CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Lung Association, *et al.*, *Petitioners*, v. U.S. Environmental Protection Agency, *et al.*, *Respondents*.	No. 19-1140 (and consolidated cases)

JOINT OPPOSITION OF WEST VIRGINIA AND 20 OTHER PROPOSED INTERVENOR-RESPONDENTS OPPOSING MOTION FOR ABEYANCE

The undersigned proposed[1] intervenor-respondents, representing twenty-one States, state officials, and state agencies ("Intervening States") respectfully submit this opposition to the motion for abeyance submitted by 22 States and 7 municipalities ("State and Municipal Petitioners"). *See* Doc. 1808103. As stated in the Intervening States'

[1] The undersigned are parties to a motion to intervene as respondents in *State of New York, et al. v. EPA* (case no. 19-1165) and consolidated cases.

motion to intervene and consistent with this Court's treatment of similar issues throughout the prior Clean Power Plan litigation, the Intervening States support bringing these consolidated actions to a prompt and decisive end. *See* EPA Mot. To Expedite (Doc. 1806337) at 5; *see also* Order, *West Virginia et al. v. E.P.A.*, D.C. Cir. 15-1363 (Doc. 1594951) (Jan. 21, 2016) (granting motions to expedite Clean Power Plan litigation). Whether and how to impose 111(d) standards on every power plant in the country are questions of paramount national importance. Further, the States and state agencies charged with implementing the EPA's regulations need certainty as they undertake significant efforts—even at this relatively early stage—to ensure they will be able to meet upcoming compliance deadlines. These factors give the "public generally" an "unusual interest in [the] prompt disposition of [this] case." D.C. Cir. Handbook at 33. The Court should not take the opposite approach of holding this entire consolidated action in indefinite abeyance.

BACKGROUND

On July 8, 2019, the Environmental Protection Agency ("EPA") issued a final rule titled *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility*

Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) ("the Rule"). The Rule, promulgated pursuant to the Clean Air Act, finalizes three separate and distinct rulemakings. *First*, it repeals a prior rule—*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Clean Power Plan"). *Second*, the Rule sets guidelines for greenhouse gas emissions from existing coal-fired electric utility generating units ("EGUs") under Section 111(d) of the Clean Air Act (the "Affordable Clean Energy Rule" or "ACE Rule"). These guidelines define the best system of emission reduction ("BSER") for EGUs, which can incorporate several distinct technologies. *Finally*, the Rule details how States should establish their "implementation plans," made up of performance standards for each individual EGU required to implement a BSER. This guidance incorporates a wider degree of latitude and deference than the Clean Power Plan allowed, permitting States to consider local economic factors and existing technological capabilities in crafting implementation plans.

On August 13, 2019, the State and Municipal Petitioners filed a petition for review seeking to invalidate the Rule, *State of New York, et*

al. v. EPA, No. 19-1165 (D.C. Cir.), which was consolidated with lead case No. 19-1140. According to the State and Municipal Petitioners, the EPA improperly repealed the Clean Power Plan and improperly promulgated the ACE Rule and implementation guidance. Separately, the State and Municipal Petitioners filed a petition for administrative reconsideration of the Rule with the EPA on September 6.

The Intervening States, on the other hand, strongly support the Rule's return to the principles of cooperative federalism and the rule of law in this critically important area of regulation. On September 12, 2019, the Intervening States filed a motion to intervene in defense of the Rule against the State and Municipal Petitioners' petition and in the consolidated cases. Given the importance of the issues and the need for prompt resolution, the Intervening States explained in their motion that they support the EPA's pending Motion to Expedite. *See* States' Mot. To Intervene (Doc. 1806337) at 5.

