

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

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AMERICAN LUNG ASSOCIATION, ET AL.,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY,

*Respondent.*

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) No. 19-1140 and

) consolidated cases

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**MOTION TO GOVERN**

The undersigned parties hereby file the following motion to govern proceedings.

1. The consolidated petitions for review in this case challenged three rules promulgated by the U.S. Environmental Protection Agency (EPA) under Section 7411(d) of the Clean Air Act and that were all contained within one Federal Register notice. *See* 84 Fed. Reg. 32,520 (July 8, 2019). These three rules included: (1) the Affordable Clean Energy (ACE) Rule, which established revised emissions guidelines for existing coal-fired power plants under the Clean Air Act, 42 U.S.C.

§ 7411(d); (2) the Clean Power Plan (CPP) Repeal Rule, which repealed the previous emission guidelines for these and certain other plants; and (3) updated regulations for implementation of emissions guidelines under Section 7411(d). *See* 84 Fed. Reg. 32,520 (July 8, 2019). The petitioners fell into five main categories: non-governmental organization (NGO) petitioners; state petitioners; power company petitioners; biogenic petitioners; and coal industry petitioners. *See* ACE Decision, Doc. Id. No. 1880546 at 38-39. A different group of states and industry organizations intervened as respondents in support of EPA.<sup>1</sup>

2. On January 19, 2021, this Court issued its decision. The decision denied the petitions for review by the coal industry petitioners. *See* ACE Decision at 147. Those petitions for review challenged EPA's authority to issue the ACE Rule. *Id.* The decision granted the petitions for review by the NGO petitioners, the state petitioners, the power company petitioners, and the biogenic petitioners. *Id.* These petitions for review challenged the CPP Repeal Rule, the ACE Rule, and the timing provisions within the implementing regulations. *Id.* at 146-47.

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<sup>1</sup> The NGO petitioners and state petitioners separately intervened in support of EPA in opposition to the coal industry petitions for review. *See* Doc. Id. Nos. 1852053, 1852121.

The decision did not specifically address whether the CPP should be reinstated upon vacatur of the CPP Repeal Rule. *See id.*

3. On February 12, 2021, EPA filed a motion for partial stay of the issuance of the mandate. Doc. Id. No. 1885168. Specifically, EPA requested that the Court stay the issuance of the mandate with respect to the vacatur of the Clean Power Plan Repeal Rule until EPA responded to the Court's remand in a new rulemaking action. *Id.* at 5. EPA did not ask the Court to stay issuance of the mandate addressing the petitions for review challenging EPA's authority to issue the ACE Rule, the petitions for review challenging the substance of the ACE Rule, or the petitions for review challenging the implementing regulations rule. *See id.*

4. The Court granted EPA's motion for a partial stay of the mandate on February 22, 2021. Order, Doc. Id. No. 1886386. Then, on March 5, 2022, the Court issued the partial mandate addressing the petitions for review challenging EPA's authority to issue the ACE Rule, the petitions for review challenging the substance of the ACE Rule, and the petitions for review challenging the implementing regulations rule. Doc. Id. No. 1888579.

5. In October of 2021, the Supreme Court granted petitions for certiorari filed by the state respondent-intervenors, Westmoreland Mining Holdings LLC, and The North American Coal Corporation. Doc. Id. No. 1920522. These petitions for review all addressed this Court's determination that "promulgation of the ACE Rule and its embedded repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act." *See* ACE Decision at 147. The Supreme Court declined to grant Westmoreland Mining Holdings LLC's petition for certiorari insofar as it challenged EPA's authority to promulgate the ACE Rule. *Id.*

6. On June 30, 2022, the Supreme Court issued its decision. Doc. Id. No. 1953093. On August 1, 2022, the Supreme Court issued an order that, in relevant part, provided: "it is ordered and adjudged by this Court that the judgments of the above court are reversed with costs, and the cases are remanded to the United States Court of Appeals for the District of Columbia Circuit for further proceedings consistent with the opinion of this Court." Doc. Id. No. 1957250.

7. On September 19, 2022, this Court ordered that: "in light of the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587

(2022), reversing this court's judgment and remanding for further proceedings, the parties file motions to govern." Doc. Id. No. 1964911.

8. The parties hereby request that the Court take the following actions with respect to the mandate:

- The Court should withdraw the mandate issued on March 5, 2021, and the associated order issued on February 22, 2021.
- For the petitions for review challenging the CPP Repeal Rule, the Court should revise its judgment entered on January 19, 2021, to reflect that the petitions for review should be denied consistent with the opinion of the Supreme Court. The Court should then issue a new partial mandate in accordance with the revised judgment.
- For the petitions for review by coal industry petitioners (North American Coal Corporation, Westmoreland Mining Holdings LLC, and the Robinson Petitioners), this Court's judgment denying these petitions is unaffected by the Supreme Court's disposition of the petitions for certiorari, and so the Court's reissued partial mandate should continue to encompass the denial of these petitions.

- For the petitions for review challenging the implementing regulations rule, this Court's judgment is unaffected by the Supreme Court's disposition of the petitions for certiorari, and so the Court's reissued partial mandate should continue to encompass the grant of these petitions.

9. With respect to the petitions for review challenging the ACE Rule filed by the NGO petitioners, the state petitioners, and the power company petitioners, certain legal and factual issues remain unresolved. This Court's January 2021 decision did not address all of the petitioners' arguments challenging that rule. Nor did the Supreme Court's opinion resolve all of the petitioners' arguments. Nevertheless, given that EPA is presently undertaking a rulemaking process to replace the ACE Rule with a new rule governing greenhouse gas emissions from fossil-fuel-fired power plants, the undersigned parties agree that the pending challenges to the ACE Rule should be placed in abeyance pending completion of that process. At this time, it is expected that EPA will issue a proposed rule by March 2023. *See* <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=2060-AV10>. The Agency expects to finalize a rule by Spring 2024. It

is within the Court's authority and consistent with its past practice to hold proceedings in abeyance where doing so would promote justice, judicial economy, and expedient resolution of the cases on its docket.

*See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). EPA proposes to file status reports on the progress of its rulemaking on 90-day intervals.

Respectfully submitted,

Dated: October 3, 2022

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing complies with this Court's  
September 19, 2022 Order because it contains 1096 words.

/s/ Meghan E. Greenfield

Meghan E. Greenfield

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing was served on October 3, 2022, 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