

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

STATE OF NORTH DAKOTA, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 15-1381 (and
	)	consolidated cases)
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, ET AL.,	)	
	)	
Respondents.	)	
_____	)	

**EPA'S STATUS REPORT**

Pursuant to this Court's orders of August 10, 2017, and January 28, 2019, Respondents United States Environmental Protection Agency, et al. ("EPA"), hereby provide the Court with this 90-day status report.

1. These cases involve numerous consolidated petitions for judicial review of an EPA rule promulgated under section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b), entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule," 80 Fed. Reg. 64,510 (Oct. 23, 2015), as well as a subsequent EPA action denying administrative petitions for reconsideration, "Reconsideration of Standards of Performance for Greenhouse Gas Emissions from

New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” 81 Fed. Reg. 27,442 (May 6, 2016) (collectively, “the Rule” or “the 111(b) Rule”). Merits briefing concerning the judicial challenges to both EPA actions was completed on February 6, 2017, and the case was scheduled for oral argument on April 17, 2017. See, e.g., ECF No. 1667709. The oral argument was later removed from the calendar. ECF No. 1668612 (Order of March 30, 2017).

2. On March 28, 2017, the President of the United States issued an Executive Order establishing the policy of the United States that executive departments and agencies “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.” Executive Order, “Promoting Energy Independence and Economic Growth,” § 1(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). With respect to the 111(b) Rule in particular, the Executive Order directs the Administrator of EPA to “immediately take all steps necessary” to review it for consistency with these and other policies set forth in the Order. Id. § 4. The Executive Order further instructs the agency to “if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding” the 111(b) Rule. Id.

3. In accordance with the Executive Order and his authority under the Clean Air Act, the EPA Administrator signed a Federal Register notice on March 28, 2017, announcing EPA's review of the 111(b) Rule and noting that if EPA's review "concludes that suspension, revision or rescission of [the 111(b) Rule] may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." "Review of the Clean Power Plan," 82 Fed. Reg. 16,329, 16,330 (Apr. 4, 2017).

4. Based on these significant developments, EPA filed a motion on March 28, 2017, to hold these cases in abeyance pending completion of EPA's review and any resulting forthcoming rulemaking. ECF No. 1668276. By order dated April 28, 2017, this Court held the cases in abeyance for 60 days and directed EPA to file status reports at 30-day intervals from the date of the order. ECF No. 1673072. The Court further directed the parties to file supplemental briefs by May 15, 2017, addressing "whether these consolidated cases should be remanded to the agency rather than held in abeyance." *Id.* EPA timely submitted its supplemental brief and advocated continuing to hold these cases in abeyance for the reasons explained therein. ECF No. 1675253.

5. On August 10, 2017, this Court ordered that the petitions be held in abeyance pending further order of the court, and directed EPA to file status reports at 90-day intervals, beginning October 27, 2017. ECF No. 1688176. On January 28,

2019, the Court denied the United States' request to extend the time to file a status report in light of a lapse in appropriations for certain federal agencies, and ordered that a report be filed within three days of the Court's order. ECF No. 1770482.

6. At this time, EPA continues to review the 111(b) Rule, as required under the Executive Order. On December 6, 2018, EPA signed a proposed rule to amend the 111(b) Rule. Notice of this proposed rule was published in the Federal Register on December 20, 2018. 83 Fed. Reg. 65,424 (Dec. 20, 2018). EPA held a public hearing on February 14, 2019, and the comment period closed on March 18, 2019. Since the last status report, EPA is continuing to review the comments submitted on the proposed rule and considering options for final action. On September 24, 2019, the National Energy Technology Laboratory of the U.S. Department of Energy ("DOE") released an update to its report entitled, "Cost and Performance Baseline for Fossil Energy Plants," an earlier version of which EPA relied on in the proposed rulemaking. EPA expects that DOE will update other reports relevant to the final rule by early November 2019. EPA intends to consider these updated reports in the final rule to assure that the rule is based on current cost and performance information. EPA's intention and expectation is that the Agency will be in a position to take final action on this proposed rule in the winter of 2019-2020.

As set forth in EPA's March 28, 2017 Motion to Hold Cases in Abeyance (ECF No. 1668276) and May 15, 2017 Supplemental Brief in Support of Abeyance

(ECF No. 1675253), EPA believes these cases should remain in abeyance pending the conclusion of EPA's review of the Rule and any resulting forthcoming rulemaking.

Respectfully submitted,

ERIC GRANT  
Deputy Assistant Attorney General

DATED: October 28, 2019

/s/ Chloe H. Kolman  
BRIAN H. LYNK  
CHLOE H. KOLMAN  
U.S. Department of Justice  
Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044  
Phone: (202) 514-9277  
Email: chloe.kolman@usdoj.gov

Of Counsel:

Scott J. Jordan  
United States Environmental  
Protection Agency  
Office of General Counsel  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Status Report have been served through the Court's CM/ECF system on all registered counsel this 28th day of October, 2019.

/s/ Chloe H. Kolman  
Counsel for Respondent