On September 25, 2019, the State and Municipal Petitioners filed a motion to hold all consolidated cases in abeyance while their petition for reconsideration remains pending. Mot. For Abeyance Pending Final Action On Pet. For Admin. Reconsideration (Doc. 1808103) ("State and

Municipal Pet'rs Mot."). The Intervening States oppose that motion, and urge this Court to keep the consolidated cases on the Court's active docket and consider promptly the important issues they raise.[2]

ARGUMENT

There are no grounds in precedent, custom, or equity to delay resolution of the important issues at stake in this consolidated action. Whether to grant a motion for abeyance is similar to the question of the "prudential ripeness of a case." *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 387 (D.C. Cir. 2012) (citation omitted). This inquiry focuses on the "fitness of the issues for judicial decision" and the "extent to which withholding a decision will cause hardship to the parties." *Id.* (quotations

[2] This Joint Opposition responds specifically to the State and Municipal Petitioners' arguments that abeyance is appropriate and would not prejudice the States and state agencies charged with implementing the Rule. The Intervening States also opposed the similar motion filed by the Environmental and Public Health Petitioners. Mot. Of Envtl. & Pub. Health Pet'rs For Abeyance Pending Final Action On Proposed Revisions To The New Source Review Program And Final Action On Pet. For Admin. Reconsideration (Doc. 1807492) at 2 n.1. The Intervening States took no position on the motion filed by the Biogenic CO2 Coalition to sever and hold in abeyance their petition in light of this Court's treatment of similar issues in the Clean Power Plan litigation. Pet. Biogenic CO2 Coalition Mot. To Sever And Hold Issues Relating To Biogenic Emissions In Abeyance (Doc. 1808208) at 1 n.2.

and citations omitted). When viewed against the full regulatory history of this action and the practical realities facing the States and regulated entities, abeyance cannot be justified under this standard. Abeyance—especially for an indefinite period—would prejudice the Intervening States and other parties, for whom rapid resolution and regulatory certainty is critically important. It is also at odds with many of these same parties' positions in the Clean Power Plan litigation, and contrary to this Court's practice in similar cases.

I. This Consolidated Action Should Be Resolved Quickly.

A. Granting Abeyance Will Prejudice The Intervening States.

Delaying final resolution of this litigation will disrupt the States' ongoing implementation actions in advance of the Rule's compliance deadlines and afflict these efforts with an unnecessary pallor of uncertainty. Contrary to the State and Municipal Petitioners' arguments, the "extent to which withholding a decision will cause hardship to the parties," *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 387 (D.C. Cir. 2012), strongly militates against abeyance.

The Rule grants States much wider discretion in tailoring state-specific implementation plans than under the Clean Power Plan, but it also established a deadline for doing so—and that clock is ticking. Right

now, States have just over 33 months to complete performance standards for each individual EGU operating within their borders. *See* 84 Fed. Reg. 32,583 (setting the deadline to submit state implementation plans to EPA for July 8, 2022). This process has already begun, and will require a steady stream of work by state agencies and regulated entities over the coming months. The EPA recognized as much in the Rule, explaining that the state implementation plan process has numerous "complexities and realities that take time to address." 84 Fed. Reg. 32,567-68.

In more concrete terms, one State anticipates that it will take nearly six months for owners and operators of EGUs to complete engineering analyses of the various BSER technologies required by the Rule, and an additional seven months for state regulators to review these analyses and incorporate the findings into proposed performance standards. Bybee Decl. (Ex. A) at ¶ 6. Once the technical reviews are complete and the proposal is drafted, this State estimates that it will take a further 18 months to move that proposal through the full bevy of state-specific administrative and legislative procedures, as well as to "develop[] the non-regulatory elements required for approval." *Id.* This 31-month process is already "an aggressive timeline" designed to meet the July

2022 deadline, and the State "cannot wait for resolution of litigation before moving forward." *Id.* at ¶¶ 5, 7.

Similarly, another Intervening State explains that there are thirty-eight individual operating EGUs "affected by the Rule" within its borders, and that "[s]takeholder outreach is necessary to fully understand and appreciate the regulatory work that must be completed to develop, submit, and implement an approvable state plan." Hatton Decl. (Ex. B) at ¶¶ 4-5. Further, this State's law sets specific requirements for adopting a state plan, including submitting the proposal through "administrative rulemaking on the state level." *Id.* ¶ 6. This process—which cannot begin until after the time needed to research, develop, and vet alternatives—will itself "span approximately ten months." *Id.* ¶ 7.

