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)

NOTICE OF EXECUTIVE ORDER, EPA REVIEW OF CLEAN POWER PLAN AND FORTHCOMING RULEMAKING, AND MOTION TO HOLD CASES IN ABEYANCE

Respondents United States Environmental Protection Agency, et al. (collectively "EPA"), hereby provide notice of (1) an Executive Order from the President of United States titled "Promoting Energy Independence and Economic Growth" and directing EPA to review the Clean Power Plan – the Rule at issue in this case; and (2) EPA's initiation of a review of the Clean Power Plan; and (3) if appropriate, a forthcoming rulemaking related to the Rule and consistent with the Executive Order. Pursuant to these developments, the Clean Power Plan is under close scrutiny by the EPA, and the prior positions taken by the agency with respect to the Rule do not necessarily reflect its ultimate conclusions. EPA should be afforded

the opportunity to fully review the Clean Power Plan and respond to the President's direction in a manner that is consistent with the terms of the Executive Order, the Clean Air Act, and the agency's inherent authority to reconsider past decisions. Deferral of further judicial proceedings is thus warranted.

Accordingly, EPA respectfully requests this Court to hold these cases in abeyance while the agency conducts its review of the Clean Power Plan, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period. As discussed further below, such abeyance will promote judicial economy by avoiding unnecessary adjudication and will support the integrity of the administrative process. Respondents contacted coordinating counsel for Petitioners, Petitioner-Intervenors, and Respondent-Intervenors regarding their positions on this motion. Petitioners and Petitioner-Intervenors do not oppose the motion. Respondent-Intervenors oppose the motion and intend to file responses in opposition, except that Respondent-Intervenor Next Era Energy Inc. takes no position on the motion.

BACKGROUND

The Executive Order and EPA's current review of the Clean Power Plan follow various proceedings undertaken during the prior Administration. These proceedings and the more recent developments under the new Administration are summarized below.

On October 23, 2015, EPA promulgated "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (the "Rule" or "the Clean Power Plan"). The Rule established "CO_2 [carbon dioxide] emission guidelines for existing fossil fuel-fired electric generating units." 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015). EPA cited its authority under the Clean Air Act as the basis for the Rule. Id. at 64,707-10.

Numerous petitions for review of the Rule were filed in this Court and were subsequently consolidated under lead case West Virginia v. EPA, No. 15-1363 ("West Virginia"). 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.

While the West Virginia litigation was proceeding, EPA received 38 petitions for administrative reconsideration of various aspects of the Rule. On January 11, 2017, shortly before the change in Administrations, EPA denied most of the petitions for reconsideration. See 82 Fed. Reg. 4864 (Jan. 17, 2017) (the "Denial Action"). To date, 17 petitions for review of the Denial Action have been filed in this Court and consolidated under lead case State of North Dakota v. EPA, No. 17-1014.[1]

[1] On February 24, 2017, petitioners Utility Air Regulatory Group, American Public Power Association and LG&E and KU Energy LLC filed a motion to sever their

On March 28, 2017, the President of the United States signed an Executive Order establishing the policy of the United States that executive departments and agencies (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," (Attachment 1 hereto), § 1(c). The Executive Order also sets forth the policy that "all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic." Id. § 1(d).

With respect to the Rule, 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. at § 4. The Executive Order further

petitions for review in North Dakota v. EPA, No. 17-1014, consolidate those petitions with the Movants' respective petitions in West Virginia v. EPA, No. 15-1363, and issue an order directing the parties in West Virginia v. EPA to submit a proposal to govern the scheduling of supplemental briefing. EPA filed a response to this motion in which it noted that while it did not oppose consolidation, "consolidation of all of the petitions for review of the Denial Action with the challenges to the Rule would be more appropriate than consolidating only two of the petitions for review of the Denial Action, so as to avoid having overlapping claims challenging the same Denial Action pursued within separate proceedings." No. 15-1363, DN1665820 (filed Mar. 13, 2017), at 2.

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.

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 providing advanced notice of forthcoming rulemaking proceedings. See Notice of Review of the Clean Power Plan (Attachment 2 hereto). Specifically, the Federal Register notice announces that EPA "is initiating its review of the [Clean Power Plan]," and "providing advanced notice of forthcoming rulemaking proceedings consistent with the President's policies." Id. at 3. The Federal Register notice further notes 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." Id.

