

ORAL ARGUMENT HELD SEPTEMBER 27, 2016**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|---------------------------------|---|---------------------|
| STATE OF WEST VIRGINIA, ET AL., |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | No. 15-1363 (and |
| |) | consolidated cases) |
| UNITED STATES ENVIRONMENTAL |) | |
| PROTECTION AGENCY, ET AL., |) | |
| |) | |
| Respondents. |) | |
| |) | |

EPA STATUS REPORT

Pursuant to this Court’s order of November 9, 2017, Respondents United States Environmental Protection Agency, et al. (“EPA”), hereby provide the Court with their scheduled 30-day status report.

1. These cases involve numerous consolidated petitions for review of an EPA rule entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” (“the Rule”). 80 Fed. Reg. 64,662 (Oct. 23, 2015). The Supreme Court granted applications for a stay of the Rule pending judicial review on February 9, 2016. Order, West Virginia v. EPA, No. 15A773. Following full merits briefing, oral argument was held before this Court, sitting en banc, on September 27, 2016.

2. On March 28, 2017, the President of the United States issued an Executive Order establishing the policy of the United States that executive departments and agencies “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.” Executive Order, “Promoting Energy Independence and Economic Growth,” § 1(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). With respect to the Rule in particular, the Executive Order directs the Administrator of EPA to “immediately take all steps necessary” to review it for consistency with these and other policies set forth in the Order. Id. § 4. The Executive Order further instructs the agency to “if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding” the Rule. Id.

3. In accordance with the Executive Order and his authority under the Clean Air Act, the EPA Administrator signed a Federal Register notice on March 28, 2017, announcing EPA’s review of the Rule and noting that if EPA’s review “concludes that suspension, revision or rescission of this Rule may be appropriate, EPA’s review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law.” “Review of the Clean Power Plan,” 82 Fed. Reg. 16,329, 16,329 (Apr. 4, 2017).

4. Based on these significant developments, EPA filed a motion on March 28, 2017, to hold these cases in abeyance pending completion of EPA's review and any resulting forthcoming rulemaking. ECF No. 1668274. By order dated April 28, 2017, this Court held the cases in abeyance for 60 days and directed EPA to file status reports at 30-day intervals from the date of the order. Id. The Court further directed the parties to file supplemental briefs by May 15, 2017, addressing "whether these consolidated cases should be remanded to the agency rather than held in abeyance." ECF No. 1673071. EPA timely submitted its supplemental brief and advocated continuing to hold these cases in abeyance for the reasons explained therein. ECF No. 1675243. By order dated August 8, 2017, the Court held the cases in abeyance for an additional 60 days and directed EPA to continue to file status reports at 30-day intervals. ECF No. 1687838. On November 9, 2017, the Court issued a further order holding the cases in abeyance for an additional 60 days and directing EPA to continue to file status reports at 30-day intervals, beginning 30 days from the date of that order. ECF No. 1703889.

5. On October 10, 2017 the Administrator signed a Federal Register notice proposing to repeal the Clean Power Plan on the grounds that it exceeds EPA's statutory authority under a proposed change in the Agency's interpretation of section 111 of the Clean Air Act, 42 U.S.C. § 7411. The proposed rule was published in the Federal Register on October 16, 2017, 82 Fed. Reg. 48,035. On November 8, 2017, EPA issued a notice scheduling public hearings on the proposal for November 28 and

29, 2017, and extending the public comment period on the proposed rule until January 16, 2018. 82 Fed. Reg. 51,787. On November 28 and 29, 2017, EPA held the public hearings. The Administrator has announced that EPA will be holding three additional public listening sessions on dates to be announced. See <https://www.epa.gov/newsreleases/epa-announces-additional-public-listening-sessions-proposed-repeal-clean-power-plan>.

6. EPA is further considering the scope of any potential new rule under section 111(d) of the Clean Air Act to regulate greenhouse gas emissions from existing electric utility generating units. EPA expects to sign in the upcoming weeks an Advance Notice of Proposed Rulemaking that will solicit information on systems of emission reduction that are in accord with the legal interpretation that has been proposed by EPA.

7. For the reasons set forth in EPA's March 28, 2017 Motion to Hold Cases in Abeyance (ECF No. 1668274) and May 15, 2017 Supplemental Brief in Support of Abeyance (ECF No. 1675243), these cases should remain in abeyance pending the conclusion of rulemaking.

Respectfully submitted,

ERIC GRANT
Deputy Assistant Attorney General

DATED: December 11, 2017 BY: /s/ Chloe H. Kolman
ERIC G. HOSTETLER
NORMAN L. RAVE, JR.
BRIAN H. LYNK
AMANDA SHAFER BERMAN
CHLOE H. KOLMAN
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Phone: (202) 305-2326
Email: eric.hostetler@usdoj.gov

Of Counsel:

Lorie Schmidt
Elliott Zenick
Scott J. Jordan
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Status Report have been served through the Court's CM/ECF system on all registered counsel this 11th day of December, 2017.

/s/ Chloe H. Kolman
Counsel for Respondent