

ORAL ARGUMENT HEARD ON SEPTEMBER 27, 2016

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

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

RESPONDENT-INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS’ RESPONSE TO RESPONDENT’S JULY 31, 2017 STATUS REPORT

Public Health and Environmental Respondent-Intervenors submit this response to the status report filed by the Environmental Protection Agency (“EPA”). The Court ordered EPA to file status reports every 30 days, but placed the case in abeyance only for a 60-day period that ended on June 27, 2017. Order, ECF No. 1673071 (Apr. 28, 2017).

EPA’s latest report repeats prior assurances that the agency “has begun the interagency review process of a proposed regulatory action resulting from its review of the Rule,” and promises that it “will update the Court as EPA takes further steps.” EPA Status Report, ECF No. 1686504 (July 31, 2017). It reiterates

that the agency has “transmitted a draft proposed rule” to the Office of Management and Budget’s Office of Information and Regulatory Affairs (“OIRA”) consistent with E.O. 12866, the same information EPA provided in its prior reports, filed on June 12, 2017 (ECF No. 1679311), and June 29, 2017 (ECF No. 1681936). EPA’s latest filing provides no new information about the status of the administrative process.

However, the Court should be aware of information that OIRA recently made public indicating that regulatory action on the Clean Power Plan (including the preliminary step of issuing a proposed amendatory or repeal rule) may still be very far off. On July 21, 2017, OIRA issued its Current Unified Agenda of Regulatory and Deregulatory Actions, which “provides an updated report on the actions administrative agencies plan to issue in the near and long term.”¹ The updated Unified Agenda contains an entry entitled “Review of the Clean Power Plan,” which states that EPA “proposes to withdraw the Clean Power Plan on grounds that it exceeds the statutory authority provided under section 111 of the Clean Air Act.” *See* Attach. A.² The review of the Clean Power Plan is classified in the Unified Agenda as a “Long Term Action.” *Id.*

¹ OIRA, “Current Unified Agenda of Regulatory and Deregulatory Actions,” <https://www.reginfo.gov/public/do/eAgendaMain> (last visited Aug. 1, 2017).

² The page may be accessed by entering RIN Number “2060-AT55” on OIRA’s website, at <https://www.reginfo.gov/public/do/eAgendaSimpleSearch>.

OIRA defines “Long Term Actions” as “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 Unified Agenda.*”³ As OIRA further explains, Long Term Actions are ones for which no proposed rule or even advance notice of proposed rulemaking is expected in the next 12 months:

The activities included in individual agency agendas are primarily those currently planned to have an Advance Notice of Proposed Rulemaking (ANPRM), a Notice of Proposed Rulemaking (NPRM), or a Final Rule issued within the next 12 months. However, to keep users better informed of opportunities for participation in the rulemaking process, an agency may list in the “Long-Term Actions” section of its agenda those rules it expects will have the next regulatory action more than 12 months after publication of the agenda. When an agency subsequently schedules a regulatory action on one of these rules within a 12-months timeframe, the item will appear in the appropriate section of the agency’s next agenda.

OIRA, “About the Unified Agenda.”⁴

In contrast, the Unified Agenda lists EPA’s planned future regulatory redefinition of “Waters of the United States” – for which a proposed rule likewise

³ OIRA, “Current Unified Agenda of Regulatory and Deregulatory Actions – Current Long Term Actions,”

https://www.reginfo.gov/public/do/eAgendaHistory?operation=OPERATION_GEST_PUBLICATION&showStage=longterm¤tPubId=201704 (last visited Aug. 1, 2017) (emphasis added).

⁴ https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.jsp (last visited Aug. 1, 2017).

has not yet been issued – as a “proposed rule,” not a “long term action.” *Compare* Attach. A *and* Attach. B.⁵

Thus, notwithstanding EPA’s carefully hedged status reports, the classification of EPA’s Clean Power Plan review in the Unified Agenda demonstrates that even the preliminary step of a *proposed* rule may be delayed for at least another year.

These facts further underscore that this Court should not continue to postpone a decision in this fully briefed case, which was argued en banc on September 27, 2016, for a period far longer than the Supreme Court presumed when it issued its stay pending this Court’s disposition of the merits. The Court should decide the case on the merits, or terminate it by remanding the case to EPA. *See* Pub. Health and Env’tl. Orgs.’ Suppl. Br., at 8-10, ECF No. 1675202 (May 15, 2017); Pub. Health and Env’tl. Orgs.’ Resp. to EPA’s Supp. Status Report, at 2-3, ECF No. 1680025 (June 16, 2017).

⁵ EPA has published a proposed rule that would rescind its 2015 Clean Water Rule and re-codify prior regulatory definitions of “waters of the United States” while EPA considers a possible new regulatory definition. *See* 82 Fed. Reg. 34,899 (July 27, 2017). EPA has stated that it is planning, but has not yet published, a proposed rule that would provide a new “waters of the United States” definition. *See id.* at 34,903. The latter action is the subject of Attachment B.