SUMMARY OF ARGUMENT

The Executive Order, Clean Power Plan review, and potential rulemaking proceedings mark substantial new developments that warrant holding this litigation in abeyance. Consistent with the inherent authority of federal agencies to reconsider past decisions and EPA's statutory authority under the Clean Air Act, EPA should be afforded the opportunity to respond to the Executive Order by reviewing the Clean Power Plan in accordance with the new policies set forth in the Order.

Because the Rule is under agency review and may be significantly modified or rescinded through further rulemaking in accordance with the Executive Order, holding this case in abeyance is the most efficient and logical course of action here. Abeyance will further the Court's interests in avoiding unnecessary adjudication, support the integrity of the administrative process, and ensure due respect for the prerogative of the executive branch to reconsider the policy decisions of a prior Administration.

ARGUMENT

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("State Farm"). EPA's interpretations of statutes it administers are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). See also Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "'[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its

programs and regulations"') (quoting State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). The Clean Air Act complements EPA's inherent authority to reconsider prior rulemakings by providing the agency with broad authority to prescribe regulations as necessary to carry out the Administrator's authorized functions under the statute. 42 USC § 7601(a).

Courts may defer judicial review of a final rule pending completion of reconsideration proceedings. See Am. Petroleum Inst. v. EPA ("API"), 683 F.3d 382 (D.C. Cir. 2012). And this Court has often held challenges to Clean Air Act rules, in particular, in abeyance pending completion of reconsideration proceedings. See, e.g., Sierra Club v. EPA, 551 F.3d 1019, 1023 (D.C. Cir. 2008); New York v. EPA, No. 02-1387, 2003 WL 22326398. at *1 (D.C. Cir. 2003) (same).

With these principles in mind, and based on recent developments, abeyance is warranted in this case. The President of the United States has directed EPA to immediately take all steps necessary to review the Rule and, if appropriate and as soon as practicable, initiate a new rulemaking relating to the Rule. In accordance with this directive, EPA has begun a review of the Rule. EPA has also announced that if the review concludes that suspension, revision, or rescission of the Rule may be appropriate, EPA's review will be followed by a rulemaking process. Thus, "[i]t would hardly be sound stewardship of judicial resources to decide this case now." API, 683 F.3d at 388. Abeyance would allow EPA to "apply its expertise and correct any errors, preserve[] the integrity of the administrative process, and prevent[]

piecemeal and unnecessary judicial review," id., while furthering the policy set forth in the Executive Order, as consistent with the Clean Air Act.

Abeyance is also warranted to avoid compelling the United States to represent the current Administration's position on the many substantive questions that are the subject of EPA's nascent review. A decision from the Court at this time would almost certainly generate a petition for writ of certiorari from some party to the litigation or another, thereby compelling further briefing on substantive questions prior to EPA's completion of its review. This could call into question the fairness and integrity of the ongoing administrative process.

Holding the present challenges in abeyance will preserve the status quo, in which the Rule is presently stayed pending judicial review by Order of the Supreme Court. None of the Petitioners challenging the Rule oppose the requested abeyance of proceedings. Respondent-Intervenors oppose abeyance, but they face no immediate harm arising from the postponement of judicial review. The requirements of the Rule, which have been stayed by the Supreme Court, would not become effective any time soon even were this litigation to proceed and the stay ultimately lifted. Indeed, no carbon dioxide emission reductions are required from sources under the Rule until 2022 at the earliest.

WHEREFORE, EPA requests that this Court hold these cases in abeyance while the agency conducts its review of the Clean Power Plan, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting

forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period.[2]

Respectfully submitted,

BRUCE S. GELBER
Deputy Assistant Attorney General

DATED: March 28, 2017 BY: /s/ *Eric G. Hostetler*
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[2] EPA is willing to provide status reports at regular intervals during the abeyance period (EPA suggests every 120 days) if the Court would find that useful.

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains approximately 1,950 words according to the count of Microsoft Word and therefore is within the word limit of 5,200 words.

