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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF WEST VIRGINIA,  
STATE OF TEXAS, *et al.*,

*Applicants,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and  
REGINA A. MCCARTHY, Administrator,  
United States Environmental Protection Agency

*Respondents.*

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ON APPLICATION FOR  
IMMEDIATE STAY OF FINAL AGENCY ACTION

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REPLY OF 29 STATES AND STATE AGENCIES IN SUPPORT  
OF APPLICATION FOR IMMEDIATE STAY

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Ken Paxton  
Attorney General of Texas  
Charles E. Roy  
First Assistant Attorney General  
Scott A. Keller  
Solicitor General  
P.O. Box 12548  
Austin, Texas 78741-2548  
Email:  
Scott.Keller@texasattorneygeneral.gov  
*Counsel for State of Texas*

Patrick Morrissey  
Attorney General of West Virginia  
Elbert Lin  
Solicitor General  
*Counsel of Record*  
J. Zak Ritchie  
Assistant Attorney General  
State Capitol, Bldg. 1, 26-E  
Charleston, WV 25305  
Email: elbert.lin@wvago.gov  
*Counsel for State of West Virginia*

*Additional counsel listed on signature block*

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## GLOSSARY

Act (or CAA)	Clean Air Act
EPA	United States Environmental Protection Agency
EPA Opp.	Memorandum For The Federal Respondents In Opposition, Nos. 15A773, <i>et al.</i> (U.S. Feb. 4, 2016)
FERC	Federal Energy Regulatory Commission
NAAQS	National Ambient Air Quality Standards
Non-State Int. Opp.	Non-State Respondent-Intervenors' Opposition to Applications for Stay of Final Agency Action Pending Appellate Review, No. 15A773 (U.S. Feb. 4, 2016)
Power Plan or Plan	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
State Int. Opp.	Opposition of States of New York, <i>et al.</i> , No. 15A773, <i>et al.</i> (U.S. Feb. 4, 2016)

## INTRODUCTION

EPA's opposition tellingly avoids the two cases of this Court that most clearly demonstrate the need for a stay in this case: *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"), and *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The *UARG* case is given all of one paragraph on pages 41 and 42 of EPA's 73-page filing, and the *Michigan* decision is not squarely addressed until page 68. The reason for this spare treatment is obvious: EPA has no answer to either case.

As the States explained in their Application, the Power Plan is clearly unlawful for a number of reasons, but most obviously it cannot be reconciled with *UARG*. In that case, this Court told EPA that it cannot make "decisions of vast 'economic and political significance'" under a long-extant statute, like the Clean Air Act, without "clear congressional authorization." *UARG*, 134 S. Ct. at 2444. And yet that is precisely what EPA has done in employing the "generation shifting" measures at the heart of the Power Plan. Buried on page 41 of its opposition, EPA *concedes* the point, admitting that Section 111(d) of the Clean Air Act "does not expressly address such measures." EPA Opp. 41.

EPA also has no answer to the fact that in *Michigan*, the agency unlawfully extracted billions of dollars in compliance from power plants before this Court could even review the rule, and is attempting to do so here again but on a much larger scale. Left unstayed, the Power Plan will force massive and irreversible changes in terms of state policies and resources, power plant shutdowns, and investments in wind and solar power. The Plan will require States to spend thousands of hours and

millions of dollars in the next year designing State Plans, while forcing them to change their laws and regulatory approaches. Indeed, absent a stay, the States will need to approve new sources of energy and other capital investments, which approvals will necessarily include hikes in energy rates for consumers, to defray the cost of Power Plan-driven projects. Simply put, if a stay is denied, the Power Plan “will immediately and significantly impact *nearly every regulatory decision affecting the energy industry in*” the States. Nowak Reply Decl. ¶¶ 3 (emphasis added).

