

**ORAL ARGUMENT HELD SEPTEMBER 27, 2016****IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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|---------------------------------|---|---------------------|
| STATE OF WEST VIRGINIA, ET AL., | ) |                     |
|                                 | ) |                     |
| Petitioners,                    | ) |                     |
|                                 | ) |                     |
| v.                              | ) | No. 15-1363 (and    |
|                                 | ) | consolidated cases) |
| UNITED STATES ENVIRONMENTAL     | ) |                     |
| PROTECTION AGENCY, ET AL.,      | ) |                     |
|                                 | ) |                     |
| Respondents.                    | ) |                     |

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**EPA STATUS REPORT**

Pursuant to this Court’s order of August 8, 2017, Respondents United States Environmental Protection Agency, et al. (“EPA”), hereby provide the Court with their scheduled 30-day status report.

1. These cases involve numerous consolidated petitions for review of an EPA rule entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” (“the Rule”). 80 Fed. Reg. 64,662 (Oct. 23, 2015). 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.

2. On March 28, 2017, the President of the United States issued an Executive Order establishing the policy of the United States that executive departments and 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,” § 1(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). With respect to the Rule in particular, 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. § 4. The Executive Order further 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.

3. 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 noting 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.” “Review of the Clean Power Plan,” 82 Fed. Reg. 16,329, 16,329 (Apr. 4, 2017).

4. Based on these significant developments, 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. ECF No. 1668274. 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. Id. 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." ECF No. 1673071. EPA timely submitted its supplemental brief and advocated continuing to hold these cases in abeyance for the reasons explained therein. ECF No. 1675243. EPA filed its most recent status report with the Court on July 31, 2017. By order dated August 8, 2017, the Court held the cases in abeyance for an additional 60 days and directed EPA to continue to file status reports at 30-day intervals beginning 30 days from the date of the order.

5. As previously reported to the Court in EPA's July 31, 2017 status report, EPA has begun the interagency review process of a proposed regulatory action resulting from its review of the Rule. EPA has transmitted a draft proposed rule to the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA"), consistent with the review procedures that are set forth in Executive Order 12866, 58 Fed. Reg. 190 (Oct. 4, 1993).

6. After the interagency review conducted by OIRA is complete, and after EPA makes any appropriate revisions based on the interagency review, the

Administrator will sign the proposed rule and EPA will send it to the Office of the Federal Register for publication to initiate the public comment period. At this time, EPA expects that the Administrator will sign the proposed rule in the fall of 2017.

7. In the most recent OIRA “Current Unified Agenda of Regulatory and Deregulatory Actions” (“Unified Agenda”), issued on July 21, 2017, the entry “Review of the Clean Power Plan”<sup>1</sup> was inadvertently classified as a “long term action,” which is the classification for “items under development but for which the agency does not expect to have a regulatory action within the 12 months after publication of this edition of the Agenda.”<sup>2</sup> This classification of EPA’s review of the Clean Power Plan was incorrect. Because EPA expects to sign a proposed rule with respect to the Clean Power Plan in the fall of 2017, EPA’s review of the Clean Power Plan should have been classified within OIRA’s Unified Agenda as being in the “Proposed Rule Stage,” which is the classification for “actions for which agencies plan to publish a Notice of Proposed Rulemaking as the next step in their rulemaking process.”<sup>3</sup> EPA intends to

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<sup>1</sup> Available at:

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT55>.

<sup>2</sup> “Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions,” available at:

[https://reginfo.gov/public/jsp/eAgenda/StaticContent/201704/Preamble\\_8888.html](https://reginfo.gov/public/jsp/eAgenda/StaticContent/201704/Preamble_8888.html)

<sup>3</sup> Id.

correct the classification of the Clean Power Plan review in its next submission for the Unified Agenda.

8. For the reasons set forth in EPA's March 28, 2017 Motion to Hold Cases in Abeyance (ECF No. 1668274) and May 15, 2017 Supplemental Brief in Support of Abeyance (ECF No. 1675243), these cases should remain in abeyance pending the conclusion of the expected forthcoming rulemaking.

Respectfully submitted,

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DATED: September 7, 2017 BY: /s/ Chloe H. Kolman  
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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 7th day of September, 2017.

/s/ Chloe H. Kolman  
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