

EN BANC 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.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Respondents.

No. 15-1363 (and
consolidated cases)

**PETITIONERS' AND PETITIONER-INTERVENORS' RESPONSE IN
OPPOSITION TO MOTION TO DECIDE THE MERITS OF THE CASE**

Petitioners and Petitioner-Intervenors (collectively “Petitioners”) respectfully submit this response opposing the motion of Respondent-Intervenor Public Health Organizations, Environmental Organizations, and State and Municipal Governments (“Movants”) seeking to remove this case from abeyance and requesting the Court to issue a decision on the merits. *See* Resp. Opposing Requests for Further Abeyance Combined with Mot. to Decide the Merits of Case, ECF No. 1748706 (Sept. 4, 2018) (“Motion”). As explained below, this Court should continue holding the case in abeyance pending completion of the U.S. Environmental Protection Agency’s (“EPA” or “Agency”) review of the Clean Power Plan.

Movants present nothing new in their Motion. Many of these same arguments were presented to the Court in April 2017 when the same parties first addressed EPA's motion to place the case in abeyance pending EPA's review of the Clean Power Plan. *See* State & Municipal Resp't-Intervenors' Opp'n to Mot. to Hold Proceeding in Abeyance, ECF No. 1669699 (Apr. 5, 2017) ("States' Abeyance Opp'n"); Resp't-Intervenor Pub. Health & Env'tl. Organizations' Opp'n to Mot. to Hold Cases in Abeyance, ECF No. 1669759 (Apr. 5, 2017) ("ENGOs' Abeyance Opp'n"). The only difference now is that the Agency has proposed a new rule to replace the Clean Power Plan and EPA's review is nearing completion. 83 Fed. Reg. 44,746 (Aug. 31, 2018) ("Replacement Proposal").

Movants thus try a different tack. Where Movants previously argued that abeyance was inappropriate because administrative review may take too long, their concern now seems to be that continued abeyance is inappropriate because that review is almost done.¹ This request is a transparent effort to have this Court issue an eleventh-hour opinion addressing the legal issues that are raised in the ongoing Replacement Proposal before that rule is finalized. Even a decision upholding the Clean Power Plan would not actually result in that rule taking effect, as it has been

¹ Petitioners and Movants are in agreement that it would be inappropriate to remand this case to EPA, albeit for different reasons. *Compare* Motion at 18-19, *with* Pet'rs' Status Report at 4-5.

stayed by the Supreme Court and that stay by its terms would continue during the pendency of review by that Court.

Issuing a decision now, as Movants seek, would effectively amount to an advisory opinion regarding EPA's soon-to-be-completed rulemaking. To the extent Movants believe EPA's proposed actions in response to that review are unlawful, they should proceed in the ordinary course: They should present their objections in rulemaking comments to EPA and seek judicial review of the final rule if they believe the Agency has failed adequately to address those concerns, particularly given that the legal issues presented by the Replacement Proposal are likely to be distinct from those at issue in this case. Attempting to resolve them here is improper, and ultimately would serve no purpose for two reasons. First, any decision on the Clean Power Plan would likely be rendered moot shortly after issuance by its repeal and replacement, and second, due to the Supreme Court's stay, the Clean Power Plan would almost certainly never go into effect, not even for the shortest of times.

ARGUMENT

EPA has proposed to repeal the Clean Power Plan and to promulgate new emission guidelines governing greenhouse gas emissions from existing power plants in its place. *See* 82 Fed. Reg. 48,035 (Oct. 16, 2017) ("Repeal Proposal"); 83 Fed. Reg. at 44,746. As this Court has repeatedly recognized, abeyance is the appropriate approach when an agency is revisiting a challenged regulation, especially when that review is the result of a new administration's change in policy. *See* Suppl. Br. of Pet'rs

& Pet'r-Intervenors, ECF No. 1675250 (May 15, 2017) ("Supplemental Brief"); Pet'rs & Pet'r-Intervenors' Status Report in Support of Continued Abeyance, ECF No. 1747382 (Aug. 24, 2018) ("Pet'rs' Status Report"). This established practice is a sound one for several reasons, not least of which is that any decision by this Court at this late stage in the Agency's rulemaking process on the legality of the Clean Power Plan would effectively amount to an advisory opinion. If EPA repeals or replaces the Clean Power Plan as the Agency has proposed, the relief requested in the petitions for review will be unavailable because that rule will no longer exist. That outcome has only become more likely since this Court first decided to place the case in abeyance at the outset of EPA's review.