Considerations of the equities similarly favor a stay. If this Court agrees with the States that the Power Plan is unlawful—including as entirely contrary to *UARG*—then the massive, immediate consequences that both sides of this case have explained to this Court, are entirely contrary to the public interest as a matter of law. This includes the “billions” of dollars that industry supporting EPA represent will be driven to their projects, and the additional international agreements the Administration is attempting to secure based upon the incorrect representation that EPA has the authority to enact the Power Plan. If this Court does not grant the stay, EPA will succeed in “bak[ing] into the system” its generation-shifting goals, regardless of the legality of the agency’s rule, just as in *Michigan*.

The States do not ask for this Court’s intervention lightly. But this case is truly extraordinary, given that the Power Plan imposes the largest burden the States have ever been asked by EPA to carry, on the basis of a rule that is flatly contrary to this Court’s recent caselaw when dealing with the same agency, and the



same pollutants. And EPA is doing this in the shadow of its own brazen abuse of its authority, where it bragged on its public blog that it had rendered this Court's decision in the States' favor an effective nullity. EPA should not be permitted to impose its generation-shifting agenda on the sovereign States before the courts have had the opportunity to rule on the lawfulness of EPA's approach.

## ARGUMENT

### I. **If The D.C. Circuit Upholds The Power Plan, There Is A Reasonable Probability That Four Justices Would Vote To Grant Review And A Fair Prospect That A Majority Would Declare The Plan Unlawful.**

#### A. **Section 111(d) Does Not Authorize EPA To "Generation-Shift."**

In the Power Plan, EPA asserted that it has the authority to restructure the States' energy grids because, in the agency's view, Section 111(d) permits it to require the "owners or operators" of an industry to "shift[]" to a competitor industry, deemed by EPA to be "cleaner." 80 Fed. Reg. at 64,726, 64,746, 64,762, 64,767-68. In their stay application, the States made three independently sufficient statutory arguments as to why this assertion of authority is unlawful under the CAA. In its opposition, EPA has defaulted on the first two arguments, meaning the States have satisfied their burden of showing likelihood of success. And as to the third argument, EPA's response is entirely inadequate, presenting an additional ground to issue relief to the States.

1. In the States' stay application, their primary merits argument was that EPA's generation-shifting theory violates *UARG's* clear statement rule. Generation-shifting finds no precedent in Section 111(d)'s 45-year history, States Appl. 17-18, would authorize EPA to completely eliminate coal-fired generation, *id.* 16, and

would empower EPA to become the nation's central planner for any stationary source that emits any air pollutant, *id.* at 16-17. EPA's far-reaching claim thus falls squarely within the *UARG*'s rule requiring "clear[]" congressional authorization to invoke "an unheralded power to regulate a significant portion of the American economy." 134 S. Ct. at 2444 (quotation omitted). Since EPA did not argue in the Power Plan that it could satisfy such a clear statement rule, States Appl. 18, the Plan is unlawful on that basis alone. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (agency action can only be upheld on "grounds upon which the agency itself based its action").

In its opposition, EPA effectively concedes the States' primary merits argument. Specifically, EPA concedes by its silence that: (1) the agency has never before attempted to use generation-shifting in Section 111(d)'s 45 year history; (2) the agency's regulatory logic means that EPA would have the authority to shut down all coal-fired power plants in this country by requiring their owners to "shift" to wind and solar power; (3) the agency's logic means that EPA would now have similar central planning authority for *any* source category regulated emitting *any* air pollutant; and (4) EPA could not prevail if *UARG*'s clear statement rule is held to apply under the *Chenery* doctrine. This silence alone is sufficient to satisfy the States' burden to show likelihood of merits success for purposes of this application.

Indeed, EPA's *only* answer in its 73-page opposition to the States' primary merits argument is a terse paragraph that *admits* that Section 111(d) does not "expressly address" generation-shifting, EPA Opp. 41, which is a *concession* that the

agency cannot satisfy the *UARG* clear statement rule. EPA then declares that because it is an “expert” agency, it can adopt *any* measures aimed at reducing carbon dioxide emissions. EPA Opp. 41-42 (quotation omitted). *UARG* rejected that very proposition when dealing with the *same* agency and the *same* pollutant.