Nevertheless, the State and Municipal Petitioners argue that July 2022 is so far out that delaying resolution of their and others' challenges to the Rule will not impede States' compliance efforts. *See* State and Municipal Pet'rs Mot. at 11-12. But as they acknowledge, *see id.*, the Rule's deadline is not stayed. Lack of a stay is more reason to resolve these questions promptly, not less. The realities of States' regulatory

processes mean that implementation efforts must begin before the deadline for compliance becomes imminent; or in other words, States cannot wait and see if the Rule is ultimately invalidated or remanded before setting the administrative gears into motion.

The State and Municipal Petitioners also—presumably—believe that the Rule will change in reconsideration or be struck down entirely as a result of their challenges. Abeyance would thus not only extend the period of uncertainty for States and state agencies as they begin implementation efforts, but may ultimately make these efforts wasted. Bybee Decl. at ¶ 7; Hatton Decl. at ¶ 9 (delay "increases the possibility that agency and stakeholder efforts and resources will have been committed to regulatory actions" unnecessarily). And although the Intervening States believe the Rule will be sustained, it would be prejudicial to force States to subject their regulatory branches and energy sectors to time-intensive and expensive proceedings under the specter of futility. The numerous steps leading to an approvable state plan "will require significant resources" from state agencies and "all affected owner or operator entities with EGU units who will need to develop engineering analyses early in the process." Bybee Decl. at ¶ 7.

The State and Municipal Petitioners give no consideration to these increased sunk costs. Rather, they argue that abeyance will provide States with more regulatory certainty by avoiding the "lingering pendency of motions for reconsideration" that purportedly "could undermine the finality and completeness of the decision reached in these cases." State and Municipal Pet'rs Mot. at 11. This argument misses the point that forcing States to conduct rulemaking while litigation is ongoing *unavoidably* creates uncertainty. Potential additional sources of uncertainty through reconsideration petitions and separate EPA rulemakings do not warrant bringing these proceedings to a halt while compliance deadline remains in place—especially because there is no statutory requirement for the EPA to take up those actions or deadlines if they do. It is a poor tradeoff to put off resolving the various challenges to the Rule while States devote time and resources toward being able to meet the regulatory deadline, in order to *potentially* alleviate other uncertainties that may never materialize.

B. Abeyance Is Contrary To Many Of The Parties' Prior Positions Favoring Rapid Resolution Of These Issues.

Separate from the time press created by the Rule's compliance deadlines, abeyance would be an unwarranted departure from the

expedited approach this Court took in the Clean Power Plan litigation in recognition of the nationwide effects and importance of the issues at stake. It would also be an about-face from the positions many of the parties here took in that prior action—including many of the State and Municipal Petitioners.

The Intervening States agree with the arguments advanced by the EPA in their motion to expedite consideration of this case and in their opposition to abeyance, *see* Mot. to Expedite at 1-5; EPA's Combined Resp. to Envtl. & State Pet'rs Mots. to Hold The Case in Abeyance (Doc. 1809478). Indeed, the Intervening States have consistently sought prompt review of the EPA's regulations in this space, arguing that the scope and importance of the national energy and utility market is significant enough to the "public generally, or . . . persons not before the Court" to create "an unusual interest in prompt disposition" of challenges like these. D.C. Cir. Handbook at 33. When many of the same Intervening States challenged the legality of the Clean Power Plan alongside other intervenors in this case, they thus sought expedited consideration. *See*, *e.g.*, Joint Mot. To Establish Briefing Format And

Expedited Briefing Schedule (Doc. 1587531) at 12, *West Virginia, et. al., v. E.P.A., et al.*, D.C. Cir. No. 15-1363 (Dec. 9, 2015).