Where "[e]ach cause of action challenge[s] the validity of" a regulation, and "that regulation no longer exists, [the Court] can do nothing to affect [petitioners'] rights relative to it, thus making th[e] case classically moot for lack of a live controversy." *Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016); see also *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388-89 (D.C. Cir. 2012) (holding case in abeyance where EPA's proposed course "if adopted, would necessitate substantively different legal analysis and would likely moot the analysis we could undertake if deciding the case now"); *Larsen v. U.S. Navy*, 525 F.3d 1, 4-5 (D.C. Cir. 2008) (challenge to withdrawn policy was moot); *Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1190-91 (D.C. Cir. 2004) (similar); cf. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 n.3 (1994) (noting that a prior suit "became moot

on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order”).

Further, this is not a case where some of the legal issues raised by the challenged rule will necessarily survive EPA’s action rescinding or modifying it. In *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286 (D.C. Cir. 2000), although EPA had decided not to defend the challenged rule and moved for the Court to vacate it, the Court held EPA’s request would not obviate the need for a decision in the case because the petitioners sought broader relief than vacatur and the Court’s opinion on the rule’s lawfulness was necessary to address those remedy issues. *Id.* at 1290. Here, EPA’s rescission or replacement of the Clean Power Plan could very well resolve all of Petitioners’ challenges. Whether there is a need for a decision on aspects of the Clean Power Plan, however, will be known only after EPA’s proposed actions are finalized and it can be determined whether Petitioners’ challenges to the Clean Power Plan have been resolved.

Moreover, even if the Court were to issue a decision before EPA takes final action on its proposals to repeal and/or replace the Clean Power Plan, EPA’s forthcoming action could still moot all or part of the case, and the parties would be entitled to seek vacatur of the Court’s ruling in this Court, *see Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc), or in the Supreme Court, *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (“When a civil case becomes moot pending appellate adjudication, [t]he established practice ... in the federal system ...

is to reverse or vacate the judgment below and remand with a direction to dismiss.”) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); see also *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam). Indeed, the Supreme Court is unlikely to allow such important legal issues to be determined by a decision that it may not be able to review due to intervening agency action mooted the case. See *Munsingwear*, 340 U.S. at 40 (vacatur is proper to “clear[] the path for future relitigation of the issues”); see also *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961) (“We think the principle enunciated in *Munsingwear* at least equally applicable to unreviewed administrative orders....”); cf. *Relf v. Weinberger*, 565 F.2d 722, 727 (D.C. Cir. 1977) (per curiam) (vacating orders where agency announced its “inten[tion] to issue a new notice of rule making ... at the conclusion of which it will promulgate [new] comprehensive regulations”).

Perhaps recognizing this, Movants do not attempt to hide their true aim: to obtain a decision from this Court that “might influence EPA’s ongoing administrative process by explicating the relevant law.” Motion at 16. But it is not the proper role of this Court to issue such prospective guidance on the law, even if doing so might save “critical time” by jumping ahead to judicial review before EPA takes final action on its Repeal Proposal and Replacement Proposal. *Id.* at 3; see also *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (denying a request to review the legality of the proposed Clean Power Plan because the rule was not yet final). If the Movants take issue with any aspect of those proposed actions, the appropriate forum to raise those

issues is in rulemaking comments on the proposed rules—not in this case. And if their concerns are not addressed in any final action EPA takes in the coming months, Movants can litigate those issues by filing a petition for review of that final action.

