

**EN BANC ORAL ARGUMENT HELD 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)

**PETITIONERS AND PETITIONER-INTERVENORS'
REPLY IN SUPPORT OF MOTIONS TO DISMISS**

The undersigned Petitioners and Petitioner-Intervenors have moved to dismiss as moot the petitions for review in these two sets of consolidated cases.¹ ECF Nos. 1797267, 1798600. Respondent United States Environmental Protection Agency (“EPA” or “Agency”) supports those motions. ECF Nos. 1797703, 1798780. No Petitioner opposes the motions.

State and Public Health and Environmental Respondent-Intervenors, however, filed an opposition to the motions. ECF No. 1799095. Importantly, Respondent-Intervenors do not dispute that EPA’s final action repealing the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019) (“Rule”), renders these cases moot. *See* ECF No. 1799095 at 4 (conceding “once an agency has rescinded or replaced a regulation, litigation challenging that regulation ordinarily becomes moot”). They argue instead that the motion to dismiss is premature because these cases will only become moot on the Rule’s September 6, 2019 effective date, and not before that date. *Id.*

Respondent-Intervenors are incorrect as to the timing of mootness. In the Rule, the Agency took final rulemaking actions repealing the Clean Power Plan in its entirety and replacing it with new emission guidelines. 84 Fed. Reg. at 32,521. That Rule has been final and subject to judicial review for nearly one month—indeed, some

¹ Petitioner Local Government Coalition for Renewable Energy did not join the initial motion to dismiss in Case No. 15-1363 but separately moved to dismiss its petition for review as moot on July 25, 2019. ECF No. 1799127.

Respondent-Intervenors have already filed a petition for review of the Rule.² *See Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. filed July 8, 2019). As a final rulemaking action under the Clean Air Act, the Rule (including the effective date of the Clean Power Plan repeal) cannot be rescinded, replaced, or amended without further notice-and-comment rulemaking proceedings. *See* 42 U.S.C. § 7607(d). EPA supports these motions to dismiss and has not given any indication that it intends to undertake a new rulemaking to alter the Rule. *See* ECF Nos. 1797703, 1798780. Accordingly, EPA has definitively “rescinded and replaced [the] challenged regulation,” and the Court should follow the “perfectly uncontroversial and well-settled principle of law” and find that these cases are now moot. *Akiachak Native Cmty. v. U.S. Dep’t of the Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016). No one can be prejudiced in any way by the dismissal of a moot case.

Because EPA and Respondent-Intervenors agree with the undersigned Petitioners and Petitioner-Intervenors that EPA’s promulgation of the Rule renders these consolidated cases moot, the Court should grant these motions to dismiss now.

² The fact that some Respondent-Intervenors have already filed a petition for review of the Rule undermines their theory that these cases will not be moot until the Rule’s effective date. If that were true, then there would not yet be an Article III case or controversy providing the basis for judicial review, which would make the Clean Air Act’s judicial review provisions illogical. *See* 42 U.S.C. § 7607(b)(1) (tying timing for filing petitions for review to Federal Register publication and not to a rule’s effective date).

Dated: August 1, 2019

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CERTIFICATE OF COMPLIANCE

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 506 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: August 1, 2019

/s/ Allison D. Wood

Allison D. Wood

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of August 2019, a copy of the foregoing document was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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