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

FOR THE COMMONWEALTH OF VIRGINIA

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

FOR THE STATE OF WASHINGTON

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

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
ATTORNEY GENERAL
Loren L. AliKhan
Solicitor General
Office of the Attorney General
441 Fourth Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 727-6287

FOR THE CITY OF NEW YORK

ZACHARY W. CARTER
CORPORATION COUNSEL
Susan E. Amron
Senior Counsel
Katherine C. Schmid
Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319

FOR BROWARD COUNTY, FLORIDA

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

FOR THE CITY OF BOULDER

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

FOR THE CITY OF PHILADELPHIA

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

FOR THE CITY OF CHICAGO

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

FOR THE CITY OF SOUTH MIAMI

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

FOR AMERICAN LUNG ASSOCIATION, CLEAN AIR COUNCIL, CLEAN WISCONSIN, CONSERVATION LAW FOUNDATION, AND THE OHIO ENVIRONMENTAL COUNCIL

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
114 State Street, 6th Floor
Boston, MA 02109
(617) 624-0234, ext. 156

FOR NATURAL RESOURCES DEFENSE COUNCIL

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

FOR CENTER FOR BIOLOGICAL DIVERSITY

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

FOR SIERRA CLUB

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Massachusetts Avenue, N.W., Suite 702
Washington, D.C. 20036
(202) 667-4500

FOR WESTERN HIGHLANDS CONSERVANCY, OHIO VALLEY ENVIRONMENTAL COALITION, COAL RIVER MOUNTAIN WATCH, KANAWHA FOREST COALITION, MON VALLEY CLEAN AIR COALITION, AND KEEPERS OF THE MOUNTAINS FOUNDATION

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
(304) 342-5588

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Michael J. Myers, 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 4,353 words.

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/s/ *Brian Lusignan*
BRIAN LUSIGNAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Requests for Additional Abeyance Combined with Motion to Decide Merits of Case was filed on September 4, 2018 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