Dated: March 28, 2017

/s/ *Eric G. Hostetler*
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Executive Order, EPA Review of Clean Power Plan, and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 28th day of March, 2017.

/s/ *Eric G. Hostetler*
Counsel for Respondent

ATTACHMENT 1

THE WHITE HOUSE
Office of the Press Secretary

FOR IMMEDIATE RELEASE
March 28, 2017

EXECUTIVE ORDER

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PROMOTING ENERGY INDEPENDENCE AND ECONOMIC GROWTH

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (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.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

Sec. 2. Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources. (a) The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, "burden" means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions. (a) The following Presidential actions are hereby revoked:

(i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," which is referred to in "Notice of Availability," 81 *Fed. Reg.* 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.

Sec. 4. Review of the Environmental Protection Agency's "Clean Power Plan" and Related Rules and Agency Actions. (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 *Fed. Reg.* 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 *Fed. Reg.* 64509 (October 23, 2015); and

(iii) The proposed rule entitled "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule," 80 *Fed. Reg.* 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues," which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this

order, pending the completion of the administrative actions described in subsection (a) of this section.

Sec. 5. Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis. (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

(i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);

(ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);

(iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);

(iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);

(v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016); and

(vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.

Sec. 6. Federal Land Coal Leasing Moratorium. The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to

Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. Review of Regulations Related to United States Oil and Gas Development. (a) The Administrator shall review the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," 81 *Fed. Reg.* 35824 (June 3, 2016), and any rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.

(b) The Secretary of the Interior shall review the following final rules, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules:

(i) The final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 *Fed. Reg.* 16128 (March 26, 2015);

(ii) The final rule entitled "General Provisions and Non-Federal Oil and Gas Rights," 81 *Fed. Reg.* 77972 (November 4, 2016);

(iii) The final rule entitled "Management of Non-Federal Oil and Gas Rights," 81 *Fed. Reg.* 79948 (November 14, 2016); and

(iv) The final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," 81 *Fed. Reg.* 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
March 28, 2017.

# # #

ATTACHMENT 2

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[FRL–XXXX–XX–XXX]

Notice of Review of the Clean Power Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) announces that it is reviewing and, if appropriate will initiate proceedings to suspend, revise or rescind the Clean Power Plan, found at 40 CFR Part 60 subpart UUUU.

DATES: This document is effective **[Insert date of publication in the Federal Register]**.

FOR FURTHER INFORMATION CONTACT: Mr. Peter Tsirigotis, Sector Policies and Programs Division (D205-01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (888) 627-7764; email address: *airaction@epa.gov*.

SUPPLEMENTARY INFORMATION: By this notice, EPA announces it is reviewing the Clean Power Plan, 80 FR 64662 (October 23, 2015) (CPP), including the accompanying Legal Memorandum, and, if appropriate, will as soon as practicable and consistent with law, initiate proceedings to suspend, revise or rescind this rule. The CPP established emission guidelines for state plans to limit carbon dioxide emissions from existing fossil fuel-fired power plants.

I. Background

The CPP was promulgated under Section 111 of the Clean Air Act. 42 U.S.C. 7411. Section 111 of the Clean Air Act authorizes the EPA to issue nationally applicable New Source Performance Standards (NSPS) limiting air pollution from "new sources" in source categories

that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. Section 7411(b)(1). Under this authority, the EPA had long regulated new fossil fuel-fired power plants to limit air pollution other than carbon dioxide, including particulate matter (PM); nitrogen oxides (NOx) and sulfur dioxide (SO2). See 40 CFR Part 60 subparts D, Da. In 2015, the EPA issued a rule that for the first time set carbon dioxide emission limits for new fossil fuel-fired power plants. Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 80 FR 64510 (October 23, 2015). Under certain circumstances, when the EPA issues standards for new sources under Section 111(b), the EPA has the authority under Section 111(d), to prescribe regulations under which each State is to submit a plan to establish standards for existing sources in the same category. The EPA relied on that authority to issue the CPP, which, for the first time, required States to submit plans specifically designed to limit carbon dioxide emissions from existing fossil fuel-fired power plants. As part of the promulgation of the CPP, EPA prepared a legal memorandum that supplemented the legal analysis provided by the Agency in the preamble to the final CPP.

