

ORAL ARGUMENT REMOVED FROM CALENDAR

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

STATE OF NORTH DAKOTA, ET AL.,)	
)	
Petitioners,)	
)	
v.)	No. 15-1381 (and
)	consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, ET AL.,)	
)	
Respondents.)	
_____)	

EPA’S STATUS REPORT

Pursuant to this Court’s orders of August 10, 2017, and January 28, 2019, Respondents United States Environmental Protection Agency, et al. (“EPA”), hereby provide the Court with this 90-day status report.

1. These cases involve numerous consolidated petitions for judicial review of an EPA rule promulgated under section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b), entitled “Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule,” 80 Fed. Reg. 64,510 (Oct. 23, 2015), as well as a subsequent EPA action denying administrative petitions for reconsideration, “Reconsideration of Standards of Performance for Greenhouse Gas Emissions from

New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” 81 Fed. Reg. 27,442 (May 6, 2016) (collectively, “the Rule” or “the 111(b) Rule”). Merits briefing concerning the judicial challenges to both EPA actions was completed on February 6, 2017, and the case was scheduled for oral argument on April 17, 2017. See, e.g., ECF No. 1667709. The oral argument was later removed from the calendar. ECF No. 1668612 (Order of March 30, 2017).

2. On March 28, 2017, the President of the United States issued an Executive Order establishing the policy of the United States that executive departments and agencies “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.” Executive Order, “Promoting Energy Independence and Economic Growth,” § 1(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). With respect to the 111(b) Rule in particular, the Executive Order directs the Administrator of EPA to “immediately take all steps necessary” to review it for consistency with these and other policies set forth in the Order. Id. § 4. The Executive Order further instructs the agency to “if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding” the 111(b) Rule. Id.

3. In accordance with the Executive Order and his authority under the Clean Air Act, the EPA Administrator signed a Federal Register notice on March 28, 2017, announcing EPA's review of the 111(b) Rule and noting that if EPA's review "concludes that suspension, revision or rescission of [the 111(b) Rule] may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." "Review of the Clean Power Plan," 82 Fed. Reg. 16,329, 16,330 (Apr. 4, 2017).

4. Based on these significant developments, EPA filed a motion on March 28, 2017, to hold these cases in abeyance pending completion of EPA's review and any resulting forthcoming rulemaking. ECF No. 1668276. By order dated April 28, 2017, this Court held the cases in abeyance for 60 days and directed EPA to file status reports at 30-day intervals from the date of the order. ECF No. 1673072. The Court further directed the parties to file supplemental briefs by May 15, 2017, addressing "whether these consolidated cases should be remanded to the agency rather than held in abeyance." *Id.* EPA timely submitted its supplemental brief and advocated continuing to hold these cases in abeyance for the reasons explained therein. ECF No. 1675253.

5. On August 10, 2017, this Court ordered that the petitions be held in abeyance pending further order of the court, and directed EPA to file status reports at 90-day intervals, beginning October 27, 2017. ECF No. 1688176. On January 28,

2019, the Court denied the United States' request to extend the time to file this status report in light of a lapse in appropriations for certain federal agencies, and ordered that this report be filed within three days of the Court's order. ECF No. 1770482.

6. At this time, EPA continues to review the 111(b) Rule, as required under the Executive Order. Since the last status report was filed, EPA signed on December 6, 2018, a proposed rule to amend the 111(b) Rule. Notice of this proposed rule was published in the Federal Register on December 20, 2018. 83 Fed. Reg. 65,424 (Dec. 20, 2018). The comment period for this proposed rule is currently scheduled to close on February 19, but that comment period will be extended because the public hearing planned for January 8 was postponed on December 28, 2018, due to the lapse in appropriations for EPA. EPA is currently determining a new date for the public hearing, and will be announcing that date and the extension of the comment period in the near future. EPA will update the Court as it takes further steps.

As set forth in EPA's March 28, 2017 Motion to Hold Cases in Abeyance (ECF No. 1668276) and May 15, 2017 Supplemental Brief in Support of Abeyance (ECF No. 1675253), EPA believes these cases should remain in abeyance pending the conclusion of EPA's review of the Rule and any resulting forthcoming rulemaking.

Respectfully submitted,

ERIC GRANT
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DATED: January 30, 2019

/s/ Chloe H. Kolman
BRIAN H. LYNK

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Status Report have been served through the Court's CM/ECF system on all registered counsel this 30th day of January, 2019.

/s/ Chloe H. Kolman
Counsel for Respondent