

**U.S. Department of Justice**

Environment and Natural Resources Division

*Environmental Defense Section*  
P.O. Box 7611  
Washington, DC 20044-7611

*Telephone (202) 305-2326*  
*Facsimile (202) 514-8865*  
*eric.hostettler@usdoj.gov*

Oral Argument *En Banc* Held on September 27, 2016

November 7, 2016

VIA ELECTRONIC FILING

The Hon. Mark J. Langer  
Clerk of Court  
United States Court of Appeals  
for the District of Columbia Circuit  
Room 5523  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001-2866

Re: *State of West Virginia, et al. v. EPA*; No. 15-1363 (and consolidated Clean Power Plan cases); EPA's Response to Petitioner's October 31, 2016 Notice of Supplemental Authority

Dear Mr. Langer:

Petitioner's Rule 28(j) letter relying on the projection for coal capacity in 2016 supporting the separate Cross-State Air Pollution Rule Update ("CSAPRU"), 81 Fed. Reg. 74,504 (Oct. 26, 2016), presents no new meaningful information.

First, the CSAPRU projection cannot be considered because review is limited to the administrative record. 42 U.S.C. § 7607(d)(7)(A). Regardless, it offers no support for Petitioner's contention that EPA understated the Clean Power Plan's ("CPP's") effects. Petitioner focuses solely on 2016 "base case" coal capacity projection, but that projection has little relevance for determining the impacts of the CPP, which does not begin to require compliance until 2022. Petitioner ignores the base case projections for 2020, 2025 and 2030. For those

years, CSAPRU modeling projects base case coal capacity at 209, 208 and 207 gigawatts (GW), projections which are *nearly identical* to CPP base case projections for the same years (208, 208, and 207 GW). Compare Petitioner 28(j) attachment and CPP RIA Table 3-12 (JA3663). The clearest way to evaluate the CPP's impact is to compare projected coal capacity after full implementation in 2030 to the projected 2030 base case. For that comparison, the CPP and CSAPRU 2030 base case projections are in *perfect alignment* (both project 207 GW).

Petitioner's comparison of projected coal capacity in 2030 under the CPP to a 2016 base case is defective because it fails to separate the CPP's effects from other factors, such as changing market conditions. Further, the CPP's 2016 base case projections—unlike later year projections—are unreliable and were not used. Those projections assume that plant operators have “perfect foresight” of the nature and timing of conditions in future years, which results in retirements projected to occur sooner than would be expected in the real world. See Reid Harvey Declaration (ECF #1586661).

Given CSAPRU's different short-term objectives, the CSAPRU 2016 base case included only already announced coal capacity reductions. See 81 Fed. Reg. at 74,547; Response to Comments at 321 (available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0500-0572>). That methodological change, however, did not affect more pertinent 2020-2030 base case projections that are in near perfect alignment with CPP modeling projections.

Sincerely,

/s/ *Eric G. Hostetler*

Eric G. Hostetler

cc: Counsel of record, via CM/ECF

**CERTIFICATE OF SERVICE**

I hereby certify that on November 7, 2016, I electronically filed the foregoing Rule 28(j) response letter with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

*/s/ Eric G. Hostetler*  
\_\_\_\_\_  
ERIC G. HOSTETLER