

## ORAL ARGUMENT NOT YET SCHEDULED

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

BIOGENIC CO2 COALITION,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	No. 19-1185 (consolidated with
	)	Nos. 19-1140 (lead), 19-1165,
	)	19-1166, 19-1173, 19-1175,
UNITED STATES ENVIRONMENTAL	)	19-1176, 19-1177, 19-1179,
PROTECTION AGENCY, ET AL.,	)	19-1186, 19-1187, 19-1188,
	)	19-1189)
Respondents.	)	
	)	

**PETITIONER BIOGENIC CO2 COALITION’S MOTION TO SEVER AND  
HOLD ISSUES RELATING TO BIOGENIC EMISSIONS IN ABEYANCE**

This case challenges a rulemaking by the Environmental Protection Agency (“EPA”) under the Clean Air Act known as the Affordable Clean Energy Rule or “ACE Rule” regulating greenhouse gas emissions from power plants.<sup>1</sup> This case (No. 19-1185) has been ministerially consolidated with numerous other petitions.<sup>2</sup>

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<sup>1</sup> *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019).

<sup>2</sup> Respondents EPA and Administrator Wheeler have indicated through counsel that they oppose this motion. The following parties have indicated that they

Unique among the consolidated petitions, the Biogenic CO2 Coalition raises an issue relating to EPA's regulation of emissions from agricultural biomass feedstocks like soybeans and corn stover ("biogenic emissions"), as distinguished from emissions from fossil fuels like coal or natural gas. This is the only issue raised in No. 19-1185.

Petitioner respectfully requests that the Court sever No. 19-1185 and hold it in abeyance pending EPA's forthcoming resolution of biogenic emissions issues administratively. EPA has indicated to the Biogenic CO2 Coalition that it intends to propose a separate rulemaking by the end of this year, which if finalized would

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take no position on this motion at this time: Petitioners Am. Lung Ass'n, *et al.* (No. 19-1140); State of New York, *et al.* (19-1165); Appalachian Mountain Club, *et al.* (19-1166); Chesapeake Bay Found., Inc. (19-1173); Robinson Enter., Inc., *et al.* (19-1175); Westmoreland Mining Holdings LLC (19-1176); City and County of Denver Colorado (19-1177); The North Am. Coal Corp. (19-1179); Advanced Energy Econ. (19-1186); and Consol. Edison, Inc., *et al.* (19-1188); Intervenors for Respondent AEP Generating Co., AEP Generation Res. Inc., Murray Energy Corp., Nat'l Mining Ass'n, Public Serv. Co. of Oklahoma, Southwestern Electric Power Co., Westmoreland Mining Holdings LLC, Wheeling Power Co., Indiana Michigan Power Co., and Kentucky Power Co. (19-1140); and Movant-Intervenors for Respondent State of West Virginia, *et al.* (19-1140). The following parties have indicated that they do not oppose this motion: Intervenors for Respondent Am.'s Power (19-1140). The following parties have not given a response at this time: Petitioners Am. Wind Energy Ass'n, *et al.* (19-1187); Intervenors for Respondent Appalachian Power Co., Nat'l Rural Electric Coop. Ass'n, State of North Dakota, U.S. Chamber of Commerce (19-1140); and Movant-Intervenors for Respondent Indiana Energy Ass'n, Indiana Util. Group (19-1166); Int'l Brotherhood of Boilermakers, *et al.*, Int'l Brotherhood of Electrical Workers, *et al.*, and United Mine Workers of Am., *et al.* (19-1173).

likely resolve the biogenic issue raised in the ACE rule as well as substantially identical biogenic issues raised in several other pending rulemaking petitions. This Court has previously severed the biogenic issues in each of these previous rulemaking challenges (listed below) and held those cases in abeyance. Thus, Petitioner requests similar relief so that the biogenic issues can be resolved together efficiently and with consistent treatment:

- *Biogenic CO2 Coalition v. EPA*, No. 15-1479 (D.C. Cir. filed Dec. 22, 2015) (challenging EPA's Clean Power Plan rulemaking at 80 Fed. Reg. 64,662 (Oct. 23, 2015)); *see* Order, dated Jan. 21, 2016 (Doc. #1594946) (severing biogenic issues and granting abeyance);
- *Biogenic CO2 Coalition v. EPA*, No. 15-1480 (D.C. Cir. filed Dec. 22, 2015) (challenging EPA's New Source Performance Standards rulemaking at 80 Fed. Reg. 64,510 (Oct. 23, 2015)); *see* Order, dated Mar. 24, 2016 (Doc. #1605581) (severing biogenic issues and granting abeyance);
- *Biogenic CO2 Coalition v. EPA*, No. 16-1358 (D.C. Cir. filed Oct. 14, 2016) (challenging EPA's Aircraft Emissions Endangerment Finding rulemaking, 81 Fed. Reg. 54,422 (Aug. 15, 2016)); *see* Order dated Nov. 14, 2016 (Doc. #1645912) (granting abeyance).

