

ORAL ARGUMENT OCCURRED OCTOBER 8, 2020
 JUDGMENT AND OPINION ISSUED JANUARY 19, 2021

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

AMERICAN LUNG ASSOCIATION, ET AL.,)	
)	
<i>Petitioners,</i>)	
)	
)	No. 19-1140 and
v.)	consolidated cases
)	
ENVIRONMENTAL PROTECTION AGENCY,)	
ET AL.,)	
)	
<i>Respondents.</i>)	

**RESPONDENTS' MOTION FOR A
PARTIAL STAY OF ISSUANCE OF THE MANDATE**

Pursuant to Federal Rule of Appellate Procedure 41, and Local Rule 41, the Respondents Environmental Protection Agency, et al., (EPA) respectfully request that the Court partially stay issuance of this Court's mandate. Specifically, EPA requests that the Court stay the issuance of the mandate for the vacatur of the Clean Power Plan (CPP) Repeal Rule until EPA takes further action consistent with the Court's decision on remand. The parties' positions are as follows: environmental petitioners, state petitioners, petitioner Westmoreland Mining Holdings

LLC, and the Robinson petitioners do not oppose the relief sought by this motion. Petitioner Biogenic CO2 Coalition and petitioner North American Coal Corporation consent to this motion. The state respondent-intervenors and industry respondent-intervenors take no position on this motion.

In support of the motion, EPA states as follows:

1. The consolidated petitions for review in this case challenged three rules: the CPP Repeal Rule; the Affordable Clean Energy (ACE) Rule which established emissions guidelines for existing coal-fired power plants under the Clean Air Act, 42 U.S.C. § 7411(d); and updated regulations for state implementation of emissions guidelines under Section 7411(d). *See* 84 Fed. Reg. 32,520 (July 8, 2019).

2. In merits briefing, the environmental and state petitioners challenged all three rules. *Env. Br.* at 45-46, *Doc. Id. No.* 1838680; *States Br.*, *Doc. Id. No.* 1838735. The environmental petitioners further asserted that if their petition challenging the CPP Repeal Rule was granted, the CPP should not be reinstated because the deadlines provided for by the rule had long passed, and the emissions targets were out of date. *Env. Br.* at 45-46. EPA likewise argued that if the CPP

Repeal Rule was invalidated, the CPP rule should not be reinstated.

EPA Br. at 266-67, Doc. Id. No. 1856430.

3. On January 19, 2021, this Court issued its decision, vacating the CPP Repeal Rule, the ACE Rule, and the challenged timing provisions within the implementing regulations. *See ACE Decision*, Doc. Id. No. 1880546. The decision did not specifically address whether the CPP should be reinstated upon vacatur of the CPP Repeal Rule. *See id.* The Court stayed issuance of the mandate until seven days after the deadline for petitions for rehearing en banc. Jan. 19, 2021 Order, Doc. Id. No. 1880547. The time for filing such petitions expires on March 5, 2021.

4. In vacating the ACE Rule and the CPP Repeal Rule, the Court instructed the Agency to “consider the question [of section 7411(d) regulation] afresh.” *See ACE Decision* at 147. Because new coal-fired power plants are regulated under Section 7411(b), EPA is obligated under Section 7411(d) to establish new emissions guidelines for existing coal-fired power plants. 42 U.S.C. § 7411(d)(1); *see also* 40 C.F.R. § 60.22(a). Given the passage of time and other significant administrative considerations, and consistent with this Court’s

instruction that the Agency consider the question afresh, EPA strongly believes that no Section 7411(d) rule should go into effect until such action is completed. This will promote regulatory certainty and to avoid the possibility of administrative disruption. *See* Decl. of J. Goffman. Therefore, EPA respectfully requests that the Court stay the mandate for vacatur of the CPP Repeal Rule until EPA responds to the Court's remand in a new rulemaking action. *See id.* EPA does not seek a stay of the mandate for the vacatur of the ACE Rule or for vacatur of the challenged timing provisions within the implementing regulations. Staying the mandate for vacatur of the CPP Repeal Rule would remove any doubt about states' and regulated entities' obligations under the CPP during this interim period.