Movants repeatedly suggest that EPA's Replacement Proposal is deficient and that this purported deficiency somehow weighs in favor of issuing a decision in this case. As an initial matter, Movants mischaracterize important aspects of the Replacement Proposal. They argue the proposed emission guideline “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.” Motion at 9. Like any emission guideline, the Replacement Proposal would not establish emission standards directly applicable to individual sources. As the Clean Power Plan itself notes, it “does not directly affect EGU owners or operators in your State.” 80 Fed. Reg. 64,662, 64,952 (Oct. 23, 2015) (promulgating 40 C.F.R. § 60.5840(a)). Rather, as section 111(d) of the Clean Air Act and EPA's implementing regulations require, the proposal designates the best system of emission reduction for the source category and provides guidance for *states* to use in developing state plans that include performance standards for each affected unit within the state. 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.22; 83 Fed. Reg. at 44,809 (proposed 40 C.F.R. § 60.5755a). And in setting those standards, the Replacement Proposal *requires* states to consider the degree of emission limitation

achievable through applicable heat rate improvements at the unit. 83 Fed. Reg. at 44,808-09 (proposed 40 C.F.R. §§ 60.5740a(a)(1), 60.5755a(a)(2)).

Movants also note disparagingly that the Replacement Proposal is projected to reduce power sector carbon dioxide emissions by up to 2 percent below “business as usual.” Motion at 10. But they neglect to note that the Clean Power Plan itself would reduce those emissions by only 3 percent below “business as usual.”² The Replacement Proposal, like the Clean Power Plan, would keep the United States on track to reduce greenhouse gas emissions from the power sector by at least 32% below 2005 levels by 2020. RIA at 3-15, Tbl. 3-6.

Regardless, Movants’ objections are directed at a *proposed* rule that may or may not be finalized in its current form. This Court should not issue a decision to resolve legal issues that may not even exist once the rule becomes final. In any event, the legal issues presented in a review of the Replacement Proposal (if finalized) are likely to be different from those presented in this case—a decision on whether the Clean Power Plan exceeds EPA’s authority under section 111(d) of the Clean Air Act may not even be relevant in determining whether EPA erred in choosing another path. If Movants oppose the Replacement Proposal, the Clean Air Act provides Movants with

² 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, EPA-452/R-18-006, at ES-8, Tbl. ES-5 (Aug. 2018), Doc. No. EPA-HQ-OAR-2017-0355-21182 (“RIA”).

a direct avenue to this Court through the filing of a petition for review of EPA's final action under section 307(b) of the Clean Air Act. 42 U.S.C. § 7607(b).

Although Movants accuse EPA and Petitioners of abusing the Court's grant of abeyance to indefinitely forestall regulation of greenhouse gas emissions from existing power plants, Motion at 16, EPA is proceeding with its review of the Clean Power Plan expeditiously. *See* Pet'rs' Status Report at 7-8 (describing progress of review in context of other complex rulemakings). Indeed, EPA is proceeding much more quickly than the 3 or 4 year period of time Movants, in their submissions opposing the Court's first grant of abeyance in this case, anticipated EPA's review could take. States' Abeyance Opp'n at 7; ENGOs' Abeyance Opp'n at 5. EPA currently expects to take final action on its review "by the first part of 2019, after consideration of public comments," putting those administrative proceedings on track for completion within 2 years or less from when they commenced. EPA Status Report at 5 ¶ 11, ECF No. 1747298 (Aug. 24, 2018).

Finally, although briefing and oral argument have taken place on challenges to the Clean Power Plan in Case No. 15-1363 and consolidated cases, there are also additional challenges to that rule that ripened upon the denial of petitions for reconsideration that have yet to be briefed or argued. *See, e.g.*, Joint Mot. to Sever & Consolidate, ECF No. 1663046 (Feb. 24, 2017). Some of those challenges involve notice issues that are critical to the fundamental legal validity of the Clean Power Plan and would need to be addressed in any decision by this Court.