Likewise, when many of the now-State and Municipal Petitioners were defending the Clean Power Plan, they also "believe[d] th[e] case should be briefed and argued expeditiously." Joint Response of Respondent-Intervenors to Petitioners' Joint Motion To Establish Briefing Format And Expedited Briefing Schedule at 1, *West Virginia*, D.C. Cir. 15-1363 (Doc. 1589874) (Dec. 21, 2015). Here, however, the State and Municipal Petitioners not only oppose expedited consideration of the same core legal issues, *see* Opposition to EPA's Mot. To Expedite (Doc. 1805699), but ask for indefinite abeyance. Attempting to minimize the tension between their former and current positions, the State and Municipal Petitioners explain that in the Clean Power Plan litigation, "the Supreme Court stayed the Clean Power Plan's requirements pending merits review by this Court," and they "sought expeditious review" to shorten the length of that stay. *Id.* at 8. This distinction does not explain the divergence. The Supreme Court stayed the Clean Power Plan on February 9, 2016, *see* Order, *West Virginia, et al. v. E.P.A., et al.*, 15A773 (S. Ct. Feb. 9, 2016)—more than a month *after* many of the

now-State and Municipal Petitioners pushed for that litigation to "be briefed and argued expeditiously." Joint Resp. of Resp't-Intervenors to Pets.' Joint Mot. To Establish Briefing Format And Expedited Briefing Schedule at 1, *West Virginia*, D.C. Cir. No. 15-1363 (Doc. 1589874) (Dec. 21, 2015).

In a similar reversal, the State and Municipal Petitioners also previously argued *against* placing the Clean Power Plan litigation in abeyance, on the grounds that absence of final regulation harmed the States. *See* State & Mun. Resp't-Intervenors' Supp. Br. in Resp. to Apr. 27, 2017 Order at 8-12, *West Virginia*, D.C. Cir. No. 15-1363 (Doc. 1675252) (May 15, 2017). In fact, these Petitioners opposed abeyance even after the EPA had acknowledged the serious legal flaws in the Clean Power Plan and publicly announced plans to make substantial revisions to that rule during "a transition from one presidential administration to another." *See* Pet'r's & Pet'r-Intervenor's Resp. Supp. EPA's Mot. to Cases Hold in Abeyance at 3, *West Virginia et al. v. E.P.A.*, D.C. Cir. No. 15-1363 (Doc. 1669984) (Apr. 6, 2017). The case for abeyance is far weaker here where there is no indication the EPA will undertake additional, substantial revisions to the Rule. There is thus no persuasive

explanation for these Petitioners' change of position, and no reason to delay judicial review.

C. Pending Reconsideration Petitions Do Not Support Abeyance.

The State and Municipal Petitioners argue that this consolidated action should be held in abeyance in its entirety because—almost a month after they filed their petition for review—they lodged a petition for administrative reconsideration with the EPA. Agency reconsideration petitions are not a valid basis to withhold judicial review under circumstances like these.

1. The Clean Air Act is clear that "filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review." 42 U.S.C. § 7607(b)(1). Consistent with this statutory provision favoring quick judicial resolution, this Court commonly allows rulemaking challenges in the Clean Air Act context to proceed in the face of pending agency reconsideration petitions. *See*, *e.g.*, *EME Homer City Generation, L.P. v. E.P.A.*, 795 F.3d 118, 123 (D.C. Cir. 2015) (considering merits of Clean Air Act rule while administrative reconsideration petition was pending); *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787

F.3d 544, 549 (D.C. Cir. 2015) (same); *Util. Air Regulatory Grp. v. E.P.A.*, 744 F.3d 741, 744 (D.C. Cir. 2014) (same); *see also Teledesic LLC v. F.C.C.*, 275 F.3d 75, 82-83 (D.C. Cir. 2001) (holding that placing a case in abeyance was not necessary where other parties had petitioned for agency reconsideration); *MCI Telecom. Corp. v. F.C.C.*, 143 F.3d 606, 608 (D.C. Cir. 1998) (holding that prudential considerations supported resolving petitions for review even where petitions for reconsideration were pending before the agency). And this practice makes sense: the EPA is not required to act on reconsideration motions or under a specific timeframe where it chooses to take one up, so making such motions the basis for abeyance could significantly delay judicial resolution of important statutory and regulatory questions.

