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
Washington, D.C. 20543

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.

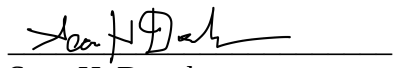
In March 2017, with the support of the petitioners challenging the Clean Power Plan, and over the opposition of the state, industry, and nongovernmental organization intervenors supporting the rule, EPA moved to put the litigation over the current regulation in abeyance while the agency undertook administrative 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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ATTACHMENT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363 **September Term, 2017**

EPA-80FR64662
EPA-82FR4864

Filed On: June 26, 2018

State of West Virginia, et al.,

Petitioners

v.

Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency,

Respondents

American Wind Energy Association, et al.,

Intervenors

Consolidated with 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-1488

BEFORE: Garland*, Chief Judge; Henderson, Rogers, Tatel,** Griffith, Kavanaugh, Srinivasan, Millett, Pillard, Wilkins,** and Katsas*, Circuit Judges

O R D E R

It is **ORDERED**, on the court's own motion, that these consolidated cases remain in abeyance for 60 days from the date of this order. EPA is directed to continue to file status reports at 30-day intervals beginning 30 days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Chief Judge Garland and Circuit Judge Katsas did not participate in this matter.

** A statement by Circuit Judge Tatel, joined by Circuit Judge Millett, concurring in the order granting further abeyance, is attached.

** A statement by Circuit Judge Wilkins, joined by Circuit Judge Millett, is attached.

TATEL, *Circuit Judge*, joined by MILLETT, *Circuit Judge*, concurring in the order granting further abeyance:

Like Judge Wilkins, I have reluctantly voted to continue holding this case in abeyance for now. Although I might well join my colleagues in disapproving any future abeyance requests, I write separately only to reiterate what I said nearly a year ago: that the untenable status quo derives in large part from petitioners' and EPA's treatment of the Supreme Court's order staying implementation of the Clean Power Plan pending judicial resolution of petitioners' legal challenges as indefinite license for EPA to delay compliance with its obligation under the Clean Air Act to regulate greenhouse gases. *See* Per Curiam Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Aug. 8, 2017) (Tatel and Millett, JJ., concurring in the order granting further abeyance).

In early 2016, petitioners represented to the Supreme Court that a stay was necessary to protect them from irreparable injury while the federal courts resolved their legal challenges to the Clean Power Plan. *See* Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 38–45, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016). Since then, however, EPA has proposed to repeal the Plan, *see* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,035 (proposed Oct. 16, 2017), and both petitioners and EPA itself have urged this court—successfully, so far—to refrain from conducting the very legal analysis the Supreme Court stay was designed to accommodate, *see* Petitioners' and Petitioner-Intervenors' Response in Support of EPA's Motion to Hold Cases in Abeyance at 8, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 6, 2017) (explaining that because "the case could ultimately be mooted by EPA's forthcoming action," any present effort to resolve the Rule's legality "would be wasted").

The Supreme Court has reminded parties that they "have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of [a] litigation." *Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)); *cf. Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983) ("As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation."). Perhaps, if advised of circumstances as they stand today, the Supreme Court would extend the stay to give EPA additional time to consider its options for replacing the Clean Power Plan with greenhouse-gas regulations that better align with the agency's current views. Or perhaps, given EPA's own judicially upheld determination that greenhouse gases pose an ongoing threat to public health and welfare, *see Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part and rev'd in part on other grounds sub nom. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and the Court's decade-old recognition in *Massachusetts v. EPA* that "[u]nder the clear terms of the Clean Air Act," EPA must take regulatory action in the face of such a determination, 549 U.S. 497, 533 (2007), the Court would determine that the need for expeditious agency action does not permit the luxury of continued delay. Either way, and especially given that EPA has yet to present any concrete alternative for complying with *Massachusetts v. EPA*, the 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.

WILKINS, *Circuit Judge*, joined by MILLETT, *Circuit Judge*:

Over a year has passed since we first held in abeyance our decision in this case – and nearly two years since oral argument. I will join in one further abeyance, but I am writing to apprise the parties that it is the last one that I am inclined to grant.

