ORAL ARGUMENT HEARD EN BANC
ON SEPTEMBER 27, 2016 IN CASE NO. 15-1363
ORAL ARGUMENT NOT SCHEDULED IN CASE NO. 17-1014

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 OF NORTH DAKOTA, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 17-1014 (and consolidated cases)

RESPONSE TO PETITIONERS' MOTIONS TO DISMISS

State and public health and environmental respondent-intervenors hereby jointly respond to the motions filed by most of the petitioners and the petitioner-

intervenors on July 15 and July 23, respectively, to dismiss the petitions for review in these sets of consolidated cases.[1] As explained below, the motions are premature and therefore should be denied or held in abeyance.[2]

The petitions in *West Virginia v. EPA* (case no. 15-1363) challenge the Environmental Protection Agency's Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), regulations that address climate-destabilizing air pollution that is already causing grave damage to public health and the environment – damage that will reach catastrophic scale in the near future absent prompt action to sharply reduce emissions. The Clean Power Plan was adopted pursuant to Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), a provision that "speaks directly" to emissions of carbon dioxide from existing power plants, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011), the largest stationary sources of such emissions.

This Court heard oral argument *en banc* on September 27, 2016. Following the last presidential transition, EPA (Doc. 1668274), with the support of petitioners

[1] The State of Wisconsin (co-petitioner in case no. 15-1363 and case no. 17-1022) and the Local Government Coalition for Renewable Energy (co-petitioner in case no. 15-1482) did not join the motions to dismiss. Respondent EPA has submitted responses in support of the motions (Doc. 1797703, Doc. 1798780).

[2] Movants did not approach respondent-intervenors about a dismissal agreement in either case no. 15-1363 or case no. 17-1014 and no agreement has been reached. *See* Fed. R. App. P. 42(b); D.C. Circuit Handbook of Practice and Internal Procedures at 34-35 (as amended through Dec. 1, 2018).

(Doc. 1669984), asked this Court not to issue a decision on the merits and to place the case in abeyance pending administrative review and new rulemakings. Respondent-intervenors opposed that request (Doc. 1669759). The Court granted the request, in part, in April 2017 (Doc. 1673071), and issued a series of further 60-day abeyances. In September 2018, two years after the oral argument, and after an abeyance period had expired, respondent-intervenors moved the Court (Doc. 1748706) to decide the case. Petitioners (Doc. 1750741) and EPA (Doc. 1750684) opposed that motion, which the Court denied (Doc. 1765562).[3]

On July 8, 2019, EPA published a final rule that, among other things, repeals the Clean Power Plan and replaces it with emission guidelines that apply to coal-fired power plants only (natural gas plants covered by the Clean Power Plan are not regulated under the new rule), and sets no overall emissions limits by which subsequent state plans are to be evaluated.[4] According to EPA's published notice, the rule will become effective on September 6, 2019. 84 Fed. Reg. at 32,520.

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[3] Regarding the petitions for review addressed in the July 23 motion, consolidated under lead case no. 17-1014, *North Dakota v. EPA*, in January 2017, EPA denied administrative petitions to reconsider the Clean Power Plan, prompting lawsuits by entities that had petitioned in *West Virginia*. The reconsideration denial cases were placed in abeyance at EPA's request (supported by petitioners) at the same time as the *West Virginia* case, in April 2017 (Doc. 1673071). The states and organizations joining this response moved to intervene in *North Dakota*, but their unopposed motions were not ruled upon.

[4] *Repeal of the Clean Power Plan: Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019).