2. The States’ next merits argument, States Appl. 18-20, was that EPA must also satisfy a clear statement rule because “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.” *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quotations omitted); *accord Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2001); *Gregory v. Ashcroft*, 501 US 452, 460–61 (1991). Given that the intrastate generation and consumption of energy is “one of the most important functions traditionally associated with the police powers of the States,” *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983), EPA’s claim of authority to reorder the States’ domestic energy mix would need to satisfy the clear statement rule, which EPA has not even attempted to meet.

EPA fails to respond to this argument as well. EPA does not address this Court’s decisions in *Bond*, *Raygor*, *Gregory*, or *Arkansas Electric*, or answer the States’ point that generation-shifting intrudes upon their primacy over intrastate generation and consumption sufficient to trigger the clear statement requirement. EPA merely points out that Congress has the constitutional authority to override State regulatory primacy under the Commerce Clause, when engaged in

“regulation of activities causing [interstate] air . . . pollution.” EPA Opp. 48 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 282 (1981)). While EPA misrepresents the States’ Tenth Amendment arguments, *see infra* at pp. 8-11, for purposes of the doctrine this Court articulated in *Bond, Raygor, Gregory*, the key point is that even if Congress had the constitutional authority to require the Power Plan, Congress did *not* do so “clearly,” and EPA does not argue otherwise.

3. In their third statutory argument, the States explained that the CAA unambiguously foreclosed EPA’s claim to generation-shifting authority, States Appl. 20-23, even if no clear statement rule applied. Section 111(d) permits EPA to adopt a “*standard of performance*” that is “*applicable* . . . to a[] particular source” within a regulated source category. 42 U.S.C. § 7411(d)(1)(B) (emphases added). Generation-shifting falls outside of this authorization because such shifting does not “administer[] *tō*” or “bring to bear” any “thing” upon individual sources, 1 Oxford English Dictionary 576 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) (emphasis added), and mandates non-performance rather than improved “performance,” *see Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

In its opposition, EPA attempts to change the subject, without offering any serious answer to the statutory text. EPA argues that generation-shifting fits within the dictionary definition of “best system of emission reduction,” EPA Opp. 35 (quoting 42 U.S.C. 7411(a)(1)), as applied to the “interconnected ‘grid’,” *id.* at 36

(quoting *FERC v. Electric Power Supply Ass'n*, No. 14-840 (Jan. 25, 2016), slip op. 4). This is a red herring. The statutory term “best system of emission reduction” is not a stand-alone, roving authorization of regulatory authority. Rather, the CAA uses this term only as part of the statutory definition of “standard of performance.” Section 111(d) requires that a “standard of performance” must be “appl[icable] . . . to a[] particular source,” which means the “best system of emission reduction” must also be “appl[icable] . . . to . . . particular source[s].” Section 111(d) does not authorize EPA to impose its view of the “best system” for reducing emissions from the “integrated” power grid as a whole. Rather, it only authorizes the agency and the States to reduce emission by improving the “performance” of “particular source[s].”<sup>1</sup>

EPA also fails to defend its attempt to conflate two concepts the CAA specifically separates: “sources” and “owners or operators” of those sources. States Appl. 22. EPA argues that “CAA holds owners and operators responsible for implementing the emissions limitations,” EPA Opp. 44, but this ignores what sorts of “limitations” can be imposed upon such owners. That is, the limitations

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<sup>1</sup> EPA seeks to call the “appl[icable] . . . to a[] particular source” requirement into question by citing a new source standard of performance under Section 111(b) that involved “pretreat[ing] coal or oil.” EPA Opp. 43. But the requirement that sources clean the fuel they burn—either by doing it themselves or by contracting with a third party to do the cleaning—is a traditional measure to improve the “performance” of a plant, which is “appl[icable] . . . to” each source burning the fuel. EPA also cites its 1995 waste combustor rule under Section 111(d), EPA Opp. 43, but fails to explain that the emission reductions there were based entirely upon pollution control technologies, and emission trading was permitted only as an alternative compliance option. *See* 60 Fed. Reg. 65,387, 65,401, 65,415-17 (Dec. 19, 1995).

themselves must be “appl[icable] . . . to a[] particular source,” not to the owners and operators.

