ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN LUNG ASSOCIATION, *et al.,* *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	No. 19-1140 and consolidated cases

RESPONSE OF PETITIONER
THE NORTH AMERICAN COAL CORPORATION
TO MOTIONS FOR ABEYANCE

Petitioner The North American Coal Corporation ("NA Coal") opposes the September 20 and 25 motions of various petitioners (Documents #1807492 and 1808098) to hold this case in abeyance. NA Coal's challenge to EPA's authority to issue the Affordable Clean Energy Rule ("the Rule") presents a pure legal question that is indisputably ripe for a decision, regardless of whether the possible administrative proceedings highlighted by those petitioners ever occur, and should accordingly be resolved without delay.

BACKGROUND

As NA Coal explained in its response to EPA's motion to expedite, NA Coal has filed a Petition for Review in order to challenge EPA's failure to make an essential threshold determination before issuing the Rule. Under the Clean Air Act, EPA can promulgate a performance standard for a category of stationary sources only if it finds that the category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A); *see also id.* § 7411(d)(1). Yet EPA here made no such finding. *See* 84 Fed. Reg. 32520, 32533 (July 8, 2019) (citing 80 Fed. Reg. 64510, 64531 (Oct. 23, 2015)).

This error goes to the heart of EPA's authority to promulgate the Rule. When EPA made an endangerment finding for greenhouse gas emissions from automobiles in 2009, EPA candidly acknowledged that "the global nature of the air pollution problem and the breadth of countries and sources emitting greenhouse gasses means that no single country and no single source category dominate or are even close to dominating on a global scale." 74 Fed. Reg. 66497, 66538 (Dec. 15, 2009). Against that backdrop, EPA justified its 2009 endangerment finding on the ground that the statutory provision applicable to automobiles, "*[u]nlike other CAA provisions . . . does not require 'significant' contribution*" and thus does not require a finding that the source category is "the sole or even the major part of an

air pollution problem." *Id.* at 66506 (emphasis added). Yet when presented with statutory language that *does* require a "significant" contribution, EPA sidestepped the significance question entirely. Having failed to "draw the significance line at all," *North Carolina v. EPA*, 531 F.3d 896, 918-19 (D.C. Cir. 2008), EPA had no authority to establish guidelines for carbon dioxide emissions from electric generating units.

ARGUMENT

Because NA Coal's challenge goes to the heart of EPA's statutory authority, there is no reason to wait to decide it. Movants essentially argue that their own challenges to the Rule are prudentially unripe because EPA might change some aspects of the Rule in administrative proceedings that may not ever occur. Movants cannot delay resolution of NA Coal's challenge to EPA's authority by arguing that their own challenges are not ripe.

Cases cited by Movants stand for the proposition that courts may hold a case in abeyance when pending administrative proceedings could significantly alter or even moot the issues raised by the petitioner. For instance, in *American Petroleum Institute v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012), the agency had proposed a revised rule that represented a "complete reversal of course" and "would likely moot the analysis we could undertake if deciding the case now." Likewise, in *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 426 (D.C. Cir. 2007), the

issues raised by the petitioners "could well be moot" depending on how still-pending administrative proceedings were resolved.[1] These cases stand for the commonsense proposition that a court may wait to review a claim while there is still a significant chance it will be resolved by the agency.

Whereas Movants' cases all involve situations where the relevant agency was in the midst of administrative activity that would almost certainly affect the substance and scope of the issues presented for decision by the Court, that is not at all the situation here. In the Affordable Clean Energy Rule, EPA expressly refused to take any final action on the proposed New Source Review reforms that Movants want to see before proceeding, instead stating that it would address those issues in "a separate final action at a later date." 84 Fed. Reg. 32520, 32521 (July 8, 2019). There is no statutory deadline or obligation for EPA to complete that action, and, even if it did, EPA made clear the consequences of that separate action "are no longer considered in parallel with" the Rule. *Id*. at 32555.

Movants' pending petitions for administrative reconsideration provide an even thinner reed on which to hang a delay of this entire proceeding, as EPA has

[1] *See also, e.g.*, *Sierra Club v. EPA*, 884 F.3d 1185, 1191 (D.C. Cir. 2018) ("EPA had so significantly changed certain aspects of the rule, including the two challenged here, that EPA decided to allow more time for public comment and to reconsider them yet again."); *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008) (case was held in abeyance after "EPA agreed to take comment" on whether to revise its rule).

not indicated that it ever intends to act on those petitions, and does not have a statutory obligation or deadline to do so. This is not a case where EPA has "decided to allow more time for public comment," *Sierra Club*, 884 F.3d at 1191, or has "agreed to take comment," *Sierra Club*, 551 F.3d at 1023, on whether to revise its rule.[2]

Moreover, none of these administrative possibilities could even possibly affect the challenge raised by NA Coal, as the Rule makes abundantly clear that EPA is "*not reopening any issues* related to [its] conclusion" that it is not required to make a pollutant-specific endangerment finding. 84 Fed. Reg. at 32533 (emphasis added).[3] Cases cited by Movants instruct that "the fitness of an issue

[2] *Am. Trucking Associations, Inc. v. EPA*, No. 97-1440, 1998 WL 65651, at *1 (D.C. Cir. Jan. 21, 1998), also is not to the contrary, as in that case the Court held in abeyance only those portions of the case that might be affected by a petition for reconsideration and proceeded to set a briefing schedule on the remaining issues. If anything, that case confirms that Movants' petitions for reconsideration cannot be allowed to delay consideration of the arguments raised by NA Coal.