The biogenic issue raised in No. 19-1185 relates only to the regulation of biogenic emissions and does not implicate any other aspect of the ACE Rule, and can thus be readily severed from the other consolidated cases and held in abeyance.<sup>3</sup> The Biogenic CO2 Coalition also filed a petition for administrative reconsideration of the ACE Rule with EPA focused solely on the biogenic issue, and that petition for reconsideration is now under consideration by the agency.<sup>4</sup> As noted, EPA has indicated that it will resolve the biogenic issues in an administrative proceeding this year, which would likely moot all four biogenic cases and avoid the need for this Court to adjudicate on this discrete yet complex issue.

Severing the Biogenic CO2 Coalition's challenge and granting abeyance will not prejudice other parties. The Coalition's challenge in No. 19-1185 is limited to the ACE Rule's treatment of biogenic emissions, an issue that is, to the Coalition's knowledge, not raised by any other petitioner or intervenor in the consolidated cases, and the Coalition does not intend to assert or pursue claims or arguments regarding any other aspects of the ACE Rule. As a result, the grant of abeyance in

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<sup>3</sup> See Biogenic CO2 Coalition Pet. for Review, No. 19-1185 (Doc. #1805347), filed Sept. 05, 2019.

<sup>4</sup> See Biogenic CO2 Coalition Pet. for Administrative Reconsideration, EPA-HQ-OAR-2017-0355 (Doc. #26751), filed Sept. 05, 2019, available on the electronic docket at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-26751>.

this case will not prevent, or even affect, the timely resolution of the other challenges to the ACE Rule.

To the contrary, if litigated, the Biogenic CO2 Coalition's challenge would raise unique legal arguments specific to the biogenic issue and would share little substantive content with the other ACE Rule challenges. Accordingly, little judicial efficiency would be gained by hearing the biogenic case together with the consolidated cases, and in fact the added complexity of the biogenic issue may thwart EPA's desire for expeditious resolution. *See* EPA's Mot. To Expedite at 2, (Doc. #1803976), filed Aug. 28, 2019. Moreover, absent abeyance, the piecemeal adjudication of the Coalition's four pending cases will undermine this Court's interest in the efficient and consistent resolution of the biogenic issues under the Clean Air Act and would raise the specter of conflicting rulings.

Accordingly, Petitioner respectfully requests that the Court sever this case, No. 19-1185, from the consolidated cases in *American Lung Association v. EPA* (No. 19-1140) and hold No. 19-1185 in abeyance as it has done in the prior cases 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 should the requested relief be granted.

Petitioner also respectfully requests that, until such time as the Court rules on

this motion, Petitioner be relieved from filings pursuant to the Court's order relating to preliminary filings.<sup>5</sup>

Dated: September 26, 2019

Respectfully submitted,

/s/ David M. Williamson

David M. Williamson  
Williamson Law + Policy, PLLC  
1850 M Street NW, Suite 840  
Washington, D.C. 20036  
Tel: (202) 256-6155  
Fax: (703) 519-0076  
maxwilliamson@williamsonlawpolicy.com  
*Counsel for Petitioner*

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<sup>5</sup> Pursuant to the Court's order dated September 11, 2019 (Doc. #1806060), preliminary filings consisting of the Certificate as to Parties, Rulings, and Related Cases; Docketing Statement Form; Procedural Motions; Statement of Intent to Utilize Deferred Joint Appendix; and Statement of Issues to be Raised are due October 7, 2019, and Dispositive Motions are due October 21, 2019.

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 26<sup>th</sup> day of September 2019, I caused the foregoing Petitioner Biogenic CO2 Coalition's Motion to Sever 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

David M. Williamson

## CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that the foregoing Petitioner Biogenic CO2 Coalition's Motion to Sever and Hold Issues Relating to Biogenic Emissions In Abeyance complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive of the caption, signature block, and any certificates of counsel, contains 1,264 words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that the foregoing Petitioner Biogenic CO2 Coalition's Motion to Sever and Hold Issues Relating to Biogenic Emissions In Abeyance complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: September 26, 2019

/s/ David M. Williamson

David M. Williamson