Finally, EPA praises generation-shifting as superior to regulations “appl[icable] . . . to a[] particular source.” EPA Opp. 40. Regardless of whether EPA is correct to prefer central planning over the installation of pollution control devices, as a policy matter, the agency “may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *UARG*, 134 S. Ct. at 2446.

**B. The Power Plan Unconstitutionally Commandeers And Coerces States And Their Officials Into Carrying Out Federal Energy Policy.**

By compelling States to restructure their electric systems, the Power Plan “use[s] the States as implements of regulation” and thereby violates the Constitution’s bar on commandeering and coercion of the States and their officials to achieve federal ends. *New York v. United States*, 505 U.S. 144, 161 (1992). The States showed in detail the actions that the Plan compels them to undertake at this time and in the coming months, but EPA simply refuses to acknowledge that showing, as well as the fact that the Plan itself expressly contemplates the need for those actions.

*First*, while EPA asserts that no State action is required to implement the Plan, EPA Opp. 50-51, it does not address or dispute the States’ detailed showing that extensive state regulatory action is required to achieve the Plan’s mandatory transition from carbon-intensive generation to increased utilization of natural gas and renewables. For example, officials of States challenging the Plan are currently undertaking substantial efforts to mitigate the Plan’s impacts through planning

new electric generation, transmission, and infrastructure capacity, as well as undertaking related regulatory actions and proceedings. *See, e.g.*, Wreath Decl. ¶¶ 2, 4, 6, 15–20; Lloyd Decl. ¶¶ 61, 78-81, 88-93; Nowak Decl. ¶¶ 7, 16-17; Bracht Decl. ¶¶ 12-13; McClanahan Decl. ¶¶ 4, 11. They are doing these things because they have to, not because they comport with state policy choices and priorities.

Indeed, as EPA itself acknowledges in the Plan, *see, e.g.*, 80 Fed. Reg. at 64,678, exercise of such state regulatory authority is necessary regardless of whether a State’s electric system is subject to a state or federal implementation plan. In either instance, state agencies will have to be involved in decommissioning coal-fired plants, addressing replacement capacity, addressing transmission and integration issues, and undertaking all manner of related regulatory proceedings. *See, e.g.*, Lloyd Decl. ¶¶ 6, 57, 59; Nowak Decl. ¶ 12; McClanahan Decl. ¶ 7. These actions are necessary to keep the lights on; in fact, EPA’s proposed federal plan expressly relies on state authorities to address reliability issues caused by the Plan. 80 Fed. Reg. 64,966, 64,981 (Oct. 23, 2015). Likewise, the States supporting the Plan acknowledge the Plan itself “anticipates that state regulators will continue exercising their traditional oversight in reviewing measures taken by power plants to comply with the Rule.” State Int. Opp. 6.

So while EPA places great weight on a State’s ability to choose whether or not to promulgate a state plan, EPA Opp. 48-49; State Int. Opp. 5, that choice “only underscores the critical alternative a State lacks: A State may not decline to administer the federal program,” *New York*, 505 U.S. at 176-77, through the

exercise of its “traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like,” *Pac. Gas & Elec. Co.*, 461 U.S. at 212. This is commandeering: the “choice” to carry out federal policy under either a state plan or a federal plan is indistinguishable from the regulate-or-take-title choice put to States in *New York* that was soundly rejected as “infringing upon the core of state sovereignty reserved by the Tenth Amendment.” 505 U.S. at 177.