The cases the State and Municipal Petitioners cite against this general practice, *see* State and Municipal Pets. Mot. at 5, make clear that abeyance pending agency reconsideration is the exception—and appropriate only under circumstances not present here. In *American Petroleum Institute v. E.P.A.*, for instance, the Court granted abeyance in response to "a notice of proposed rulemaking that, if made final, would significantly amend" the challenged rule. 683 F.3d 382, 394 (D.C. Cir.

2012). That situation mirrors the regulatory context in which this Court granted abeyance of the Clean Power Plan litigation (over the objection of many of the State and Municipal Petitioners), but circumstances are different now. There is no indication the EPA plans to revisit any aspect of the Rule, much less "significantly amend" it.

Similarly, in two other cases the Court granted abeyance in response to *ongoing* reconsideration proceedings, not the mere filing of a reconsideration petition. *See Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008); Order at *1, *New York v. EPA*, 2003 WL 22326398, (Sept. 30, 2003) (D.C. Cir. No 02-1387). And in one of those cases, the EPA's reconsideration proceedings concerned its authority to issue *any* rule of the challenged type. *See Sierra Club*, 551 F.3d at 1023. The EPA has not taken up the State and Municipal Petitioners' request for reconsideration, and their description of their purported grounds for reconsideration make clear that, in any event, they have not raised such foundational questions. Finally, the last cited case addressed a partial abeyance granted to a single movant, not to an entire consolidated action involving numerous petitioners for review and multiple intervenors on

all sides. *See* Order at *1, *American Trucking v. E.P.A.*, 1998 WL 65651 (Jan. 21, 1998) (D.C. Cir. No. 97-1440).

2. Considerations in the State and Municipal Petitioners' reconsideration petition involving the EPA's ongoing proceedings regarding the New Source Rule are also no basis to hold this action in abeyance. These Petitioners argue that the EPA's cost-benefit analysis supporting the Rule may be affected by potential future revisions to the EPA's rule regarding new emission sources, as opposed to the existing emission sources this Rule addresses, because additional BSERs could become economically viable depending on the agency's treatment of new sources. State and Municipal Pets. Mot. at 7-9. Yet the EPA already considered this purported interrelationship between the two rules, and made clear that *this* Rule stands on its own. *See* 84 Fed. Reg. at 32,555 (explaining that any future reforms to the New Source Rule "are no longer considered in parallel with ACE").

Further, tying consideration of challenges to this Rule to potential future changes to a separate rule—even one with overlapping considerations—would be in tension with the "significant latitude" courts afford to "the manner, *timing*, content, and *coordination* of [an agency's]

regulations." *WildEarth Guardians v. U.S. E.P.A.*, 751 F.3d 649, 654 (D.C. Cir. 2014) (quoting *Massachusetts v. E.P.A.*, 549 U.S. 497, 533 (2007)) (emphasis added). "[A]gencies are constrained by limited resources, information, and time," and regulatory analysis has to start somewhere. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1361 (2016). Judicial review of one agency action should not be placed on indefinite hold because a party speculates that the agency may be open to reconsideration after it finalizes another.

This argument also has no limiting principle. It is hardly surprising that an agency's rules in one area could have implications for the cost-benefit analysis in another proceeding—especially for an agency like the EPA that deals routinely with the same sectors and regulated parties. Instead, the Court should take the EPA at its word that this Rule and the New Source Rule are distinct.

II. At A Minimum, The Court Should Resolve Now Threshold Legal Issues Relating To The Statutory Authority For The Rule.

There is no legal or practical basis to grant the State and Municipal Petitioners' request to hold all petitions in this consolidated action in abeyance. Even if, however, the Court determines that abeyance is

appropriate for *some* of the issues raised in the consolidated cases, the Court may and should decide now the threshold legal questions several of the petitions raise.

As discussed above, the considerations guiding whether to grant a motion for abeyance are similar to those relating to prudential ripeness. An important aspect of this inquiry is the "fitness of the issues for judicial decision," which "depends on whether [an issue] is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Am. Petroleum Inst.*, 683 F.3d at 387 (quotations and citations omitted). A classic example of a "purely legal" question is whether an agency has "statutory authority" for the action it intends to pursue. *Atl. Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 783 (D.C. Cir. 1984). After all, "[questions] of statutory interpretation are the day-to-day business of the courts." *Id.*

Several petitioners in this consolidated action raise issues that sound solely in statutory interpretation—specifically, the EPA's legal authority to issue the Rule. While, for example, the State and Municipal Petitioners disagree with EPA's interpretation of the scope of BSERs that may be required under Section 111(d), *see* State and Municipal Pets. Mot.

at 6, the *Robinson* Petitioners argue that Section 111 of the Clean Air Act does not authorize the Rule and the EPA erred by not proceeding under Sections 108-110 instead. *See* Mem. In Opp. To Mot. For Abeyance (Doc. 1808711) at 3-4. The *Robinson* Petitioners also, along with Westmoreland Mining Holdings, argue that any "category of sources" regulated under Section 112 of the Clean Air Act—like coal-fired EGUs—may not be regulated under Section 111(d) at all. *Id.* at 4; Pet. Westmoreland Mining Holdings LLC's Opp. To Mots. for Abeyance (Doc. 1808726) at 2. And the North American Coal Corporation argues that the EPA does not have authority to regulate carbon emissions from EGUs because it failed to "make an endangerment finding under Section 111(b)(1)." Res. Of Pet. N. Am. Coal Corp. to Mots. for Abeyance (Doc. 1808554) at 6.

At a minimum, there is no reason to delay consideration of these issues, which are threshold questions that present solely "questions of statutory interpretation." *Atl. Richfield Co*, 769 F.2d at 783. Pending reconsideration petitions or separate administrative proceedings are no barrier to review because issues of law like these are "impossible" to "finally [settle] . . . administratively." *Id.* at 784.

There is likewise a "strong public interest in early resolution of" these issues. *Id.* at 784. As discussed above, the Intervening States are already in the process of expending significant money and effort to comply with the current regulations in light of upcoming compliance deadlines. *E.g.*, Bybee Decl. (Ex. A) at ¶6. Prompt resolution of these "purely legal issues" will thus do much to create regulatory certainty, regardless of the Court's conclusion. *See Atl. Richfield Co.*, 769 F.2d at 784 ("any review by this Court will not require effort to be expended in vain, without compensating clarification of the issue[s]" (citation omitted)).

Given these circumstances, even if the Court agrees with the State and Municipal Petitioners that abeyance is appropriate for some issues, it should in no event hold in abeyance all petitions and all issues in this action. And because judicial efficiency is better served by considering all issues together, the existence of these threshold questions further supports declining to hold in abeyance the issues the State and Municipal Petitioners raise.

CONCLUSION

For the foregoing reasons, the motion to hold the consolidated cases in abeyance should be denied.

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CERTIFICATE OF COMPLIANCE

The foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains less than 5,200 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

The foregoing also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2019 in 14-point, Century Schoolbook font.

/s/ Lindsay. S. See
Lindsay S. See

Rule 26.1 Disclosure Statement

None of the Intervening States are required to file a disclosure statement under Federal Rule of Appellate Procedure 26.1 or D.C. Circuit Rule 26.1.

/s/ Lindsay. S. See
Lindsay S. See

CERTIFICATE OF SERVICE

I hereby certify that, on October 7,, 2019, a copy of the foregoing Response in Opposition was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Lindsay. S. See
Lindsay S. See