To decide the validity of the Clean Power Plan, therefore, the Court would need to expend significant resources to resolve the pending motions to consolidate, accept briefing and argument on the additional issues that ripened upon EPA's denial of the petitions for reconsideration, resolve all issues, issue a decision for the *en banc* Court (along with any potential separate concurrences or dissents), and deal with any petitions for rehearing that may be filed. The non-prevailing parties would surely file protective petitions for writs of certiorari in the Supreme Court, requiring all of the numerous parties and the Justices to expend further resources. Given the large number of parties and counsel involved in this matter and the complexity of the issues, such an effort would be extensive. And because, as explained above, the case could ultimately be mooted by EPA's final action on review of the Clean Power Plan, all of this effort would likely be wasted.

By contrast, continuing to hold these cases in abeyance until EPA finalizes its rulemaking by early 2019 conserves judicial and party resources and would not prejudice the parties. Movants' quarrel is not ultimately with abeyance, but with the Supreme Court's decision to stay the Clean Power Plan. Movants argue that they are prejudiced because while the Clean Power Plan continues to be stayed, they are "denied regulatory protection from" existing power plants' greenhouse gas emissions.³

³ Movants are incorrect that these sources' emissions are subject to "no federal limits." Motion at 5. Existing power plants may be subject to standards of performance for greenhouse gases under section 111(b) of the Clean Air Act if they are modified or reconstructed, 40 C.F.R. pt. 60 Subpt. TTTT, and may be subject to

Motion at 17-18. Movants ignore that the Supreme Court granted an extraordinary stay in this case because it presumably concluded both that the Clean Power Plan was likely unlawful and that imposing that unlawful rule on Petitioners would cause them irreparable harm. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

In light of that stay, a decision by this Court would have no near-term practical effect. The Supreme Court has stayed the Clean Power Plan pending disposition of any petitions for writs of certiorari (or a decision on the merits if the petitions are granted).⁴ *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773). Thus, even if this Court were to issue a decision upholding the Clean Power Plan, that rule would not take effect unless and until the Supreme Court were to resolve the inevitable petitions for writs of certiorari and resolve them in Movants' favor, long before which EPA would almost certainly have concluded its rulemaking. Where the Court's institutional interests favor deferring review, any hardship a party would suffer from deferral must be "immediate and significant" to merit potentially proceeding with the

"best available control technology" limits for greenhouse gases under the Act's Prevention of Significant Deterioration program if they conduct a major modification for another pollutant, *see Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

⁴ As Petitioners informed the Court, the Public Health and Environmental Respondent-Intervenors sent a letter to Chief Justice Roberts on July 27, 2018, noting that "the Court may wish to require the parties to explain why the stay should continue in effect." Pet'rs' Status Report at 6 (quoting Letter from Sean H. Donahue, Counsel of Record for Environmental Defense Fund, et al., to The Hon. John G. Roberts, Jr., Chief Justice of the United States & Circuit Justice for the D.C. Circuit, Supreme Court of the United States, at 3 (July 27, 2018)). The Supreme Court has docketed the letter. Docket, *West Virginia v. EPA*, No. 15A773 (S. Ct.).

case. *Am. Petroleum Inst.*, 683 F.3d at 389 (placing case in abeyance where “it is not at all clear that [party] could [avoid claimed hardship resulting from abeyance] if we decided this petition in their favor”) (internal quotation marks and citation omitted). Movants cannot meet that standard. Continuing to hold these cases in abeyance will not cause hardship to Movants given the Supreme Court’s continuing stay of the Clean Power Plan.

CONCLUSION

For the foregoing reasons, this Court should deny Movants’ request to issue a decision and continue holding these cases in abeyance.

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Pursuant to Rules 27(d)(2) and 32(g) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(e)(1), I hereby certify that the foregoing document contains 2,965 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: September 14, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of September 2018, a copy of the foregoing Petitioners' and Petitioner-Intervenors' Response in Opposition to Motion to Decide the Merits of the Case was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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