5. This Court has previously recognized that a stay of the mandate can be appropriate where a transition period is required after existing regulations have been vacated. *See Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998). Such a period is particularly appropriate in this case. EPA's action on remand must take into account, among other things, the changed facts and circumstances in

the electricity sector that have occurred over the last several years. A stay is also consistent with the Clean Air Act's mandate to protect "health [and] welfare" from pollution that "endanger[s]" the public, 42 U.S.C. §7411(b)(1). A stay would allow EPA to focus its efforts on taking appropriate action on remand as expeditiously as practicable.

For these reasons, EPA respectfully requests that the Court stay the issuance of the mandate for the vacatur of the Clean Power Plan Repeal Rule until EPA responds to the Court's remand in a new rulemaking action. EPA will provide status reports on the progress of the administrative proceedings at 90-day intervals.

February 12, 2021

Respectfully submitted,

JEAN E. WILLIAMS
Acting Assistant Attorney General

/s/ Meghan E. Greenfield

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d) because this document contains 788 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: February 12, 2021

/s/ Meghan E. Greenfield
MEGHAN E. GREENFIELD

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was served on February 12, 2021, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Meghan E. Greenfield

MEGHAN E. GREENFIELD

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

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION
AGENCY,

Respondent.

No. 19-1140 (and consolidated cases)

DECLARATION OF JOSEPH GOFFMAN

1. I, Joseph Goffman, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees under my supervision.

2. I am Principal Deputy Assistant Administrator and Acting Assistant Administrator for the United States Environmental Protection Agency (“EPA” or the “Agency”) Office of Air and Radiation (OAR), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

3. OAR is the EPA headquarters-based unit with primary responsibility for administration of the Clean Air Act (CAA). As the Principal Deputy Assistant Administrator and Acting Assistant Administrator for OAR, I serve as the principal advisor to the Acting Administrator of EPA on matters pertaining to air and radiation programs, and I am responsible

for managing these programs, including: program policy development and evaluation; development of emissions standards; program policy guidance and overview; and technical support and evaluation of regional air and radiation program activities.

4. As part of my duties as Principal Deputy Assistant and Acting Assistant Administrator of OAR, I oversee the development and implementation of regulations, policy, and guidance associated with section 111 of the CAA, 42 U.S.C. § 7411.

5. This declaration is filed in support of EPA's motion for a partial stay of the issuance of the mandate in *American Lung Ass'n, et al. v. EPA*, No. 19-1140 (D.C. Cir.).

6. Section 111(b) of the CAA, 42 U.S.C. § 7411(b), requires that EPA establish "standards of performance" for new sources in the source categories listed pursuant to that section. These standards are commonly referred to as "new source performance standards" or "NSPS."

7. Section 111(d) of the CAA, 42 U.S.C. § 7411(d), requires that EPA prescribe regulations establishing a procedure under which each state shall submit to EPA a plan for regulating air pollutants (with certain exceptions) emitted from existing sources that would be subject to NSPS if they were new sources. EPA refers to its regulations for specific pollutants from existing sources as "emission guidelines."

8. On October 23, 2015, EPA promulgated the Clean Power Plan (CPP) as an emission guideline, requiring that states submit plans establishing standards of performance limiting greenhouse gases (GHGs), in the form of carbon dioxide, from fossil fuel-fired power plants, also referred to as electric utility generating units (EGUs). 80 Fed. Reg. 64,662.

9. On July 8, 2019, EPA promulgated a rulemaking package that contained three distinct rules: 1) repeal of the CPP (CPP Repeal Rule), 2) the Affordable Clean Energy rule

(ACE), which were new emission guidelines replacing the CPP, and 3) general implementing regulations, which provide for the development and implementation of emission guidelines under CAA section 111(d). 84 Fed. Reg. 32,520.

10. On January 19, 2021, the D.C. Circuit vacated the Affordable Clean Energy (ACE) rule, the CPP Repeal Rule, and the challenged timing provisions within the implementing regulations, and remanded the actions to the Environmental Protection Agency (EPA) for further proceedings consistent with its opinion.

11. The purpose of this declaration is to provide the Court with factual information and context regarding EPA's understanding of the Court's decision and its effect on the status of states' obligations under both the CPP and ACE. I have relied upon my staff to provide the factual information concerning the record and issues in the case for which I make this declaration.

12. EPA understands the Court's decision as leaving neither the CPP nor ACE, and thus no CAA section 111(d) regulation, in place with respect to GHG emissions from EGUs. EPA is therefore obligated to propose and promulgate new rulemaking under CAA section 111(d) for the regulation of GHGs from EGUs. 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.22(a).