Respectfully submitted,

Sean H. Donahue

Sean H. Donahue
Susannah L. Weaver
Donahue & Goldberg, LLP
1111 14th Street, N.W., Suite 510A
Washington, D.C. 20005
(202) 277-7085
sean@donahuegoldberg.com
*Counsel for Environmental Defense
Fund*

Tomás Carbonell
Vickie Patton
Martha Roberts
Benjamin Levitan
Environmental Defense Fund
1875 Conn. Avenue, N.W. Ste. 600
Washington, D.C. 20009
(202) 572-3610
*Counsel for Environmental Defense
Fund*

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street, N.W., Suite 300
Washington, D.C. 20005
(202) 513-6256
*Counsel for Natural Resources
Defense Council*

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
*Counsel for American Lung
Association, Clean Air Council,
Clean Wisconsin, Conservation Law
Foundation, and The Ohio
Environmental Council*

Vera P. Pardee
Kevin P. Bundy
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
*Counsel for Center for Biological
Diversity*

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Massachusetts Avenue, N.W.,
Suite 702
Washington, D.C. 20036
(202) 667-4500
Counsel for Sierra Club

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
(304) 342-5588
*Counsel for West Virginia Highlands
Conservancy, Ohio Valley
Environmental Coalition, Coal River
Mountain Watch, Kanawha Forest
Coalition, Mon Valley Clean Air
Coalition, and Keepers of the
Mountains Foundation*

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 815 words.

CERTIFICATE OF SERVICE

I certify that on August 3, 2017, the foregoing Response was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue



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EPA/OAR

RIN: 2060-AT55

Publication ID: Update 2017

Title: •Review of the Clean Power Plan

Abstract:

On April 4, 2017, the EPA announced it is reviewing the Clean Power Plan, found at 40 CFR part 60, subpart UUUU. This action proposes to withdraw the Clean Power Plan on grounds that it exceeds the statutory authority provided under section 111 of the Clean Air Act.

Agency: Environmental Protection Agency(EPA)

Priority: Economically Significant

RIN Status: First time published in the Unified Agenda

Agenda Stage of Rulemaking: Long-Term Actions

Major: Yes

Unfunded Mandates: Undetermined

CFR Citation: [40 CFR 60](#)

Legal Authority: [42 U.S.C. 7411 Clean Air Act](#)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
NPRM	To Be Determined	
Final Rule	To Be Determined	

Regulatory Flexibility Analysis Required: Undetermined

Government Levels Affected: Federal, State, Tribal

Federalism: Undetermined

Included in the Regulatory Plan: No

RIN Data Printed in the FR: No

Agency Contact:

Peter Tsirigotis
Environmental Protection Agency
Office of Air and Radiation
6204J, 109 T.W. Alexander Drive, Mail Code D205-01,
Research Triangle Park, NC 27711
Phone:888 627-7764
Email: airaction@epa.gov

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EPA/OW

RIN: 2040-AF75

Publication ID: Update 2017

Title: •Second Action: Definition of "Waters of the U.S."

Abstract:

In 2015, the Environmental Protection Agency and the Department of the Army (the agencies" published the Clean Water Rule: Definition of "Waters of the United States" (80 FR 37054, June 29, 2015). On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 rule nationwide pending further action of the court. On February 28, 2017, the President issued an Executive Order titled Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule" which instructed the agencies to review the 2015 rule and rescind or replace it as appropriate and consistent with law. The agencies are publishing this proposed rule to follow the first step which sought to recodify the definition of waters of the United States" that existed prior to the 2015 rule. In this second step, the agencies are conducting a substantive re-evaluation and revision of the definition of waters of the United States" in accordance with the Executive Order.

Agency: Environmental Protection Agency(EPA)

Priority: Other Significant

RIN Status: First time published in the Unified Agenda

Agenda Stage of Rulemaking: Proposed Rule Stage

Major: Undetermined

Unfunded Mandates: Undetermined

CFR Citation: [40 CFR 40](#) [40 CFR 110](#) [40 CFR 112](#) [40 CFR 116](#) [40 CFR 117](#) [40 CFR 122](#) [40 CFR 230](#) [40 CFR 232](#) [40 CFR 300](#) [40 CFR 302](#)

Legal Authority: [33 U.S.C. 1251 et seq.](#)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
NPRM	12/00/2017	

Regulatory Flexibility Analysis Required: Undetermined

Government Levels Affected: Federal, Local, State, Tribal

Federalism: Undetermined

Included in the Regulatory Plan: No

RIN Data Printed in the FR: No

Agency Contact:

Donna Downing
 Environmental Protection Agency
 Office of Water
 4502T,
 Washington, DC 20460
 Phone:202 566-2428
 Email: cwawotus@epa.gov

Rose Kwok
 Environmental Protection Agency
 Office of Water
 1200 Pennsylvania Avenue NW., Mail Code 4502T,
 Washington, DC 20460
 Phone:202 566-0657
 Email: cwawotus@epa.gov

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