Due to concerns about EPA's legal authority and record, 27 States and a number of other parties sought judicial review of the CPP in the D.C. Circuit. *State of West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.). On February 9, 2016, the Supreme Court stayed implementation of the CPP pending judicial review. Following full merits briefing, oral argument was held before the D.C. Circuit, sitting *en banc*, on September 27, 2016. That case is currently pending in the D.C. Circuit.

II. Initiation of Review of CPP

On March 28, 2017, President Trump issued an Executive Order establishing a national policy in favor of energy independence, economic growth, and the rule of law. The purpose of that Executive Order is to facilitate the development of U.S. energy resources—including oil and gas—and to reduce unnecessary regulatory burdens associated with the development of those resources. The President has directed agencies to review existing regulations that potentially burden the development of domestic energy resources, and appropriately suspend, revise, or rescind regulations that unduly burden the development of US energy resources beyond what is necessary to protect the public interest or otherwise comply with the law. The Executive Order also directs agencies to take appropriate actions, to the extent permitted by law, to promote clean air and clean water while also respecting the proper roles of Congress and the States. This Executive Order specifically directs EPA to review and, if appropriate, initiate reconsideration proceedings to suspend, revise or rescind this Rule, including the accompanying Legal Memorandum.

Pursuant to the Executive Order, EPA is initiating its review of the CPP, including the accompanying legal memorandum, and providing advanced notice of forthcoming rulemaking proceedings consistent with the President's policies. 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.

As part of the review of the CPP that EPA is initiating today, EPA will be reviewing the compliance dates that were set in the CPP. Under the Supreme Court's stay of the CPP, states and other interested parties have not been required nor expected to work towards meeting the

compliance dates set in the CPP. Indeed, some compliance dates have passed or will likely pass while the CPP continues to be stayed. For these reasons, the compliance dates in the CPP will need to be re-evaluated. Once EPA completes its review and decides what further action to take on the CPP, EPA will ensure that any and all remaining compliance dates will be reasonable and appropriate in light of the Supreme Court stay of the CPP and other factors.

EPA's ability to revisit existing regulations is well-grounded in the law. Specifically, the agency has inherent authority to reconsider past decisions and to rescind or revise a decision to the extent permitted by law when supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *Motor Vehicle Manufacturers Ass'n of the United States, Inc., et al, v. State Farm Mutual Automobile Insurance Co., et al,* 463 U.S. 29, 42 (1983) ("*State Farm*"). Moreover, the Clean Air Act itself authorizes EPA to reconsider its rulemakings. 42 U.S.C. § 7607(b)(1), (d)(7)(B). The Clean Air Act complements the EPA's inherent authority to reconsider prior rulemakings by providing the agency with broad authority to prescribe regulations as necessary. 42 USC § 7601(a). The authority to reconsider prior decisions exists in part because EPA's interpretations of statutes it administers "are not carved in stone" but must be evaluated "on a continuing basis," *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 857-58 (1984). This is true when—as is the case here—review is undertaken "in response to . . . a change in administrations." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005). Importantly, such a revised decision need not be based upon a change of facts or circumstances. Rather, a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its

programs and regulations." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15; quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

In conducting this review, EPA will follow each of the principles and policies set forth in the Executive Order, as consistent with EPA's statutory authority. The Agency will reevaluate whether this Rule and alternative approaches are appropriately grounded in EPA's statutory authority and consistent with the rule of law. EPA will assess whether this Rule or alternative approaches would appropriately promote cooperative federalism and respect the authority and powers that are reserved to the states. EPA will also examine whether this Rule and alternative approaches effect the Administration's dual goals of protecting public health and welfare while also supporting economic growth and job creation. EPA will review whether this Rule or alternative approaches appropriately maintain the diversity of reliable energy resources and encourage the production of domestic energy sources to achieve energy independence and security. Additionally, EPA will assess this Rule and alternative approaches to determine whether they will provide benefits that substantially exceed their costs. In taking any actions subsequent to this review, EPA will use its appropriated funds and agency resources wisely by firmly grounding in the statute its actions to protect public health and welfare.

Dated: March 28, 2017.

E. Scott Pruitt,
Administrator.