*Second*, confirming that this is no “textbook exercise of cooperative federalism,” EPA Opp. 48, EPA does not even attempt to identify federal authority that could displace the need for state actors to implement the Plan. While EPA declares itself prepared to “directly regulate[] [in-state] sources’ CO<sub>2</sub> emissions,” EPA Opp. 48, it cites no authority by which it or another federal agency could accomplish the Plan’s forced retirement or reduced utilization of massive amounts of generating capacity; the construction of commensurate replacement capacity consistent with the Plan’s requirements; or the substantial legislative, regulatory, planning, and other activities that are necessary to achieve the Plan’s mandatory targets while maintaining electric service. Instead, as EPA’s silence concedes, all those activities are pushed on the States—again, just like the low-level nuclear waste program struck down in *New York*. *See* 505 U.S. at 176 (“A choice between two unconstitutionally coercive regulatory techniques is no choice at all.”).

*Third*, EPA identifies no precedent for this invasion of state sovereignty. “[H]aving the power to make decisions and to set policy is what gives the State its



sovereign nature.” *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). Consistent with that principle, the mining statute at issue in *Hodel* allowed States to displace federal mining regulation with their own programs, but did not *require* them to do anything. 452 U.S. at 288 (“If a State does not wish to [regulate consistent with the statute], the full regulatory burden will be borne by the Federal Government.”); *see also Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) (same).<sup>2</sup> But, as in *New York* and *NFIB*, the Power Plan deprives the States of that core aspect of their sovereignty, requiring them to exercise regulatory authority while stripping them of policymaking discretion. This is not cooperative federalism. It is a plain violation of the principle that “the Federal Government may not compel the States to implement . . . federal regulatory programs.” *Printz v. United States*, 521 U.S. 898, 925 (1997).

*Finally*, the suggestion by States supporting EPA that the Plan advances state sovereignty, State Int. Opp. 6, is utterly false. The difference between the Plan and other rules that may affect state regulatory efforts is that the Plan relies on and compels state implementation—which EPA and its Intervenors concede. *See id.* If EPA’s supporters were correct, the federal government could demand obedience in any area of traditional state authority, and States would be powerless to resist.

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<sup>2</sup> As concerns coercion, the prospect of the lights going out, which would frustrate a State’s exercise of its police powers, is far more of a “gun to the head,” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (Roberts, C.J), than the minor diversion of federal funding at issue in *Miss. Comm’n on Env’tl. Quality*. *See* 790 F.3d at 177-78.

### C. The Section 112 Exclusion Unambiguously Prohibits The Power Plan.

The Section 112 Exclusion is an independently sufficient prohibition against the Power Plan. States Appl. 29–38. The Exclusion prohibits EPA from invoking Section 111(d) to require States to regulate “any air pollutant” emitted from a “source category which is regulated under [Section 112].” 42 U.S.C. § 7411(d)(1)(A)(i). Or, as this Court observed in *American Electric Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) (“*AEP*”), “EPA may not employ § [1]11(d) if existing stationary sources of the pollutant in question are regulated . . . under . . . § [1]12.” *Id.* at 2537 n.7. Given EPA’s voluntary decision to continue to regulate power plants under Section 112—notwithstanding this Court’s ruling in *Michigan v. EPA*—EPA simply may not invoke Section 111(d) for those same power plants.<sup>3</sup>

In its opposition, EPA makes no effort to defend—as a matter of the statutory text—the interpretation of the Exclusion that the agency adopted in the Power Plan. As the States explained in their application, that interpretation is based upon an impermissible “rewrit[ing of] clear statutory terms to suit [EPA’s] own sense of how the statute should operate,” *UARG*, 134 S. Ct. at 2446, including inserting whole phrases nowhere found in the text, *see* States Appl. 33. EPA offers no answer for this argument, and in doing so fails to give meaning to the critical statutory phrase “source category which is regulated under [Section 112].” 42 U.S.C. § 7411(d)(1)(A)(i). Remarkably, EPA’s opposition articulates a different

