

ORAL ARGUMENT NOT YET SCHEDULED

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

BIOGENIC CO2 COALITION,)	
)	
Petitioner,)	
)	
v.)	
	)	No. 15-1479
)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, ET AL.,)	
)	
Respondent.)	

WEST VIRGINIA, ET AL.,	)	No. 15-1363 (consolidated with
	)	Nos. 15-1364, 15-1365, 15-1366,
Petitioners,	)	15-1367, 15-1368, 15-1370, 15-
	)	1371, 15-1372, 15-1373, 15-1374,
v.	)	15-1375, 15-1376, 15-1377, 15-
	)	1378, 15-1379, 15-1380, 15-1382,
	)	15-1383, 15-1386, 15-1409, 15-
	)	1410, 15-1413, 15-1418, 15-1422,
UNITED STATES ENVIRONMENTAL	)	15-1432, 15-1442, 15-1451, 15-
PROTECTION AGENCY,	)	1459, 15-1488)
)	
Respondent,)	

**PETITIONER’S MOTION TO SEVER OR FOREGO CONSOLIDATION
AND HOLD ISSUES RELATING TO BIOGENIC EMISSIONS IN
ABEYANCE**

This case involves a challenge under the federal Clean Air Act by

Petitioner, the Biogenic CO₂ Coalition, to Respondent EPA's rulemaking addressing carbon dioxide emissions from electric power plants, popularly known as the Clean Power Plan.¹ Petitioner is raising unique issues relating to the regulation of "biogenic" emissions, *i.e.*, air emissions resulting from use of organic agricultural feedstocks as distinguished from emissions from fossil fuels, under the Clean Power Plan and the effect of EPA's actions on regulation of biogenic emissions under the Clean Air Act more broadly.

The Clean Power Plan has drawn myriad challenges from States, the electric power sector, manufacturers and others challenging the rulemaking, and other States, non-profit organizations and companies have sought to intervene on behalf of EPA in defense of the rulemaking. Most of these petitions have been consolidated with lead case *West Virginia et al. v. EPA*, No. 15-1363, as indicated in the caption above. Although this case, which was filed December 22, 2015, has not yet been consolidated with other Clean Power Plan challenges, Petitioner anticipates that the Court will be inclined to consolidate this case in a similar manner.

However, for the reasons set forth below, Petitioner respectfully requests that this Court withhold consolidation, or if the cases are consolidated, sever

¹ The EPA rule at issue is titled: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (October 23, 2015).

issues directed at biogenic emissions from the consolidated cases, and hold these issues, which relate uniquely to the regulation of “biogenic carbon dioxide emissions,” in abeyance in order to allow the parties to continue ongoing discussions regarding an administrative resolution which may avoid the need for judicial determination of these complex issues.

It is Petitioners understanding that only two other petitions to the Clean Power Plan rulemaking, both of which have likewise not yet been consolidated into the lead case, will be raising biogenic emissions as an issue to be litigated, and that these petitioners will shortly be filing similar motions for severance and abeyance. These cases are *National Association of Forest Owners v. EPA*, No. 15-1478 (filed December 22, 2015) (“*NAFO Petition*”), and *American Forest & Paper Association and American Wood Council v. EPA*, No. 15-1485 (filed December 22, 2015) (“*AF&PA Petition*”). This motion for relief is made necessary as Petitioner was required by Clean Air Act § 307(b), 42 U.S.C. § 7607(b), to file its Petition for Review in this Court within 60 days of publication of the subject rules, which it has done.

As described more fully below, severing the few cases implicating biogenic emissions, or not consolidating those at all into the lead case, and granting abeyance would promote judicial efficiency, conserve resources, and avoid potentially unnecessary litigation and would allow Respondent the opportunity to

potentially address the issues by administrative action without the need for judicial action. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (finding cause for abeyance when other pending proceedings may affect the outcome of the case).

BACKGROUND

On October 23, 2015, EPA published its “Clean Power Plant” which established final emissions standards under section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), applicable to greenhouse gas emissions from existing fossil fuel-fired electric generating units (EGUs) (*i.e.*, power plants). *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule*, 80 Fed. Reg. 64,662 (October 23, 2015). EPA’s promulgation of emissions guidelines in turn by operation of law requires States to develop implementation plans to reduce greenhouse gas emissions from existing fossil fuel-fired EGUs. The primary greenhouse gas from power plants is carbon dioxide, which results from combustion of fossil fuels and which has been determined by EPA to cause and contribute to climate change. However, an important strategy to reduce greenhouse gas emissions from power plants is to substitute or “co-fire” biomass as a fuel, which reduces the power plant’s emissions footprint due to the carbon-neutral character of biomass across its emissions life-cycle.

