

ORAL ARGUMENT HEARD EN BANC  
ON SEPTEMBER 27, 2016 IN CASE NO. 15-1363  
ORAL ARGUMENT NOT SCHEDULED IN CASE NO. 17-1014

**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 OF NORTH DAKOTA,	)	
	)	
	)	
<i>Petitioner,</i>	)	
	)	
v.	)	
	)	No. 17-1014
	)	(and consolidated cases)
UNITED STATES	)	
ENVIRONMENTAL PROTECTION	)	
AGENCY, et al.,	)	
	)	
<i>Respondents.</i>	)	

**RESPONSE TO PETITIONERS’ MOTIONS TO DISMISS**

State and public health and environmental respondent-intervenors hereby jointly respond to the motions filed by most of the petitioners and the petitioner-

intervenors on July 15 and July 23, respectively, to dismiss the petitions for review in these sets of consolidated cases.<sup>1</sup> As explained below, the motions are premature and therefore should be denied or held in abeyance.<sup>2</sup>

The petitions in *West Virginia v. EPA* (case no. 15-1363) challenge the Environmental Protection Agency's Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), regulations that address climate-destabilizing air pollution that is already causing grave damage to public health and the environment – damage that will reach catastrophic scale in the near future absent prompt action to sharply reduce emissions. The Clean Power Plan was adopted pursuant to Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), a provision that “speaks directly” to emissions of carbon dioxide from existing power plants, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011), the largest stationary sources of such emissions.

This Court heard oral argument *en banc* on September 27, 2016. Following the last presidential transition, EPA (Doc. 1668274), with the support of petitioners

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<sup>1</sup> The State of Wisconsin (co-petitioner in case no. 15-1363 and case no. 17-1022) and the Local Government Coalition for Renewable Energy (co-petitioner in case no. 15-1482) did not join the motions to dismiss. Respondent EPA has submitted responses in support of the motions (Doc. 1797703, Doc. 1798780).

<sup>2</sup> Movants did not approach respondent-intervenors about a dismissal agreement in either case no. 15-1363 or case no. 17-1014 and no agreement has been reached. *See* Fed. R. App. P. 42(b); D.C. Circuit Handbook of Practice and Internal Procedures at 34-35 (as amended through Dec. 1, 2018).

(Doc. 1669984), asked this Court not to issue a decision on the merits and to place the case in abeyance pending administrative review and new rulemakings.

Respondent-intervenors opposed that request (Doc. 1669759). The Court granted the request, in part, in April 2017 (Doc. 1673071), and issued a series of further 60-day abeyances. In September 2018, two years after the oral argument, and after an abeyance period had expired, respondent-intervenors moved the Court (Doc. 1748706) to decide the case. Petitioners (Doc. 1750741) and EPA (Doc. 1750684) opposed that motion, which the Court denied (Doc. 1765562).<sup>3</sup>

On July 8, 2019, EPA published a final rule that, among other things, repeals the Clean Power Plan and replaces it with emission guidelines that apply to coal-fired power plants only (natural gas plants covered by the Clean Power Plan are not regulated under the new rule), and sets no overall emissions limits by which subsequent state plans are to be evaluated.<sup>4</sup> According to EPA's published notice, the rule will become effective on September 6, 2019. 84 Fed. Reg. at 32,520.

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<sup>3</sup> Regarding the petitions for review addressed in the July 23 motion, consolidated under lead case no. 17-1014, *North Dakota v. EPA*, in January 2017, EPA denied administrative petitions to reconsider the Clean Power Plan, prompting lawsuits by entities that had petitioned in *West Virginia*. The reconsideration denial cases were placed in abeyance at EPA's request (supported by petitioners) at the same time as the *West Virginia* case, in April 2017 (Doc. 1673071). The states and organizations joining this response moved to intervene in *North Dakota*, but their unopposed motions were not ruled upon.

<sup>4</sup> *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).

As petitioners and EPA note, precedent of this Court holds that once an agency has rescinded or replaced a regulation, litigation challenging that regulation ordinarily becomes moot. *See Akiachak Native Cmty. v. U.S. DOI*, 827 F.3d 100, 113-15 (D.C. Cir. 2016) (when challenged regulation “no longer exists,” court lacks Article III jurisdiction). Here, however, the rule repealing and replacing the Clean Power Plan does not become legally effective until September 6. Therefore, the current motions are premature, a point the federal government conceded in an analogous recent case involving a replacement rule that was not yet in effect at the time the dismissal motion was filed. *See Becerra v. U.S. DOI*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (granting states’ motion for summary judgment on their claim that Department of Interior violated the Administrative Procedure Act; noting the federal government’s concession that the case was not moot under Article III and rejecting prudential mootness argument). Consequently, the Court should deny petitioners’ current motions or hold them in abeyance until the repeal and replacement of the Clean Power Plan becomes effective on September 6, 2019.

Respondent-intervenors further note that a petition for review of the Clean Power Plan repeal and replacement rule has already been filed in this Court, *American Lung Ass’n v. EPA* (case no. 19-1140), and that additional petitions for review of this rule are expected. In that litigation, the Court likely will be asked, *inter alia*, to vacate the repeal of the Clean Power Plan. If the Court grants such

relief, it is conceivable that the petitioners in the present litigation may seek to revive the claims that they seek to dismiss here. Respondent-intervenors reserve their rights to object to any such revival in the future as precluded. *See* 42 U.S.C. § 7607(b); *Chamber of Commerce v. EPA*, 642 F.3d 192, 208 n.14 (D.C. Cir. 2011). Notably, for more than two years petitioners had every opportunity to seek judicial resolution of their claims (an outcome contemplated by the design of the Supreme Court's stay), but instead opposed respondent-intervenors' efforts to obtain that result, and repeatedly urged the Court not to resolve those claims.

For the reasons stated above, the motions should be denied as premature or held in abeyance until the repeal and replacement of the Clean Power Plan becomes effective on September 6, 2019.

Dated: July 25, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned attorney, Michael J. Myers, hereby certifies:

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response to Petitioners' Motions to Dismiss was filed on July 25, 2019 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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