

**ORAL ARGUMENT REMOVED FROM CALENDAR  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA, et al.,	)	
	)	
<i>Petitioners,</i>	)	
	)	
v.	)	No. 15–1381
	)	(and consolidated cases)
U.S. ENVIRONMENTAL	)	
PROTECTION AGENCY, et al.,	)	
	)	
<i>Respondents.</i>	)	

**RESPONSE OF ENVIRONMENTAL RESPONDENT-INTERVENORS TO  
RESPONDENT’S MOTION FOR EXTENSION OF TIME TO FILE  
STATUS REPORT**

Environmental Respondent-Intervenors respectfully oppose the motion of respondent Environmental Protection Agency (EPA or Agency) for leave to extend the January 22, 2018 deadline for submitting its 90-day status report. EPA has not provided grounds sufficient to overcome the Court’s and the public’s strong interest in receiving, consistent with this Court’s order of August 27, 2017 (Doc. 1688176), an update on the agency reconsideration that is the basis for this Court’s decision to place this case in abeyance, particularly given the significant developments since the Agency’s last status report in October.

We readily understand the severe burdens that the ongoing, unprecedentedly long lapse in appropriations imposes upon EPA and Department of Justice staff. However, in this instance, the lapse is also burdening the public and interfering with its rights to notice and comment. These impositions are ones that the Agency, even limited to top leadership and staff that management deems “essential,” can and should remedy by providing basic information that would save the public time and effort and ensure that the shutdown will not impair the public’s right to participate in an important Clean Air Act rulemaking.

Since its last status report was filed three months ago, Doc. 1756604 (filed Oct. 23, 2018), and as part of the reconsideration process that prompted the Agency to ask the Court to place these consolidated cases in abeyance, EPA has published a proposed replacement rule that would weaken limits on greenhouse gas emissions from new coal-burning power plants. 83 Fed. Reg. 65,424 (Dec. 20, 2018). Despite the lapse in appropriations, EPA has not postponed impending events associated with this rulemaking, including an imminent date for the sole public hearing on the proposal and an upcoming deadline for public comment.

Pursuant to the Clean Air Act's requirement that EPA “*shall* give interested persons an opportunity for the *oral* presentation of data, views, or arguments, in addition to an opportunity to make written submissions,” 42 U.S.C. § 7607(d)(5)(ii) (emphasis added), the sole public hearing the Agency has announced

concerning its proposal is scheduled for January 30, 2019.<sup>1</sup> Parties that may wish to participate in the public hearing are forced to make arrangements for that hearing date with no certainty whether the hearing will take place as scheduled next week even if the shutdown were to end soon.

Written comments on the proposed rule are currently due on February 19, 2019. 83 Fed. Reg. at 65,424/2. The shutdown, however, has caused the closure of EPA's reading rooms, which contain record information that is key to stakeholders' ability to prepare adequate written comments and is not otherwise available to the public, online or elsewhere.<sup>2</sup> Parties are therefore forced to prepare written comments without access to necessary information, even though EPA is legally bound to change the February 19 deadline. The Clean Air Act requires a

---

<sup>1</sup> See EPA, "Rescheduled: Public Hearing on Proposed NSPS for Greenhouse Gas Emissions from New, Modified, and Reconstructed EGUs,"

<https://www.epa.gov/stationary-sources-air-pollution/forms/rescheduled-public-hearing-proposed-nsps-greenhouse-gas> (visited on Jan. 22, 2018) ("The hearing will be held on Wednesday, January 30, 2019, from 9:00 a.m. – 7:00 p.m. (local time)" in Washington, D.C.).

<sup>2</sup> On January 18, 2018, several of the Respondent-Intervenors filed a request that EPA extend the comment deadline, noting, among other things, that the partial government shutdown has precluded them from accessing information necessary to prepare written comments. Center for Biological Diversity, Clean Air Task Force, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club, "Request for Information Not Provided and Extension of the Comment Deadline for Proposed Rule: Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 65,424 (Dec. 20, 2018)" (submitted Jan. 18, 2019), Addendum at 3-4.

minimum of 30 days between the public hearing and the deadline for written comments. 42 U.S.C. § 7607(d)(5).

Given the substantial and prejudicial uncertainty concerning the status of the ongoing rulemaking, including imminent deadlines for public participation, EPA should not be excused from its obligation to provide this Court and the public with a status report, including an explanation of how the Agency intends to ensure that the current lapse in appropriations will not prejudice the public's opportunity to comment on EPA's proposed rule.

Respectfully submitted,

Sean H. Donahue

Sean H. Donahue  
Susannah L. Weaver  
Donahue & Goldberg, LLP  
1008 Pennsylvania Ave., S.E.  
Washington, D.C. 20003  
(202) 277-7085  
sean@donahuegoldberg.com  
*Counsel for Environmental Defense  
Fund*

Tomás Carbonell  
Vickie Patton  
Martha Roberts  
Benjamin Levitan  
Environmental Defense Fund  
1875 Conn. Avenue, N.W. Ste. 600  
Washington, D.C. 20009  
(202) 572-3610  
*Counsel for Environmental Defense  
Fund*

David Doniger  
Benjamin Longstreth  
Melissa J. Lynch  
Natural Resources Defense Council  
1152 15th Street, N.W., Suite 300  
Washington, D.C. 20005  
(202) 513-6256  
*Counsel for Natural Resources  
Defense Council*

Joanne Spalding  
Andres Restrepo  
Alejandra Núñez  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
(415) 977-5725  
*Counsel for Sierra Club*

Ann Brewster Weeks  
James P. Duffy  
Clean Air Task Force  
114 State Street, 6<sup>th</sup> Fl.  
Boston, MA 02100  
(617) 624-0234, ext. 156  
*Counsel for American Lung  
Association, Clean Air Council,  
Clean Wisconsin, Conservation Law  
Foundation, and The Ohio  
Environmental Council*

Clare Lakewood  
Climate Law Institute  
Center for Biological Diversity  
1212 Broadway, Suite 800  
Oakland, CA 94612  
(510) 844-7121  
clakewood@biologicaldiversity.org  
*Counsel for Center for Biological  
Diversity*

Howard I. Fox  
Earthjustice  
1625 Massachusetts Avenue, N.W.,  
Suite 702  
Washington, D.C. 20036  
(202) 667-4500  
*Counsel for Sierra Club*

William V. DePaulo  
122 N Court Street, Suite 300  
Lewisburg, WV 24901  
(304) 342-5588  
*Counsel for West Virginia Highlands  
Conservancy, Ohio Valley  
Environmental Coalition, Coal River  
Mountain Watch, Kanawha Forest  
Coalition, Mon Valley Clean Air  
Coalition, and Keepers of the  
Mountains Foundation*

**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 698 words.

**CERTIFICATE OF SERVICE**

I certify that on January 22, 2019, the foregoing Response was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue

## ADDENDUM



January 18, 2019

**Submitted via regulations.gov**

Acting Administrator Andrew Wheeler  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460  
Attn: Doc. No. EPA-HQ-OAR-2013-0495

Re: *Request for information not provided and extension of the comment deadline for Proposed Rule: Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 83 Fed. Reg. 65,424 (Dec. 20, 2018).

Dear Acting Administrator Wheeler:

The Environmental Defense Fund, Center for Biological Diversity, Clean Air Task Force, Natural Resources Defense Council, and Sierra Club respectfully request an extension of the comment deadline to at least 60 days after the end of the government shutdown for the Proposed Rule: *Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 83 Fed. Reg. 65,424 (Dec. 20, 2018). As explained below, EPA has not made available information essential to evaluating and to commenting meaningfully on the proposal and must provide this information and adequate time for its review. Moreover, the current government shutdown has prevented access to other critical information. EPA has currently provided only a 60-day comment period, extending over the holiday period and ending on February 19, 2019, and one public hearing scheduled for January 30, 2019, in Washington D.C. Since EPA has moved the public hearing from its initial scheduled date of January 8, 2019, pursuant to the explicit requirements of the Clean Air Act, EPA must, at minimum, provide official notice of this change in the public hearing date, extend the comment deadline to 30 days after the new public hearing date, and provide notice of the new comment deadline.<sup>1</sup> Given the lack of access to essential information about the proposal, the timing of the announcement, the government shutdown, and the significance of the issues under consideration, more time is clearly warranted and EPA must extend the initial comment deadline by at least an additional 60 days after the shutdown ends.

---

<sup>1</sup> 42 U.S.C. § 7607(d)(5).



The length of the comment period must reflect the significance of the proposal, which concerns the greatest environmental challenge of our time—global climate change—and raises numerous complex technical issues. The proposal would severely weaken the only nationwide limits on carbon pollution from new coal-fired power plants. It would allow new coal-fired power plants to be built and operated without pollution controls that would meaningfully limit their carbon emissions. In doing so, the proposal would eliminate a significant climate protection at a time when the dangers of uncontrolled climate change have never been more clear. This administration's recent release of the United States Global Change Research Program's FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES<sup>2</sup> further confirms the incontrovertible scientific conclusion that climate change is *already* causing enormous damage to the physical, social, and economic well-being of communities across the country and around the world, that those damages increase exponentially over time, and that steep emission reductions must be achieved within the next decade if truly catastrophic damage is to be avoided.

Speeding the transition to a clean, low-carbon power sector is critical to protect communities from further harm. Power plants remain America's largest stationary source of climate pollution. According to one analysis of worldwide historical data, assuming a 40-year-lifetime, every 6 GW of new coal-fired capacity commits the world to 1 Gt CO<sub>2</sub> of emissions.<sup>3</sup> Because even one new uncontrolled coal-fired power plant would substantially increase carbon pollution at a time when we must sharply reduce emissions, EPA's proposal to dramatically weaken carbon pollution limits for new coal-fired power plants is both unconscionable and untenable. The public must, therefore, have a full and meaningful opportunity to analyze and comment on this proposal.

Unfortunately, EPA's current timeframe undercuts the public's ability to analyze and meaningfully comment on the proposal's technical issues. The proposed rule raises complex questions related to power plant technology, emission rates associated with different boiler designs, and the availability and cost of carbon capture and sequestration and other pollution control measures. Moreover, EPA added technical support documents further detailing these issues to the docket on and after the date of publication of the proposed rule just before the holidays.<sup>4</sup> In light of these complex technical issues and the importance of the existing standards as a safeguard against increased climate-disrupting carbon pollution, the current brief comment period is clearly inadequate and must be extended by at least 60 days after the shutdown ends. Precedent exists for such an extension: notably, EPA provided an approximately four-month period for public comment after publication of the January 8, 2014 proposed rule that resulted in

---

<sup>2</sup> U.S. Global Change Research Program, *Fourth National Climate Assessment* (Nov. 23, 2018), available at <https://www.globalchange.gov/nca4>.

<sup>3</sup> Steven J. Davis and Robert H. Socolow, *Commitment accounting of CO<sub>2</sub> emissions*, 9 Environ. Res. Lett. 084018 (2014), <http://iopscience.iop.org/article/10.1088/1748-9326/9/8/084018/pdf>.

<sup>4</sup> See, e.g., EPA, Memorandum from The Office of Air Quality Planning and Standards Re: Review of the Water Consumption and Availability Impacts on the Viability of Carbon Capture and Storage Projects, Document ID #: EPA-HQ-OAR-2013-0495-11942; EPA, Memorandum from The Office of Air Quality Planning and Standards, Document ID #: EPA-HQ-OAR-2013-0495-11941.

the establishment of these standards, underscoring the inappropriately short time period EPA has provided here.<sup>5</sup>

Furthermore, EPA has not provided information that is necessary for the public meaningfully to evaluate and comment upon the proposal. There are multiple docket materials that include or relate to information essential for assessing the proposal, but for which corresponding attachments are not available online in the [www.regulations.gov](http://www.regulations.gov) docket due to copyright restrictions. These include attachments to the Geographic Availability Memorandum,<sup>6</sup> Best System of Emission Reduction memorandum,<sup>7</sup> Preamble References memorandum,<sup>8</sup> and GHG BACT Permits Cover Memorandum.<sup>9</sup> Due to the ongoing government shutdown, the public cannot visit the EPA Docket Center Public Reading Room to review these materials—indeed, a number of the signatories to this letter have repeatedly attempted and failed to access the materials in this manner due to the shutdown. In many cases, these attachments provide specific information EPA relied on when formulating the proposal, but without access to this information, commenters have no way to evaluate EPA’s decisions and provide informed feedback.

Similarly, access to other key sources of information necessary to evaluate the proposal is not possible during the shutdown. For example, [www.data.gov](http://www.data.gov), which includes information that the undersigned organizations require to evaluate EPA’s claims in the proposal regarding power plant cooling systems, remains unavailable due to the lapse in government funding. The Clean Air Act requires that “[a]ll data, information, and documents. . . on which the proposed rule relies [] be included in the [rulemaking] docket” and that the rulemaking docket “be open for inspection by the public at reasonable times.”<sup>10</sup> Furthermore, these data, information, and documents “shall be included in the docket *on the date of publication of the proposed rule.*”<sup>11</sup> The statute thus directly contemplates that all such materials must be publicly available during the entire public comment period. To the extent that they are added after the date of publication of the rule, or are, as a practical matter, unavailable to the public during some part of the comment period, the agency must, consistent with the Clean Air Act, extend the public comment period to account for such lapses. In this instance, EPA must therefore extend the comment period in order to give the public an adequate opportunity to access, review, and comment upon these documents and information in light of the present shutdown.

In addition, critical information needed to properly assess EPA’s proposal is simply missing. One example of this is EPA’s failure to provide adequate documentation as to how it derived its proposed standards of performance. In a December 2018 memorandum posted to the docket, EPA explained that it “normalized” the emission rates of today’s better-performing coal-fired power plants to account for factors such as steam temperature and pressure, number of reheat

---

<sup>5</sup> See Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 12,681 (Mar. 6, 2014) (extending comment period to May 9, 2014).

<sup>6</sup> Docket ID #: EPA-HQ-OAR-2013-0495-11941.

<sup>7</sup> Docket ID #: EPA-HQ-OAR-2013-0495-11954.

<sup>8</sup> Docket ID #: EPA-HQ-OAR-2013-0495-11952.

<sup>9</sup> Docket ID #: EPA-HQ-OAR-2013-0495-11951.

<sup>10</sup> 42 U.S.C. § 7607(d)(3)-(4) (emphasis added).

<sup>11</sup> *Id.* § 7607(d)(3) (emphasis added).

cycles, coal type, ambient temperature, and cooling type.<sup>12</sup> EPA, however, did not provide the full set of underlying data or the source of the engineering equations it used to perform this normalization procedure.<sup>13</sup> For this reason, we and others cannot fully evaluate the validity of the agency's normalizing equations, the uncertainty associated with those equations, and the limitations of those equations.

Because EPA has relied so heavily on its review of existing old units (including units that are subcritical and with zero or only one reheat cycle) in developing its proposed emission limits, the agency must provide the technical publications and/or full set of data that support the use of its proposed formula for making each of its "normalization" adjustments. Under these circumstances, EPA must extend the comment period deadline for the proposed rule to provide a reasonable period of time *after* the information has been made available to allow the public to review that critical information.

Lastly, EPA released the proposal immediately before the holiday season, which also hampers public participation. The agency has had an extremely protracted period to consider the issues under review and must grant the public a reasonable opportunity to do the same. EPA announced its review of the existing 2015 standards on Tuesday April 4, 2017.<sup>14</sup> EPA has had over 20 months to review and deliberate over the current proposal, underscoring the arbitrariness of the agency's decision to release the proposal right before the holiday season and thereby unreasonably truncate public review and comment. The comment deadline must be extended in consideration of this timing.

We note, with serious concern, that this inadequate schedule reflects the current administration's troubling pattern of shortchanging and frustrating public engagement in the rulemaking process with respect to major rollbacks and rescissions of critical public health protections. The current administration has upended hearing locations without explanation<sup>15</sup> and repeatedly rejected extension and hearing requests without reasoned justification.<sup>16</sup> Similarly, the administration has

---

<sup>12</sup> EPA, *Best System of Emissions Reduction (BSER) for Steam Generating Units and Integrated Gasification Combined Cycle (IGCC) Facilities* at 7 (Dec. 2018), Docket ID #: EPA-HQ-OAR-2013-0495-11954.