This Clean Power Plan rule therefore implicates carbon dioxide emissions from the combustion of biomass feedstocks derived from agricultural production where biomass feedstocks can be burned to create energy in certain EGUs. Such emissions are generally referred to as “biogenic emissions.” In addition, EPA’s asserted regulation of power plant emissions implicate the treatment of biogenic emissions under other provisions of the Clean Air Act, such as the Prevention of Significant Deterioration program, which provisions may be triggered or affected (the degree to which being an issue as to which the parties may disagree) by the scope of regulation of biogenic emissions in the Clean Power Plan rules.

The Biogenic CO₂ Coalition is an unincorporated association composed of non-governmental trade associations representing a cross-section of agricultural stakeholder interests, including producers of agricultural biomass as well as processors of agricultural materials which convert biomass feedstocks into food, fiber, biofuels and bioproducts.² The Biogenic CO₂ Coalition is greatly concerned with the regulatory treatment of biogenic emissions associated with agricultural production and processing, and the Coalition submitted extensive comments on the EPA rules.

² For purposes of this petition, the Biogenic CO₂ Coalition consists of the following national trade associations: the American Bakers Association, American Farm Bureau Federation, Corn Refiners Association, National Cotton Council of America, National Cottonseed Products Association, and National Oilseed Processors Association.

On December 22, 2015, the Biogenic CO2 Coalition filed a petition for review, which was assigned case number 15-1479, challenging certain aspects of the EPA Clean Power Plan rulemaking. Petitioner asserts that EPA has improperly regulated biomass emissions, has failed to adequately consider the carbon neutrality of biomass feedstocks, and that EPA has exceeded its statutory authority by conditioning the carbon neutrality of biomass feedstocks on the “sustainability” of the agricultural or forestry production from which the feedstock is derived. Petitioner also filed a petition for administrative reconsideration of the Clean Power Plan on December 22, 2015, under section 307(b) of the Clean Air Act, which Respondent is now considering.

Petitioner’s challenge to the EPA rules in this case is limited to the “biogenic emissions” issues, and Petitioner does not intend to assert or pursue in this case claims or arguments regarding the legality of other aspects of the EPA rules.³ As noted above, it is Petitioner’s understanding that similar issues will be raised in the NAFO Petition and AF&PA Petition, but Petitioner is not aware of any other petitioners in the consolidated cases which will be raising issues implicating biogenic emissions.⁴

³ Certain of the members of the Biogenic CO2 Coalition are participating in challenging other aspects of the EPA rules either in their own name or as members of industry groups in other consolidated cases.

⁴ The State of Wisconsin, which is a petitioner in *West Virginia et al. v. EPA*, No. 15-1363, has indicated in its Non-Binding Statement of Issues that it will raise whether EPA properly

Petitioner and Respondents are actively advancing discussions around the appropriate regulatory approach to biogenic emissions. Petitioner has discussed the relief sought in this motion with Respondents, beginning on December 4, 2015 and formally sought Respondents' position on December 22, 2015; however, due to the intervening holidays Respondent has not yet had an opportunity to respond. Petitioner anticipates that Respondent will agree with the relief sought and confirm their wish to avoid litigation and to provide time for additional discussions without expenditure of time and resources in this matter.

Because the biogenic emissions issues are unique and particularly amenable to severance and raised in only a small number of petitions, the issues can be severed and treated procedurally on a separate track, or the petitioner raising biogenic issues (the Biogenic CO2 Coalition Petition, the NAFO Petition, and the AF&PA Petition) can be maintained separate from other consolidated petitions and themselves consolidated, but in any event held in abeyance until any of the parties indicate that litigation is necessary.

PROPOSAL TO SEVER AND HOLD CASE IN ABEYANCE

Petitioner believes that it is appropriate to withhold consolidation or sever

considered biomass generation in setting the State emissions reduction target under the Clean Power Plan, which is a somewhat different issue. Petitioner has inquired whether Wisconsin would like to join in this motion for severance and abeyance but Wisconsin has not yet been able to respond.

the Petition for Review from consolidated cases implicating EPA's power plant rules and to hold the Petition for Review in abeyance without prejudice. Given that EPA is currently considering various issues relating to regulatory, scientific and carbon accounting treatment of biogenic issues, it is both unnecessary and potentially a waste of the Court's and the parties' resources to litigate the issues raised by the Petition for Review at this juncture. Moreover, EPA has before it a petition for administrative reconsideration on which it has not yet had an opportunity to act. Should EPA ultimately conclude at the end of its review that biogenic CO₂ emissions should not be regulated or regulated in a certain manner to which Petitioner does not object, there will be no purpose served by litigating the Petition for Review. Accordingly, to avoid unnecessary litigation, the appropriate step now is to sever or decline consolidation and place this case in abeyance. This proposed relief would promote judicial efficiency, conserve the parties' and the Court's resources, and avoid potentially unnecessary litigation while still preserving Petitioner's claims in the interim.

