

NOT CURRENTLY SCHEDULED FOR ORAL ARGUMENT

No. 15-1381 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTH DAKOTA, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

**SUPPLEMENTAL BRIEF OF PUBLIC HEALTH AND
ENVIRONMENTAL ORGANIZATION RESPONDENT-INTERVENORS**

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*

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*

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*

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

Additional Counsel Listed On Signature Block.

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TABLE OF AUTHORITIES

STATUTES, REGULATIONS, AND RULES

42 U.S.C. 7607(b)(1)2
80 Fed. Reg. 64,510 (Oct. 23, 2015)1
*D.C. Cir. Rule 41(b)2

* Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

| | |
|-----------------|--|
| Clean Air Act | 42 U.S.C. §§ 7401-7671q |
| EPA | United States Environmental Protection Agency |
| New Source Rule | Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) |

Public Health and Environmental Respondent-Intervenors respectfully submit this supplemental brief in response to this Court's order of April 28, 2017, ECF No. 1673072, in which the Court requested briefing on whether it should remand, rather than hold in abeyance, the consolidated cases challenging the Environmental Protection Agency's Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units ("New Source Rule"), 80 Fed. Reg. 64,510 (Oct. 23, 2015).

ARGUMENT

Respondent-Intervenors continue to oppose EPA's motion to hold these ripe, fully briefed cases in abeyance. As we have explained, EPA's abeyance motion, ECF No. 1668276, has not identified good reasons to avoid oral argument and decision of the case. *See* Respondent-Intervenor Public Health and Environmental Organizations' Opposition to Motion to Hold Case in Abeyance, ECF No. 1669762 (filed April 5, 2017). Unless Petitioners choose to dismiss their challenges to the New Source Rule, the Court should hear and decide these cases – a path that would not preclude EPA from reviewing or proposing changes to the New Source Rule through regular Clean Air Act rulemaking procedures. A decision here would also promote judicial economy by avoiding later litigation on central issues that are

likely to arise again in the event that EPA chooses to rescind or modify the New Source Rule. *Id.* at 15 n.9.

If the Court rejects our position, its options include holding these cases in abeyance or remanding them. Remanding the cases would terminate this Court's jurisdiction, and any challenge to any further action on remand would require a new petition for review. *See* D.C. Cir. Rule 41(b). Because the Clean Air Act requires that challenges to EPA rules be brought within 60 days of their publication in the Federal Register, 42 U.S.C. 7607(b)(1), the practical effect of such a remand could be to foreclose Petitioners' ability to challenge the October 2015 New Source Rule later.¹ Insofar as Petitioners now seek to avoid decision on challenges they have brought and that are fully briefed, that effect would hardly be inequitable.

Unlike the Clean Power Plan at issue in *West Virginia v. EPA*, Nos. 15-1363, *et al.*, the New Source Rule has not been stayed, and is currently operating to limit pollution. Thus, the choice whether to hold in abeyance or remand the consolidated cases will not bear on the New Source Rule's effectiveness during any period of review by the new administration. Because the New Source Rule would remain in effect under either approach, Respondent-Intervenors do not have

¹ Were the Court to remand the record rather than the cases, D.C. Cir. Rule 41(b), the petitions for review would remain pending in this Court, and the possibility of forfeiture would presumably not arise.

a strong preference as between remand and abeyance. If the Court does opt for abeyance, it should require EPA to provide regular reports concerning the status of its review and any subsequent rulemaking activity.

CONCLUSION

The Court should deny EPA's abeyance motion and proceed to consider the merits of the petitions for review.

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
The 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 506 words.

CERTIFICATE OF SERVICE

I certify that on May 15, 2017, the foregoing Supplemental Brief was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue