

ORAL ARGUMENT HEARD EN BANC ON SEPTEMBER 27, 2016**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WEST VIRGINIA, et al.,	)	
	)	
<i>Petitioners,</i>	)	
	)	
v.	)	No. 15-1363
	)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, et al.,	)	
	)	
<i>Respondents.</i>	)	
	)	

**STATE AND MUNICIPAL INTERVENORS’  
OPPOSITION TO EPA’S REQUEST FOR FURTHER ABEYANCE**

The undersigned State and Municipal Intervenors (State Intervenors) oppose the Environmental Protection Agency’s renewed request for abeyance of this litigation “pending the conclusion of rulemaking.” *See* EPA Status Rep. (filed May 2, 2018, Doc. No. 1729161), at 5. It has now been over a year since this Court’s April 2017 grant of EPA’s initial motion for abeyance premised on additional rulemaking, and EPA has neither completed a rulemaking nor even committed to a deadline for doing so. State Intervenors reiterate their continued opposition to EPA’s attempt to stave off judicial review of the legality of the Clean Power Plan based on EPA’s plans to repeal (and *possibly* replace) the Plan at some undisclosed future date. Nothing in EPA’s latest filing provides a persuasive

reason for this Court to further refrain from issuing a ruling on the merits of this critically-important measure limiting power plant pollution that is harming State Intervenor. EPA's request should be denied.

First, with respect to EPA's proposed repeal of the Clean Power Plan on the grounds that the Rule exceeds EPA's legal authority, *see* 82 Fed. Reg. 48,035 (Oct. 16, 2017), the agency provides no new information to warrant additional abeyance, only noting that the public comment period on the proposal has now ended. *See* May Status Rpt., ¶ 5 ("EPA is currently reviewing the comments submitted and considering what further action to take on the proposal"). Nor has EPA provided a firm deadline for completion of this rulemaking. Moreover, as previously noted, this Court need not wait for EPA to render its verdict on the legality of the Clean Power Plan given the exhaustive briefing and argument that has already taken place in the case. *See* State Intervenor's Opp. (filed Jan. 17, 2018, Doc. No. 1713215) at 2.

Second, EPA's Advance Notice of Proposed Rulemaking on "any new potential rule" to replace the Clean Power Plan, *see* 82 Fed. Reg. 61,507 (Dec. 28, 2017), likewise does not justify further abeyance of this case, as explained in State Intervenor's previous opposition. *See id.* at 2-3. The only new factual grounds EPA offers in its May status report is that "EPA is preparing a proposed rulemaking package that will be published in the Federal Register for public comment." *See*

May Status Rpt., ¶ 6. But this representation regarding a possible replacement does not even include a start date for publishing the proposal, much less an end date for promulgating a final rule. EPA's apparent lack of urgency in considering a potential replacement rule to address "the Nation's most important and urgent environmental challenge," EPA Final Brief in *West Virginia v. EPA* (filed April 22, 2016, Doc. No. 1609995) at 61, undermines the credibility of the agency's request.

State Intervenors again reiterate the other reasons cited in our prior filings why a merits ruling should be issued without further delay, including (1) the Court's "virtually unflagging" obligation to decide live cases or controversies, *see* State Intervenors' Resp. at 4, State Intervenors' Supp. Br. (filed May 15, 2017, Doc. No. 1675252) at 12-14, and State Intervenors' Opp. to Motion for Abeyance (filed April 5, 2017, Doc. No. 1669699) at 4-12; and (2) the fact that judicial economy would be advanced by a ruling, *see* State Intervenors' Resp. at 4-5 and State Intervenors' Opp. to Motion for Abeyance at 12-15.

For these reasons, the Court should reject EPA's request and rule on the merits of the Clean Power Plan. If the Court disagrees, and decides that further abeyance is appropriate, State Intervenors request that the Court continue to limit the period of any abeyance to 60 days and require EPA to file regular status reports.

Dated: May 9, 2018

Respectfully Submitted,

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/s/ Michael J. Myers<sup>1</sup>

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned attorney, Michael J. Myers, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 622 words.

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*/s/ Michael J. Myers*  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing State and Municipal Intervenor's Opposition to EPA's Request for Additional Abeyance was filed on May 9, 2018 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

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