

## NOT CURRENTLY SCHEDULED FOR ORAL ARGUMENT

No. 15-1381 (and consolidated cases)

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NORTH DAKOTA, *et al.*,  
Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
Respondent.

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**SUPPLEMENTAL BRIEF OF PUBLIC HEALTH AND  
ENVIRONMENTAL ORGANIZATION RESPONDENT-INTERVENORS**

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\* Authorities upon which we chiefly rely are marked with an asterisk.

## GLOSSARY

Clean Air Act	42 U.S.C. §§ 7401-7671q
EPA	United States Environmental Protection Agency
New Source Rule	Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015)

Public Health and Environmental Respondent-Intervenors respectfully submit this supplemental brief in response to this Court's order of April 28, 2017, ECF No. 1673072, in which the Court requested briefing on whether it should remand, rather than hold in abeyance, the consolidated cases challenging the Environmental Protection Agency's Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units ("New Source Rule"), 80 Fed. Reg. 64,510 (Oct. 23, 2015).

### **ARGUMENT**

Respondent-Intervenors continue to oppose EPA's motion to hold these ripe, fully briefed cases in abeyance. As we have explained, EPA's abeyance motion, ECF No. 1668276, has not identified good reasons to avoid oral argument and decision of the case. *See* Respondent-Intervenor Public Health and Environmental Organizations' Opposition to Motion to Hold Case in Abeyance, ECF No. 1669762 (filed April 5, 2017). Unless Petitioners choose to dismiss their challenges to the New Source Rule, the Court should hear and decide these cases – a path that would not preclude EPA from reviewing or proposing changes to the New Source Rule through regular Clean Air Act rulemaking procedures. A decision here would also promote judicial economy by avoiding later litigation on central issues that are

likely to arise again in the event that EPA chooses to rescind or modify the New Source Rule. *Id.* at 15 n.9.

If the Court rejects our position, its options include holding these cases in abeyance or remanding them. Remanding the cases would terminate this Court's jurisdiction, and any challenge to any further action on remand would require a new petition for review. *See* D.C. Cir. Rule 41(b). Because the Clean Air Act requires that challenges to EPA rules be brought within 60 days of their publication in the Federal Register, 42 U.S.C. 7607(b)(1), the practical effect of such a remand could be to foreclose Petitioners' ability to challenge the October 2015 New Source Rule later.<sup>1</sup> Insofar as Petitioners now seek to avoid decision on challenges they have brought and that are fully briefed, that effect would hardly be inequitable.

Unlike the Clean Power Plan at issue in *West Virginia v. EPA*, Nos. 15-1363, *et al.*, the New Source Rule has not been stayed, and is currently operating to limit pollution. Thus, the choice whether to hold in abeyance or remand the consolidated cases will not bear on the New Source Rule's effectiveness during any period of review by the new administration. Because the New Source Rule would remain in effect under either approach, Respondent-Intervenors do not have

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<sup>1</sup> Were the Court to remand the record rather than the cases, D.C. Cir. Rule 41(b), the petitions for review would remain pending in this Court, and the possibility of forfeiture would presumably not arise.

a strong preference as between remand and abeyance. If the Court does opt for abeyance, it should require EPA to provide regular reports concerning the status of its review and any subsequent rulemaking activity.

### CONCLUSION

The Court should deny EPA's abeyance motion and proceed to consider the merits of the petitions for review.

Respectfully submitted,

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**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 506 words.

**CERTIFICATE OF SERVICE**

I certify that on May 15, 2017, the foregoing Supplemental Brief was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue