

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.,)	
)	
<i>Petitioners,</i>)	
)	
v.)	No. 15-1363
)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,)	
)	
<i>Respondents.</i>)	
)	

**STATE AND MUNICIPAL INTERVENORS’
OPPOSITION TO EPA’S REQUEST FOR FURTHER ABEYANCE**

The undersigned State and Municipal Intervenors (State Intervenors) oppose the Environmental Protection Agency’s renewed request for abeyance of this litigation “pending the conclusion of rulemaking.” *See* EPA Status Rep. (filed May 2, 2018, Doc. No. 1729161), at 5. It has now been over a year since this Court’s April 2017 grant of EPA’s initial motion for abeyance premised on additional rulemaking, and EPA has neither completed a rulemaking nor even committed to a deadline for doing so. State Intervenors reiterate their continued opposition to EPA’s attempt to stave off judicial review of the legality of the Clean Power Plan based on EPA’s plans to repeal (and *possibly* replace) the Plan at some undisclosed future date. Nothing in EPA’s latest filing provides a persuasive

reason for this Court to further refrain from issuing a ruling on the merits of this critically-important measure limiting power plant pollution that is harming State Intervenor. EPA's request should be denied.

First, with respect to EPA's proposed repeal of the Clean Power Plan on the grounds that the Rule exceeds EPA's legal authority, *see* 82 Fed. Reg. 48,035 (Oct. 16, 2017), the agency provides no new information to warrant additional abeyance, only noting that the public comment period on the proposal has now ended. *See* May Status Rpt., ¶ 5 ("EPA is currently reviewing the comments submitted and considering what further action to take on the proposal"). Nor has EPA provided a firm deadline for completion of this rulemaking. Moreover, as previously noted, this Court need not wait for EPA to render its verdict on the legality of the Clean Power Plan given the exhaustive briefing and argument that has already taken place in the case. *See* State Intervenor's Opp. (filed Jan. 17, 2018, Doc. No. 1713215) at 2.

Second, EPA's Advance Notice of Proposed Rulemaking on "any new potential rule" to replace the Clean Power Plan, *see* 82 Fed. Reg. 61,507 (Dec. 28, 2017), likewise does not justify further abeyance of this case, as explained in State Intervenor's previous opposition. *See id.* at 2-3. The only new factual grounds EPA offers in its May status report is that "EPA is preparing a proposed rulemaking package that will be published in the Federal Register for public comment." *See*

May Status Rpt., ¶ 6. But this representation regarding a possible replacement does not even include a start date for publishing the proposal, much less an end date for promulgating a final rule. EPA's apparent lack of urgency in considering a potential replacement rule to address "the Nation's most important and urgent environmental challenge," EPA Final Brief in *West Virginia v. EPA* (filed April 22, 2016, Doc. No. 1609995) at 61, undermines the credibility of the agency's request.

State Intervenors again reiterate the other reasons cited in our prior filings why a merits ruling should be issued without further delay, including (1) the Court's "virtually unflagging" obligation to decide live cases or controversies, *see* State Intervenors' Resp. at 4, State Intervenors' Supp. Br. (filed May 15, 2017, Doc. No. 1675252) at 12-14, and State Intervenors' Opp. to Motion for Abeyance (filed April 5, 2017, Doc. No. 1669699) at 4-12; and (2) the fact that judicial economy would be advanced by a ruling, *see* State Intervenors' Resp. at 4-5 and State Intervenors' Opp. to Motion for Abeyance at 12-15.

For these reasons, the Court should reject EPA's request and rule on the merits of the Clean Power Plan. If the Court disagrees, and decides that further abeyance is appropriate, State Intervenors request that the Court continue to limit the period of any abeyance to 60 days and require EPA to file regular status reports.

Dated: May 9, 2018

Respectfully Submitted,

FOR THE STATE OF NEW YORK

BARBARA D. UNDERWOOD
ACTING ATTORNEY GENERAL

/s/ Michael J. Myers¹

Steven C. Wu
Deputy Solicitor General
David S. Frankel
Assistant Solicitor General
Michael J. Myers
Morgan A. Costello
Brian M. Lusignan
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2400

¹ Counsel for the State of New York represents that the other parties listed in the signature blocks below 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 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
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 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 St., 18th Floor
Chicago, IL 60602
(312) 814-3816

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 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 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 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 STATE OF MINNESOTA

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 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 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 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 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 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
James C. McKay, Jr.
Senior Assistant Attorney General
Office of the Attorney General
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

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 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 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 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 PHILADELPHIA FOR THE CITY OF SOUTH MIAMI

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

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

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 622 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/ Michael J. Myers
MICHAEL J. MYERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State and Municipal Intervenor's Opposition to EPA's Request for Additional Abeyance was filed on May 9, 2018 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