

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 June 26, 2018 (Doc. No. 1737735), Respondents United States Environmental Protection Agency, et al. ("EPA"), hereby provide their scheduled 30-day status report. As set forth in more detail below, there has been a significant administrative development since the submission of EPA's previous status report. On August 20, 2018, EPA Acting Administrator Andrew R. Wheeler signed a notice of proposed rulemaking to replace the challenged Clean Power Plan rule with revised emission guidelines for states to follow in developing implementation plans to reduce greenhouse gas emissions from existing fossil-fuel fired electric generating units ("power plants"). EPA is committed to concluding rulemaking as expeditiously as practicable.

EPA further states as follows.

1. This litigation involves petitions for review of an EPA rule promulgating emission guidelines for states to follow in developing implementation plans to reduce greenhouse gas emissions from power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015) (“the Rule” or “the Clean Power Plan”).

2. The Supreme Court granted Petitioners’ 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.

3. The President on March 28, 2017, issued an Executive Order directing EPA to review the Rule in accordance with certain new policies and instructing the agency to conclude any appropriate rulemaking to repeal or revise the Rule “as soon as practicable.” 82 Fed. Reg. 16,093, 16,095. In accordance with that Executive Order, the EPA Administrator on March 28, 2017, announced EPA’s review of the Rule, 82 Fed. Reg. 16,329, 16,329 (Apr. 4, 2017), and 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. Doc. No. 1668274. In its motion, EPA explained that because the Rule could be significantly modified, holding the case in abeyance would further the Court’s interest in avoiding unnecessary adjudication, support the integrity of the administrative process, and ensure respect for the

prerogative of the executive branch to reconsider the policy decisions of a prior Administration. Id.

4. 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. Doc. No. 1673071. 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.” Id. In its supplemental brief, EPA explained that abeyance would enable EPA to focus its resources most efficiently on concluding any rulemaking as promptly as possible. Doc. No. 1675243.

5. The Court has subsequently issued four additional orders, all on the court’s own motion, likewise holding the case in abeyance for 60-day intervals and directing EPA to file status reports at 30-day intervals. *See* August 8, 2017 Order (Doc. No. 1687838); November 9, 2017 Order (Doc. No. 1703889); March 1, 2018 Order (Doc. No. 1720228); June 26, 2018 Order (Doc. No. 1737735).

6. Three judges issued two concurring statements accompanying the Court’s June 26, 2018 abeyance order. One of these concurring statements (*see* concurring statement of Tatel, J., joined by Millett, J.) suggested the parties update the Supreme Court regarding administrative and litigation developments. In response to that statement, public health and environmental organizations who are Respondent-Intervenors in this case sent the attached letter to Chief Justice Roberts on July 27, 2018. *See* Attachment A.

7. As reported in previous status reports, the Administrator signed a Federal Register notice on October 10, 2017, 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. 82 Fed. Reg. 48,035 (Oct. 16, 2017). The period for public comment on that proposal closed on April 26, 2018.

8. On December 18, 2017, the Administrator signed an Advance Notice of Proposed Rulemaking ("ANPR") soliciting information on systems of emission reduction that are in accord with the revised legal interpretation proposed by EPA. 82 Fed. Reg. 61,507 (Dec. 28, 2017). The comment period for the ANPR closed on February 26, 2018.

9. Since the last 30-day status report was filed on July 26, 2018, EPA has now completed developing proposed replacement section 111(d) emission guidelines premised on an alternative regulatory approach to that set forth in the Clean Power Plan. Specifically, on August 20, 2018, EPA Acting Administrator Andrew R. Wheeler signed the proposed "Affordable Clean Energy Rule" ("the ACE Rule"). EPA has transmitted the proposal to the Office of Federal Register for publication and requested that the Federal Register expedite publication. A pre-publication copy of the proposal is available on EPA's website at <https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-energy-ace-rule> (last visited August 24, 2018).

10. The proposed ACE Rule includes a proposed revised determination of the best system of emission reduction for reducing greenhouse gas emissions from power plants. It additionally includes a proposed list of technologies that states would need to consider in establishing standards of performance for individual existing coal-fired plants. The proposal also includes revised section 111(d) implementing regulations and a proposed revised applicability test for determining whether a physical or operational change made to a power plant may be a major modification triggering the Act's New Source Review program. EPA is soliciting comments on all aspects of the proposal.

11. Concluding rulemaking replacing the Clean Power Plan remains a high priority for the Agency, and EPA is committed to completing final rulemaking action as expeditiously as practicable. EPA's intention and expectation remains that the Agency will be in a position to take final rulemaking action by the first part of 2019, after consideration of public comments.

12. For the reasons set forth in EPA's March 28, 2017 Motion to Hold Cases in Abeyance (Doc. No. 1668274) and May 15, 2017 Supplemental Brief in Support of Abeyance (Doc. No. 1675243), these cases should continue to be held in abeyance pending the conclusion of this high priority rulemaking, which the Agency is committed to completing as expeditiously as practicable.