[3] Similarly, while EPA has proposed changes to its regulation of new and modified electric generating units under Section 111(b), the proposed changes do not disturb EPA's determination it is not required to make a pollutant-specific endangerment finding. *See* 83 Fed. Reg. 65424, 65434 (Dec. 20, 2018). And while EPA has called for comments on its interpretation of Section 111(b) in a separate proposed rulemaking pertaining to emissions of methane from natural gas facilities, that release specifically states that "EPA proposes to retain its current interpretation" of the endangerment finding provision. 84 Fed. Reg. 50244, 50261 (Sept. 24, 2019). In any event, EPA has given no indication that it would revisit its regulation of electric generating units if it were to revise its interpretation of

'depends on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Am. Petroleum Inst.*, 683 F.3d at 387 (citation omitted). Applying that standard, the issue raised by NA Coal is indisputably fit for judicial decision, as the requirement to make an endangerment finding under Section 111(b)(1) goes to the bedrock question of EPA's legal authority, and EPA has definitively stated it has no intention to revisit its determination.[4] It makes no sense to postpone consideration of that fundamental legal question simply because Movants believe there is a possibility EPA might make technical changes to the Rule that could affect their unrelated legal challenges. Indeed, Movants cite no case for the proposition that petitioners with concededly unripe claims can indefinitely postpone the Court's consideration of *other* claims by *other* petitioners that indisputably are ripe for review.

Section 111(b) in the course of a separate rulemaking pertaining to different emissions from a different source category.

[4] Notably, EPA cannot evade review of this issue simply because it declined to reconsider its prior resolution of this question when promulgating the Rule. EPA's decision to adopt the Rule without making an endangerment finding "necessarily raises the issue of whether" EPA exceeded its authority when it first declined to make an endangerment finding in the Clean Power Plan, and thus that issue can be reviewed on a petition for review of the Rule. *Envtl. Def. Fund v. EPA*, 852 F.2d 1316, 1324–25 (D.C. Cir. 1988); *see also, e.g., Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 78–79 (D.D.C. 2013).

Finally, Movants are wrong when they suggest that holding the case in abeyance would not cause hardship to regulated entities like NA Coal. If this case were held in abeyance, the delay would be indefinite, as EPA is not required to address Movants' petitions for reconsideration on any timeline, and the New Source Review rulemaking that Movants highlight may *never* be finalized (and certainly need not be finalized within a particular time). Meanwhile, the regulatory status of coal-powered plants has been subject to considerable uncertainty since at least 2014, when EPA first proposed new rules for existing coal-powered plants as part of the Clean Power Plan. This uncertainty frustrates long-term business planning, creates a barrier to investment, and slows the adoption of new technologies. Moreover, EPA's failure to make the threshold determination required by Section 7411(b)(1)(A) will further prolong this uncertainty, as it will ultimately require a remand for EPA to consider the required determination. This Court's prompt review is needed to assure that EPA acts consistent with the authority conferred on it by the Clean Air Act, and review should not be postponed simply because Movants believe that delay would further ripen their more peripheral legal claims.

CONCLUSION

For the foregoing reasons, the motions to hold these petitions in abeyance should be denied.

Dated: September 30, 2019

Respectfully submitted,

/s/ Charles T. Wehland

Charles T. Wehland*
*Counsel of Record
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, IL 60601-1692
Tel: (312) 782-3939
Fax: (312) 782-8585
ctwehland@jonesday.com

Jeffery D. Ubersax
Robert E. Johnson
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
jdubersax@jonesday.com
robertjohnson@jonesday.com

Shay Dvoretzky
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 879-1600
sdvoretzky@jonesday.com

Counsel for Petitioner The North American Coal Corporation

CERTIFICATE OF COMPLIANCE

1. Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), I hereby certify that the foregoing response complies with the type-volume limitation because it contains 1,641 words, according to the count of Microsoft Word.

2. Pursuant to Federal Rule of Appellate Procedure 27(d)(1)(E), I hereby certify that the foregoing response complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ Charles T. Wehland
Charles T. Wehland

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c), I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/ Charles T. Wehland
Charles T. Wehland