13. Under the CPP, states were required to submit their plans no later than September 6, 2018, 80 Fed. Reg. at 64,828, three years after the CPP was signed on August 3, 2015, *id.* at 64,941. Because the ACE decision was handed down almost five and one-half years after the CPP was signed, this deadline has long since passed and is therefore impossible to meet. The CPP further required that sources comply with their state plan requirements in phases, the first of which was to run from 2022 to 2024, allowing sources more than three years from state plan submittal before having to begin to comply, and that sources achieve full compliance by 2030.

Id. at 64828. As a practical matter, this compliance schedule would also have to be significantly revised.

14. Furthermore, ongoing changes in electricity generation mean that on a nationwide basis, the emission reductions that the CPP was projected to achieve have already been achieved by the power sector. Specifically, the CPP was projected to reduce CO₂ emissions from the electric power sector by 2030 to a level approximately 32 percent below the level in 2005. 80 Fed. Reg. at 64665. Preliminary data indicates that CO₂ emissions from the electric power sector in 2019 were 34 percent below the level in 2005. *Compare* “Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units,” EPA-452/R-19-003 (June 2019), at ES-8, Table ES-4 (2005 emissions) *with* EPA, Clean Air Markets, “Power Plant Emission Trends,” www.epa.gov/airmarkets/power-plant-emission-trends (2019 emissions).

15. EPA has notified the EPA Regional Administrators of its understanding of the Court’s decision and the status of states’ obligations under both the CPP and ACE. *See* Exhibit A, Memorandum from Joseph Goffman, Acting Assistant Administrator, to EPA Regional Administrators (Feb. 12, 2021).

16. **Conclusion:** In light of the previously described facts, I support the conclusion that, in order to promote clarity on the states’ obligations under CAA section 111(d) and to avoid any potential disruption among the regulated community, no section 111(d) rule should go into effect until EPA responds to the Court’s remand in a new rulemaking action. While I believe that is the most natural reading of the Court’s decision, in order to leave no room for doubt, I believe it would be appropriate and helpful for the Court to stay issuance of the mandate with respect to the CPP Repeal Rule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of February, 2021.



Joseph Goffman
Principal Deputy Assistant Administrator and Acting
Assistant Administrator
Office of Air and Radiation
United States Environmental Protection Agency

EXHIBIT A



February 12, 2021

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Status of Affordable Clean Energy Rule and Clean Power Plan

FROM: Joseph Goffman
Acting Assistant Administrator

TO: EPA Regional Administrators
Regions I - X

On January 19, 2021, the D.C. Circuit vacated the Affordable Clean Energy (ACE) rule and remanded to the Environmental Protection Agency (EPA) for further proceedings consistent with its opinion.¹ Since then, EPA Regional staff have received requests from multiple states seeking clarity regarding their obligations in light of the court decision. The purpose of this memo is to provide EPA Regional staff with information so they can respond to those requests regarding EPA's view that the court's opinion did not result in any obligation for states to submit Clean Air Act (CAA) section 111(d) State Plans under the Clean Power Plan (CPP),² nor do states have any obligations under the now-vacated ACE rule.³

The court's decision vacated the ACE rule, including its requirements that states submit State Plans by July 8, 2022. Because the court vacated ACE and did not expressly reinstate the CPP, EPA understands the decision as leaving neither of those rules, and thus no CAA section 111(d) regulation, in place with respect to greenhouse gas (GHG) emissions from electric generating units (EGUs). As a practical matter, the reinstatement of the CPP would not make sense. The deadline for states to submit State Plans under the CPP has already passed⁴ and, in any event, ongoing changes in electricity generation mean that the emission reduction goals that the CPP set for 2030 have already been achieved.⁵ Therefore, EPA does not expect states to take any further action to develop and submit plans under CAA section 111(d) with respect to GHG emissions from EGUs at this time.

1 *Am. Lung Ass'n v. EPA*, 2021 WL 162579 (D.C. Cir. Jan. 19, 2021).

2 80 Fed. Reg. 64,662 (Oct. 23, 2015).

3 84 Fed. Reg. 32,520 (July 8, 2019).

4 Under the CPP, states were required to submit their State Plans no later than September 6, 2018. 80 Fed. Reg. at 64,828.

5 See "Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units," EPA-452/R-19-003 (June 2019), at 2-14 to 2-15. We note further that none of the parties in the ACE litigation sought reinstatement of the CPP.