<sup>13</sup> *Id.*

<sup>14</sup> Review of the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 82 Fed. Reg. 16,330 (Apr. 4, 2017).

<sup>15</sup> Joint Comments on the Proposed Rollback of Clean Car Standards submitted by Center for Biological Diversity, Conservation Law Foundation, Environmental Defense Fund, Earthjustice, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, and Union of Concerned Scientists, Appendix A at 212-14, Document ID #: NHTSA-2018-0067-12000, available at: <https://www.regulations.gov/document?D=NHTSA-2018-0067-12000>.

<sup>16</sup> See, e.g., Joint Comments on the Proposed Rollback of Clean Car Standards submitted by Center for Biological Diversity, Conservation Law Foundation, Environmental Defense Fund, Earthjustice, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, and Union of Concerned Scientists, Appendix A at 207-08, Document ID #: NHTSA-2018-0067-12000, available at: <https://www.regulations.gov/document?D=NHTSA-2018-0067-12000>; Comment of EDF, ELPC, & WE ACT on EPA's Proposed Rule, *Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits*, 82 Fed. Reg. 53,442 (Jan. 5, 2018), at Part VIII, available at: <https://www.edf.org/sites/default/files/content/EDF%20ELPC%20WE%20ACT%20Comments%20on%20Glider%20Proposed%20Repeal%20final.pdf>; Comments from Environmental Defense Fund on EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (Aug. 31, 2018) at 71-73 (Oct. 31, 2018), Document ID #: EPA-HQ-OAR-2017-0355-24419.

established a pattern of omitting required procedural steps that ensure proper consideration of issues related to states, tribes, environmental justice communities, and other important stakeholders.<sup>17</sup> Public engagement is the foundation of reasoned rulemaking, not a formulaic box to be checked. We call on EPA to change course and enable meaningful public engagement.

We thus respectfully request that EPA make available all relevant documents immediately upon restoration of funding to EPA and extend the comment deadline by at least an additional 60 days after the end of the government shutdown.

Thank you for your consideration of this request.

Sincerely,

Surbhi Sarang  
Environmental Defense Fund  
1875 Connecticut Avenue, NW  
Suite 600  
Washington, DC 20009  
(202) 572-3526  
[ssarang@edf.org](mailto:ssarang@edf.org)

Clare Lakewood  
Climate Law Institute  
Center for Biological Diversity  
Ph: (510) 844-7121  
Fax: (510) 844-7150  
[clakewood@biologicaldiversity.org](mailto:clakewood@biologicaldiversity.org)

Jay Duffy  
Clean Air Task Force  
114 State Street, 6th Floor  
Boston, MA 02109  
P: 802.233.7967  
[jduffy@catf.us](mailto:jduffy@catf.us)

Lissa Lynch  
Natural Resources Defense Council  
1152 15th Street NW Suite 300  
Washington DC 20005  
[llynch@nrdc.org](mailto:llynch@nrdc.org)  
202-717-8296

Andres Restrepo  
Sierra Club  
(301) 367-7572  
[andres.restrepo@sierraclub.org](mailto:andres.restrepo@sierraclub.org)

---

<sup>17</sup> See, e.g., Joint Comments on the Proposed Rollback of Clean Car Standards submitted by Center for Biological Diversity, Conservation Law Foundation, Environmental Defense Fund, Earthjustice, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, and Union of Concerned Scientists, Appendix A at 228-39, Document ID #: NHTSA-2018-0067-12000, available at: <https://www.regulations.gov/document?D=NHTSA-2018-0067-12000>; Comment of EDF, ELPC, & WE ACT on EPA's Proposed Rule, *Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits*, 82 Fed. Reg. 53,442 (Jan. 5, 2018), at Part III & VII(e), available at: <https://www.edf.org/sites/default/files/content/EDF%20ELPC%20WE%20ACT%20Comments%20on%20Glanders%20Proposed%20Repeal%20final.pdf>; Comments from Environmental Defense Fund on EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (Aug. 31, 2018) at 75 (Oct. 31, 2018), Document ID #: EPA-HQ-OAR-2017-0355-24419.