This Court has used the same approach in other similar circumstances, including in similar rulemaking challenges implicating biogenic greenhouse gas emissions. *See* Order dated May 27, 2011 (Dck#1385400) in *National Alliance of Forest Owners v. EPA*, No. 10-1209 (D.C. Circuit) (granting joint motion of petitioners and EPA for abeyance of issues relating to biogenic emissions in

challenge to EPA greenhouse gas standards under the “Tailoring” greenhouse gas rulemaking); *see also* Order dated Nov. 29, 2007 (Dck#1083340) in *Coke Oven Environmental Task Force v. EPA*, No. 06-1131 (D.C. Circuit) (severing previously consolidated case and holding it in abeyance pending EPA reconsideration).

Severing Petitioners’ Petition for Review or withholding consolidation and placing it in abeyance will not prejudice other parties in any consolidated cases. Petitioner’s challenge is limited to the EPA power plant rules’ treatment of biogenic CO₂ emissions, an issue that is not raised or disputed by any of the other petitioners in the various consolidated rulemaking challenges other than as described above. As noted, it is Petitioner’s understanding that all similarly situation petitioners will be shortly filing similar motions for severance and abeyance. As a result, the grant of an abeyance in this case will not prevent, or even affect, the timely resolution of the other challenges to the EPA power plant rules, which will be governed by a separate briefing schedule to be established by the Court.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court sever Case No. 15-1479 from the consolidated cases, or withhold consolidation in the first instance if cases have not yet been consolidated at the

time of the Court's consideration of this motion, and hold this case in abeyance until the parties determine whether it is necessary to reopen and litigate these challenges. This motion is made without prejudice to Petitioner's position on procedural or substantive aspects of the case, and Petitioner retains its right to file a motion to reactivate this case in the future.

Respectfully submitted,

/s/ David M. Williamson

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CORPORATE DISCLOSURE STATEMENT
OF THE BIOGENIC CO2 COALITION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Biogenic CO2 Coalition, an unincorporated association, and its members state that Petitioner and each of its members are non-governmental trade associations, are not owned in whole or in part by a parent corporation or a publicly traded company, and do not issue stock.

The members of Petitioner association, for the purposes of this petition, are the following: American Bakers Association, American Farm Bureau Federation, Corn Refiners Association, National Cotton Council of America, National Cottonseed Products Association, and National Oilseed Processors Association.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and Amici

Pursuant to D.C. Circuit Rules 15, 27(a)(4), and 28(a)(1), counsel certifies that the petitioners in the above-captioned cases, which in absence of this motion for relief are likely to be consolidated with this case and each of which is a related case, are the following:

15-1363 (lead case) – States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, the State of North Carolina Department of Environmental Quality, and Attorney General Bill Schuette on behalf of the People of Michigan

15-1364 – State of Oklahoma, ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma, and the Oklahoma Department of Environmental Quality

15-1365 – International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

15-1366 – Murray Energy Corporation

15-1367 – National Mining Association

15-1368 – American Coalition for Clean Coal Electricity

15-1370 – Utility Air Regulatory Group and the American Public Power Association

15-1371 – Alabama Power Company, Georgia Power Company, Gulf Power Company, and the Mississippi Power Company

15-1372 – CO2 Task Force of the Florida Electric Power Coordinating Group, Inc.

15-1373 – Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

15-1374 – Tri-State Generation and Transmission Association, Inc.

15-1375 – United Mine Workers of America

15-1376 – National Rural Electric Cooperative Association, Arizona Electric Power Cooperative, Inc., Associated Electric Cooperative, Inc., Big Rivers Electric Corporation, Brazos Electric Power Cooperative, Inc., Buckeye Power, Inc., Central Montana Electric Power Cooperative, Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative, Dairyland Power Cooperative, Deseret Generation & Transmission Co-operative, Inc., East Kentucky Power

Cooperative, Inc., East River Electric Power Cooperative, Inc., East Texas Electric Cooperative, Inc., Georgia Transmission Corporation, Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Northeast Texas Electric Cooperative, Inc., Northwest Iowa Power Cooperative, Oglethorpe Power Corporation, Powersouth Energy Cooperative, Prairie Power, Inc., Rushmore Electric Power Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., San Miguel Electric Cooperative, Inc., Seminole Electric Cooperative, Inc., South Mississippi Electric Power Association, South Texas Electric Cooperative, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, Tex-La Electric Cooperative of Texas, Inc., Upper Missouri G. & T. Electric Cooperative, Inc., Wabash Valley Power Association, Inc., Western Farmers Electric Cooperative, and Wolverine Power Supply Cooperative, Inc.

