

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 RESPONDENT-INTERVENORS'  
OPPOSITION TO EPA'S REQUEST FOR FURTHER ABEYANCE**

The undersigned States and Municipalities (State Intervenors) file this opposition to the Environmental Protection Agency's request in its January 10, 2018 status report for additional abeyance of this litigation "pending the conclusion of rulemaking." *See* EPA Status Rep. (filed Jan. 10, 2018, Doc. No. 1712376), at 4. Neither EPA's proposed repeal of the Clean Power Plan nor its prolonged and uncertain plans to replace the rule justify additional abeyance. State Intervenors therefore respectfully request that the Court deny the abeyance.

In its status report, EPA asserts two bases for continued abeyance of the litigation. EPA first cites its proposed repeal of the Clean Power Plan, *see* 82 Fed. Reg. 48,035 (Oct. 16, 2017). EPA Status Rep., ¶ 5. As explained in State

Intervenors' opposition to EPA's last request for abeyance, however, a repeal of the Clean Power Plan without replacement would put EPA in violation of its statutory duty to regulate carbon dioxide from existing power plants. *See* State Intervenors' Resp. (filed Oct. 17, 2017, Doc. No. 1699425), at 2. EPA's decision to extend the public comment period on its proposed repeal until late April, *see* <https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-repealing-clean-power-plan-0> (announcing extension until April 26, 2018), means it is unlikely that the agency will complete repeal until late 2018 at the earliest, more than two years after *en banc* argument in this case. And only then would State Petitioners (and other parties) be able to initiate a challenge to the repeal, which would turn on the same statutory authority arguments already fully briefed and argued before this Court. *See* 82 Fed. Reg. at 48,038-42. For example, EPA contends that a repeal would serve the agency's desire to avoid running afoul of a "clear statement rule." *Id.* at 48,042 (citing *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). This issue was extensively briefed and argued, and EPA is not entitled to any deference in determining whether (1) its regulations are sufficiently "transformative" so as to require a clear statement, or (2) the statute contains a sufficiently clear statement so as to justify any transformative effects.

Nor does EPA's recently-issued Advanced Notice of Proposed Rulemaking on "the scope of any new potential rule under section 111(d) of the Clean Air Act

to regulate greenhouse gases from existing electric utility generating units,” Status Rep., ¶ 6 (citing 82 Fed. Reg. 61,507 (Dec. 28, 2017)), warrant further abeyance. As discussed in response to EPA’s foreshadowing of the advanced notice in its October status report, such a preliminary regulatory tool is patently inappropriate in these circumstances, where there has already been an extraordinarily lengthy regulatory process, the agency possesses thousands (if not millions) of relevant comments, and “the Nation’s most important and urgent environmental challenge” is awaiting long overdue action. *See* State Intervenors’ Resp. at 3. Nothing in the Advanced Notice itself suggests that EPA is planning prompt and meaningful steps to replace the Clean Power Plan. *See, e.g.*, 82 Fed. Reg. at 61,509 (“EPA continues to consider the possibility of replacing certain aspects of the CPP in coordination with a proposed [repeal]”). Nor has EPA even provided the Court with any deadlines for progressing from advanced notice to a promulgated rule.

State Intervenors also reiterate the additional 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 Court continue to limit the period of any abeyance to 60 days and require EPA to file regular status reports.

Dated: January 17, 2018

Respectfully Submitted,

FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN  
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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 699 words.

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*/s/ Michael J. Myers*  
MICHAEL J. MYERS

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing State and Municipal Respondent-Intervenors' Opposition to EPA's Request for Additional Abeyance was filed on January 17, 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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