

EN BANC ORAL ARGUMENT HELD SEPTEMBER 27, 2016**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Respondents.

No. 15-1363 (and
consolidated cases)

**PETITIONER NORTH DAKOTA'S STATUS REPORT IN SUPPORT OF
CONTINUED ABEYANCE**

Petitioner North Dakota respectfully submits this status report to urge the Court to continue to hold these consolidated cases in abeyance. Removing the abeyance would waste judicial and party resources, could jeopardize North Dakota's right to judicial review of the rule challenged in this litigation (the Clean Power Plan), and would directly harm North Dakota. North Dakota agrees with and supports the arguments put forward in the other Petitioners' and Petitioner-Intervenors' Status Report filed last Friday with the Court, and with Petitioners' and Petitioners-Intervenors' Supplemental Brief. *See* Pet'rs & Pet'r-Intervenors' Status Report In Support Of Continued Abeyance, ECF No. 1747382 (August 24, 2018) (Pet'rs Status Report); Suppl. Br. Of Pet'rs & Pet'r-Intervenors, EDF No.

1675250 (May 15, 2017) (Pet'rs Suppl. Br.). North Dakota does not reiterate duplicative arguments in this Status Report, and writes separately only to inform the Court of the particular ways that North Dakota will be injured if the abeyance in this matter is lifted.

ARGUMENT

I. North Dakota Will Suffer Additional Unique Harms If The Court Declines To Continue The Abeyance

North Dakota is one of four parties that independently sought and obtained a stay of the Clean Power Plan from the Supreme Court of the United States. Order in Pending Case, *North Dakota v. EPA*, No. 15A793 (U.S. Feb. 9, 2016). Throughout the proceedings in the Supreme Court of the United States and until recently in this consolidated case, North Dakota was the principal proponent of the argument that the Clean Power Plan violates the Clean Air Act (CAA) section 111(d)'s express delegation to states of authority to establish emission rate performance standards for existing electric generating units (EGUs), a cooperative federalism provision that allows states to make individual decisions regarding existing EGU performance standards.

While EPA released a proposed rule to replace the Clean Power Plan on August 21, 2018, the proposal does not resolve North Dakota's CAA section 111(d) concerns over that issue as it is not a final agency action. Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility

Generating Units, Pre-publication copy available at

[https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-](https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-energy-ace-rule)

[energy-ace-rule](https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-energy-ace-rule) (last visited August 27, 2018) (the Affordable Clean Energy (ACE) Rule). Until the Clean Power Plan is repealed or replaced, North Dakota is unable to ascertain whether its particular CAA section 111(d) concerns are fully addressed by the proposed ACE Rule.

As noted in Pet'rs Status Report, if this Court were to decline to continue the abeyance in this matter and remand to EPA notwithstanding the unresolved petitions, the rules of this Court and the statutory provisions of the CAA would leave North Dakota subject to jurisdictional and statutory limitation hurdles that could preclude review of its CAA section 111(d) arguments (though North Dakota would argue otherwise). Pet'rs Status Report, at 3-5. This is especially concerning to North Dakota, as its arguments relating to EPA's statutory overreach under CAA section 111(d) have not been emphasized by other petitioners in this action, and those arguments could potentially be lost if the case is remanded to EPA.

EPA's usurpation of state authority under CAA section 111(d) – by promulgating federal performance standards in the Clean Power Plan – has a disproportionate impact on North Dakota as a major lignite coal-producing state with many existing coal-fired EGUs that would be forced to close under the Clean Power Plan. North Dakota faces significant economic and political implications

for the future of its energy sector under the Clean Power Plan and the proposed ACE Rule. Absent this Court's continuation of the abeyance in this matter, North Dakota faces immediate harm in that it may potentially be precluded from obtaining review on its CAA section 111(d) arguments.

For the reasons set forth above and in in Pet's Status Report and Pet's Suppl. Br., North Dakota respectfully requests that this Court continue to hold these consolidated cases in abeyance while EPA moves forward with its reconsideration of the Clean Power Plan.

Dated: August 27, 2018

Respectfully submitted,

/s/ Paul M. Seby

Wayne Stenehjem

ATTORNEY GENERAL OF NORTH
DAKOTA

Margaret Olson

Assistant Attorney General
North Dakota Attorney General's
Office

600 E. Boulevard Avenue #125
Bismarck, ND 58505

Tel: (701) 328-3640

wstenehjem@nd.gov

maiolson@nd.gov

Paul M. Seby
Jerry Stouck
Special Assistant Attorneys General
State of North Dakota
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Tel: (303) 572-6500
Fax: (303) 572-6540
sebyp@gtlaw.com
stouckj@gtlaw.com

*Counsel for Petitioner State of North
Dakota*

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of August 2018, a copy of the foregoing Petitioner North Dakota's Status Report In Support Of Continued Abeyance was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Paul M. Seby

Paul M. Seby