Respectfully submitted,

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DATED: August 24, 2018

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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 24th day of August, 2018.

/s/ Eric G. Hostetler
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ATTACHMENT A

July 27, 2018

Honorable John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the D.C. Circuit
Supreme Court of the United States
1 First Street, NE
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Re: *West Virginia v. EPA*, No. 15A773
Basin Elec. Power Coop. v. EPA, No. 15A776
Murray Energy Corp. v. EPA, No. 15A778
Chamber of Commerce v. EPA, No. 15A787
North Dakota v. EPA, No. 15A793

* * * *

West Virginia v. EPA, No. 15-1363 (D.C. Cir.)

Dear Chief Justice Roberts:

On February 9, 2016, this Court stayed the Environmental Protection Agency's Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), pending disposition of petitions for review in the United States Court of Appeals for the District of Columbia Circuit and of any petitions for certiorari in this Court.

The undersigned public health and environmental organizations, who are respondent-intervenors in the D.C. Circuit litigation, hereby notify the Court of developments in the underlying litigation, as suggested by D.C. Circuit judges who highlighted litigants' "continuing duty to inform th[is] Court of any development which may conceivably affect the outcome," *Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)).

Issued in October 2015 pursuant to section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), the Clean Power Plan provides for limits on emissions of carbon dioxide from existing power plants. *See Am. Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011). A number of states and private entities petitioned for judicial review, and other states and private entities intervened to support the rule in *West Virginia v. EPA*, D.C. Cir. Nos. 15-1363, *et al.* After a D.C. Circuit panel denied stay motions and ordered expedited merits briefing, various parties filed stay applications with you as Circuit Justice. On February 9, 2016, this Court granted those applications. The stay orders provide that the Clean Power Plan

is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate

automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Order, *West Virginia v. EPA*, No. 15A773. The court of appeals subsequently decided to hear the case initially en banc, and the full D.C. Circuit (with Chief Judge Garland not participating) heard nearly seven hours of oral argument on September 27, 2016.

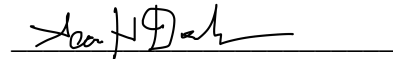
In March 2017, with the support of the petitioners challenging the Clean Power Plan, and over the opposition of the state, industry, and nongovernmental organization intervenors supporting the rule, EPA moved to put the litigation over the current regulation in abeyance while the agency undertook administrative proceedings to consider revising or repealing the Clean Power Plan. The D.C. Circuit placed the litigation in abeyance for 60 days and has granted a succession of additional 60-day abeyances since. In October 2017, EPA published a proposed regulation to repeal the Clean Power Plan, 82 Fed. Reg. 48,035 (Oct. 16, 2017), but the agency has not finalized that proposal nor proposed any other changes to the Clean Power Plan. *Cf.* 82 Fed. Reg. 61,507 (Dec. 28, 2017) (advance notice of proposed rulemaking, which “does not propose any regulatory requirements”). The agency is reported to be considering a new proposal to revise the Clean Power Plan rather than finalize the proposal to repeal it, but no such proposal has yet issued. EPA has not committed to a firm schedule for issuing the new proposed rule or any final rule, representing only its “intention and expectation is that the [proposed rule] will be published in the Federal Register by late summer or early fall so that the Agency will be in a position to take final action . . . by the first part of 2019.” Status Report, ECF No. 1742722 (July 26, 2018).

Approximately two and one-half years have elapsed since this Court issued a stay pending the D.C. Circuit’s disposition of the petitions for review and any appeal to this Court therefrom, and nearly two years have elapsed since the en banc oral argument. On June 26, 2018, the D.C. Circuit issued the latest 60-day extension of the abeyance. Three judges issued concurring statements noting that the merits review anticipated when this Court stayed the regulations has not materialized; two judges urged the parties to inform this Court of these circumstances. *See* Attachment A, Concurring Statement of Tatel, J., joined by Millett, J. (“[T]he Supreme Court is entitled to decide for itself whether the temporary stay it granted pending *judicial* assessment of the Clean Power Plan ought to continue now that it is being used to maintain the status quo pending *agency* action.”) (emphasis in original); *see also* Attachment B (statement of Judge Tatel and Judge Millett concurring in August 8, 2017 abeyance order). In a separate statement concurring in the June 26 order, Judge Wilkins, also joined by Judge Millett, stated that petitioners and respondent EPA “have hijacked the Court’s equitable power for their own purposes,” and urged that “[i]f EPA or the Petitioners wish to delay further the operation of the Clean Power Plan, then they should avail themselves of whatever authority Congress gave them to do so, rather than availing themselves of the Court’s authority under the guise of preserving jurisdiction over moribund petitions.” Concurring Statement of Wilkins, J., joined by Millett, J., Attachment A.

As the D.C. Circuit judges’ statements highlight, about two and one-half years after the stay *pendente lite* was granted, and contrary to the premise of the stay orders, the litigation has

come to a protracted standstill with the support of the parties that sought a stay in this Court. In light of these changed circumstances, the Court may wish to require the parties to explain why the stay should continue in effect.

Respectfully submitted,



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