The Court's ability to hold a case in abeyance – or to stay a rule – derives from the Court's inherent equitable power to "preserv[e] rights" and "to save the public interest from injury or destruction while an appeal is being heard." *See Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 15 (1942). The Administrative Procedure Act codifies this in the rulemaking context by enabling courts, where "necessary to prevent irreparable injury," "to postpone the effective date of an agency action or to preserve status or rights *pending conclusion of the review proceedings*." 5 U.S.C. § 705 (emphasis added). Thus, the Court's equitable power to maintain the status quo is inextricably tied to the Court's authority to resolve disputes. *Nken v. Holder*, 556 U.S. 418, 421 (2009) (power to stay an action or ruling "allow[s] an appellate court the time necessary to review it"); *see also* 28 U.S.C. § 1651(a) (All Writs Act empowers courts to "issue all writs necessary or appropriate *in aid of their respective jurisdictions*" (emphasis added)). Courts cannot simply issue stays without an active case pending. *See In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985) (Absent a petition, "there was no ongoing proceeding in this court in which a motion for stay could have been filed and thus the court did not have jurisdiction to grant the motion for stay.").

While this matter technically remains pending before us, in reality, the dispute appears to have dissipated. From the beginning of the abeyance proceedings, Petitioners and Petitioner-Intervenors have supported the request by the Environmental Protection Agency (EPA) that the Court detain its decision, on the basis that the Clean Power Plan may be short-lived after agency review. *See* Doc. #1669984, Pet'rs' and Pet'r-Intervenors' Resp. in Supp. of EPA's Mot. to Hold Cases in Abeyance. In other words, the parties who brought this controversy have joined their erstwhile adversary in seeking indefinite delay of the very result that their Petitions request – that is, this Court's review of the Clean Power Plan – and Petitioners appear to have no current interest in prosecuting this action to disposition. Meanwhile, EPA has offered no indication of when it expects its review of the CPP to be complete, and instead simply asserts that "these cases should remain in abeyance pending the conclusion of [its] rulemaking [process]." Doc. #1733943, EPA Status Report (June 1, 2018). In this posture, our abeyance does not serve to maintain the status quo while *the Court decides* the disposition of the Petitions: instead, the result is the maintenance of the status quo while *EPA decides* the disposition of the rule that the Petitions challenge. The upshot is that the Petitioners and EPA have hijacked the Court's equitable power for their own purposes. If EPA or the Petitioners wish to delay further the operation of the Clean Power Plan while the agency engages in rulemaking, 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.

Unless Petitioners articulate a good reason to conclude otherwise, it would appear that the equities will no longer favor granting further abeyance in 60 days. At that time, I will urge the Court to dismiss the Petitions without prejudice and remand the case to EPA.

ATTACHMENT B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363 **September Term, 2016**

EPA-80FR64662
EPA-82FR4864

Filed On: August 8, 2017

State of West Virginia, et al.,

Petitioners

v.

Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency,

Respondents

American Wind Energy Association, et al.,
Intervenors

Consolidated with 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-1488

BEFORE: Garland*, Chief Judge, and Henderson, Rogers, Tatel**, Brown, Griffith, Kavanaugh, Srinivasan, Millett**, Pillard, and Wilkins, Circuit Judges

O R D E R

It is **ORDERED**, on the court's own motion, that these consolidated cases remain in abeyance for 60 days from the date of this order. EPA is directed to continue to file status reports at 30-day intervals beginning 30 days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

* Chief Judge Garland did not participate in this matter.

** A statement by Circuit Judges Tatel and Millett, concurring in granting further abeyance is attached.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363 **September Term, 2016**

TATEL, *Circuit Judge*, and MILLETT, *Circuit Judge*, concurring in the order granting further abeyance:

The Supreme Court stayed the Rule under review here "pending disposition of the . . . petitions for review" in this court and, if certiorari were granted, in the Supreme Court. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). As this court has held the case in abeyance, the Supreme Court's stay now operates to postpone application of the Clean Power Plan indefinitely while the agency reconsiders and perhaps repeals the Rule. That in and of itself might not be a problem but for the fact that, in 2009, EPA promulgated an endangerment finding, which we have sustained. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (*per curiam*), *aff'd in part and rev'd in part on other grounds*, *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). That finding triggered an affirmative statutory obligation to regulate greenhouse gases. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) ("Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."). Combined with this court's abeyance, the stay has the effect of relieving EPA of its obligation to comply with that statutory duty for the indefinite future. Questions regarding the continuing scope and effect of the Supreme Court's stay, however, must be addressed to that Court.