15-1377 – Westar Energy, Inc.

15-1378 – NorthWestern Corporation, doing business as NorthWestern Energy

15-1379 – National Association of Home Builders

15-1380 – State of North Dakota

15-1382 – Chamber of Commerce of the United States of America, National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, National Federation of Independent Business, American Chemistry Council, American Coke and Coal Chemicals Institute, American Foundry Society, American Forest & Paper Association, American Iron and Steel Institute, American Wood Council, Brick Industry Association, Electricity Consumers Resource Council, Lignite Energy Council, National Lime Association, National Oilseed Processors Association, and the Portland Cement Association

15-1383 – Association of American Railroads

15-1386 – Luminant Generation Company, LLC, Oak Grove Management Company, LLC, Big Brown Power Company, LLC, Sandow Power Company, LLC, Big Brown Lignite Company, LLC, Luminant Mining Company, LLC, and Luminant Big Brown Mining Company, LLC

15-1393 – Basin Electric Power Cooperative

15-1398 – Energy & Environment Legal Institute

15-1409 – Mississippi Department of Environmental Quality

15-1410 – International Brotherhood of Electrical Workers, AFL-CIO

15-1413 – Entergy Corporation

15-1418 – LG&E and KU Energy LLC

15-1422 – West Virginia Coal Association

15-1432 – Newmont Nevada Energy Investment LLC and Newmont USA
Limited

15-1442 – The Kansas City Board of Public Utilities- Unified Government
of Wyandotte County/Kansas City, Kansas

15-1451 – The North American Coal Corporation

15-1459 – Indiana Utility Group

15-1488 – The Competitive Enterprise Institute, the Buckeye Institute for
Public Policy Solutions, the Independence Institute, the Rio Grande Foundation,
the Sutherland Institute, Klaus J. Christoph, Samuel R. Damewood, Catherine C.
Dellin, Joseph W. Luquire, Lisa R. Markham, Patrick T. Peterson, and Kristi
Rosenquist

15-1472 (pending consolidation) – Prairie State Generating Company LLC

15-1474 (pending consolidation) – Minnesota Power (operating division of
ALLETE, Inc.)

15-1475 (pending consolidation) – Denbury Onshore, LLC

15-1477 (pending consolidation) – The Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation (EIM)

15-1478 (pending consolidation) – The National Alliance of Forest Owners

15-1479 (pending consolidation) – Biogenic CO2 Coalition

15-1483 (pending consolidation) – The Local Government Coalition for Renewable Energy

15-1484 (pending consolidation) – The National Rural Electric Cooperative Association, Basin Electric Cooperative, East Kentucky Power Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Minnkota Power Cooperative, Inc., Sunflower Electric Power Corporation, and Tri-state Generation & Transmission Association Inc.

15-1485 (pending consolidation) – American Forest & Paper Association, Inc. and American Wood Council

Respondents are Regina A. McCarthy, Administrator, United States Environmental Protection Agency and the United States Environmental Protection Agency.

Movant-intervenors include Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department,

National Grid Generation, LLC, Pacific Gas and Electric Company, American Wind Energy Association, Advanced Energy Economy, American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, Sierra Club, Peabody Energy Corporation, Solar Energy Industries Association, the States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, Broward County, Florida, NextEra Energy, Inc., the West Virginia Highlands Conservancy, the Ohio Valley Environmental Coalition, Coal River Mountain Watch, the Kanawha Forest Coalition, Mon Valley Clean Air Coalition, Keepers of the Mountains Foundation New York Power Authority, Sacramento Municipal Utility District, Southern California Edison Company, the City of Los Angeles, by and through its Department of Water and Power, Dixon Bros., Inc., Nelson Brothers, Inc., Wesco International, Inc., Norfolk Southern Corp., Joy Global Inc., and Gulf Coast Lignite Coalition.

Movant-Amicus Curiae is Philip Zoebisch.

B. Ruling under Review

The motion relates to EPA’s Final Rule titled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule*, published at 80 Fed. Reg. 64,662 (Oct. 23, 2015).

C. Related Cases

The following related cases are currently pending before the Court, but have not yet been consolidated with the lead case:

The National Alliance of Forest Owners v. EPA, Case No. 15-1478 (D.C. Cir. Dec. 22, 2015).

American Forest & Paper Association, Inc. and American Wood Council v. EPA, Case No. 15-1485 (D.C. Cir. Dec. 22, 2015).

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of January, 2016, I caused the foregoing Motion to Sever or Forego Consolidation and Hold Issues Relating to Biogenic Emissions in Abeyance to be served on counsel of record in this case by means of the Court's CM/ECF system.

/s/ David M. Williamson

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