As petitioners and EPA note, precedent of this Court holds that once an agency has rescinded or replaced a regulation, litigation challenging that regulation ordinarily becomes moot. *See Akiachak Native Cmty. v. U.S. DOI*, 827 F.3d 100, 113-15 (D.C. Cir. 2016) (when challenged regulation "no longer exists," court lacks Article III jurisdiction). Here, however, the rule repealing and replacing the Clean Power Plan does not become legally effective until September 6. Therefore, the current motions are premature, a point the federal government conceded in an analogous recent case involving a replacement rule that was not yet in effect at the time the dismissal motion was filed. *See Becerra v. U.S. DOI*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (granting states' motion for summary judgment on their claim that Department of Interior violated the Administrative Procedure Act; noting the federal government's concession that the case was not moot under Article III and rejecting prudential mootness argument). Consequently, the Court should deny petitioners' current motions or hold them in abeyance until the repeal and replacement of the Clean Power Plan becomes effective on September 6, 2019.

Respondent-intervenors further note that a petition for review of the Clean Power Plan repeal and replacement rule has already been filed in this Court, *American Lung Ass'n v. EPA* (case no. 19-1140), and that additional petitions for review of this rule are expected. In that litigation, the Court likely will be asked, *inter alia*, to vacate the repeal of the Clean Power Plan. If the Court grants such

relief, it is conceivable that the petitioners in the present litigation may seek to revive the claims that they seek to dismiss here. Respondent-intervenors reserve their rights to object to any such revival in the future as precluded. *See* 42 U.S.C. § 7607(b); *Chamber of Commerce v. EPA*, 642 F.3d 192, 208 n.14 (D.C. Cir. 2011). Notably, for more than two years petitioners had every opportunity to seek judicial resolution of their claims (an outcome contemplated by the design of the Supreme Court's stay), but instead opposed respondent-intervenors' efforts to obtain that result, and repeatedly urged the Court not to resolve those claims.

For the reasons stated above, the motions should be denied as premature or held in abeyance until the repeal and replacement of the Clean Power Plan becomes effective on September 6, 2019.

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Respectfully submitted,

FOR ENVIRONMENTAL DEFENSE FUND

Sean H. Donahue
Susannah L. Weaver
Donahue, Goldberg & Weaver LLP
1008 Pennsylvania Ave., SE

Washington, D.C. 20003
(202) 277-7085
sean@donahuegoldberg.com

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

FOR THE STATE OF NEW YORK

LETITIA JAMES
ATTORNEY GENERAL

/s/ Michael J. Myers[5]

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

[5] 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
Timothy Sullivan
Elizabeth Rumsey
Deputy Attorneys General
1515 Clay Street
Oakland, CA 94612
(510) 879-1300

Attorneys for the State of California, by and through Governor Gavin Newsom, the California Air Resources Board, and Attorney General Xavier Becerra

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
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

KATHLEEN JENNINGS
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

CLARE E. CONNORS
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

KWAME RAOUL
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 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

AARON M. FREY
ATTORNEY GENERAL
Mary Sauer
Laura Jensen
Assistant Attorneys General
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

KEITH ELLISON
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
Anne Minard
Special Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 490-4045

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. NERONHA
ATTORNEY GENERAL
Gregory S. Schultz
Special Assistant Attorney General
Office of the 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
Donald D. Anderson
Deputy Attorney General
Paul Kugelman, Jr.
Sr. Asst. Attorney General and Chief
Environmental Section
202 North 9th Street
Richmond, VA 23219
(804) 786-3811

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 BROWARD COUNTY, FLORIDA

ANDREW J. MEYERS
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
Christopher G. King
Kathleen C. Schmid
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2314

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

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 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 Fl.
Boston, MA 02109
(617) 624-0234, ext. 156

FOR CENTER FOR BIOLOGICAL DIVERSITY

Clare Lakewood
Howard M. Crystal
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 844-7121

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 NATURAL RESOURCES DEFENSE COUNCIL

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

FOR SIERRA CLUB

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725

Vera Pardee
726 Euclid Ave.
Berkley, CA 94708
(858) 717-1448

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:

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/s/ *Michael J. Myers*
MICHAEL J. MYERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Petitioners' Motions to Dismiss was filed on July 25, 2019 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