

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

AMERICAN LUNG ASSOCIATION,
et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Respondents.

No. 19-1140
and consolidated cases

RESPONSE OF PETITIONER
THE NORTH AMERICAN COAL CORPORATION
TO EPA’S MOTION TO EXPEDITE

Petitioner The North American Coal Corporation (“NA Coal”) submits this response to the August 28, 2019 motion of the United States Environmental Protection Agency (“EPA”) to expedite proceedings in this case. NA Coal supports EPA’s motion to expedite, in the interest of securing a prompt resolution of the issues and much-needed certainty for the energy sector.

NA Coal operates surface coal mines in North Dakota, Texas, Mississippi, and on the Navajo Nation in New Mexico. In 2018, these mines delivered, on a long-term contractual basis, approximately 28 million tons of coal to electric utility generating units. Most of the operations serviced by NA Coal involve a “mine-

mouth” setup, which means that the source of coal is either co-located with the serviced power plant or located nearby. Based on this nexus, NA Coal is deeply interested in EPA’s regulation of existing energy generating units, and NA Coal participated as a commenter in the underlying rulemaking.

NA Coal has filed a Petition for Review in order to challenge, among other possible grounds for review, EPA’s failure to make an essential threshold determination prior to issuing the Affordable Clean Energy Rule. Under the Clean Air Act, EPA can promulgate a performance standard for a category of stationary sources only if it finds that the category “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A); *see also id.* § 7411(d)(1). Yet EPA made no such finding, instead incorporating the discussion of this issue in the Clean Power Plan, which in turn incorporated regulatory findings pertaining to different sources of different pollutants, some of which are nearly 50 years old. *See* 84 Fed. Reg. 32520, 32533 (July 8, 2019) (citing 80 Fed. Reg. 64510, 64531 (Oct. 23, 2015)). Although the Affordable Clean Energy Rule corrects many of the Clean Power Plan’s legal deficiencies, EPA’s failure to address this essential threshold determination is a fatal flaw.

Against this backdrop, expedited resolution is warranted to provide much-needed certainty for the regulated community. The regulatory status of coal-

powered plants has been subject to considerable uncertainty since at least 2014, when EPA first proposed new rules for existing coal-powered plants as part of the Clean Power Plan. This uncertainty frustrates long-term business planning, creates a significant barrier to investment, and slows the adoption of new technologies. Moreover, EPA's failure to make the threshold determination required by Section 7411(b)(1)(A) will further prolong this uncertainty, as it will ultimately require a remand to EPA to address the required determination. Briefing before this Court should be expedited so that EPA can begin that process with the least possible delay.

Finally, EPA's proposed schedule provides ample time for presentation of the issues. Under EPA's proposed schedule, opening briefs are not due until *three months* after the deadline to file petitions for review, and EPA is granted almost two months to prepare its response. Even considering the complexity and importance of the issues, EPA's proposed schedule is more than reasonable and should be approved.

Dated: September 9, 2019

Respectfully submitted,

/s/ Charles T. Wehland

Charles T. Wehland*

**Counsel of Record*

JONES DAY

77 West Wacker Drive, Suite 3500

Chicago, IL 60601-1692

Tel: (312) 782-3939

Fax: (312) 782-8585

ctwehland@jonesday.com

Jeffery D. Ubersax

Robert E. Johnson

JONES DAY

North Point

901 Lakeside Avenue

Cleveland, OH 44114

Tel: (216) 586-3939

Fax: (216) 579-0212

jdubersax@jonesday.com

robertjohnson@jonesday.com

Shay Dvoretzky

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Tel: (202) 879-3939

Fax: (202) 879-1600

sdvoretzky@jonesday.com

*Counsel for Petitioner The North
American Coal Corporation*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), I hereby certify that the foregoing complies with the type-volume limitation because it contains 503 words, according to the count of Microsoft Word.

/s/ Charles T. Wehland
Charles T. Wehland

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c), I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/ Charles T. Wehland

Charles T. Wehland