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<sup>3</sup> EPA cites *AEP* for the claim that the agency “has well-established authority under Section 7411 to limit air pollution emitted by power plants.” EPA Opp. 21. But that is true only to the extent EPA does not trigger one of Section 111(d)’s exclusions, *AEP*, 131 S. Ct. at 2537 n.7, which EPA did by adopting the regulation of existing power plants in 2012 *after AEP* was decided. 77 Fed. Reg. 9,304 (Feb. 16, 2012).

understanding of the Exclusion from what it adopted in the Power Plan. In the Plan, EPA explained that, in its view, the Exclusion prohibits “the regulation of HAP emissions under CAA section 111(d) *and only when that source category is regulated under CAA section 112.*” 80 Fed. Reg. at 64,714 (emphasis added). But in its opposition, EPA claims that the Exclusion “permit[s] EPA to regulate emissions of specific pollutants that are not themselves regulated under . . . [Section 112],” without any mention of whether the source category is regulated under Section 112 or not. EPA Opp. 22. This attempt to change the agency’s reading of the Exclusion during litigation is forbidden by the *Chenery* doctrine, and is a transparent effort to distract from the fact that EPA has no plausible textual defense for the interpretation it actually adopted.

Having no serious argument based upon the statutory text, EPA turns to a scattershot, spaghetti-against-the-wall approach.

*First*, EPA argues that because Congress used the word “or” to separate two of the exclusions in Section 111(d), the Section 112 Exclusion does not operate to independently prohibit *any* rule. EPA Opp. 23. But EPA fails to disclose that the agency *rejected* that “or” interpretation in the Plan as “not a reasonable reading of the statute” because it would render the Exclusion entirely meaningless. 80 Fed. Reg. at 64,713. Of course, agency action can only be upheld on “grounds upon which the agency itself based its action.” *Chenery*, 318 U.S. at 88.

*Second*, EPA claims that the States’ reading of the Exclusion—which the agency itself articulated just five years after the 1990 Amendments, *see* EPA, *Air*

*Emissions from Municipal Solid Waste Landfills*, Pub. No. EPA-453/R-94-021, 1-6 (1995) (“1995 EPA Analysis”)—was “plainly [] not intended” by the 1990 Congress because it would “create[] an unexplained gap in the CAA[],” and “strip Section 7411(d) of nearly all effect.” EPA Opp. 26. But EPA’s *only* support for this “gap” concept is the 1970 legislative history of the CAA, which entirely ignores the fact that the dispute is about what the Congress did in 1990. *Critically, EPA has absolutely no response to the States’ argument that their interpretation is entirely consistent with EPA’s regulatory practice since 1990*, in which the agency has properly treated Section 111(d) as a rarely-used alternative to the widely-used Section 112 regime. States Appl. 34-35. In any event, even if EPA had raised some genuine practical concerns arising from a faithful application of the literal statutory text, that would not permit the agency to “rewrite clear statutory terms to suit [EPA’s] own sense of how the statute should operate.” *UARG*, 134 S. Ct. at 2446.

*Third*, EPA claims that the 1990 Congress did not mean to alter the Exclusion through a provision listed within “Miscellaneous Guidance” amendments. EPA Opp. 27-29. But in the Power Plan, EPA itself argued that the amendment listed in the “Miscellaneous Guidance” section changed the Exclusion from simply prohibiting the regulation of HAPs under Section 111(d) to prohibiting “the regulation of HAP emissions under CAA section 111(d) *and only when that source category is regulated under CAA section 112.*” 80 Fed. Reg. at 64,714 (emphasis added); *see also* 2007 EPA Brief, 2007 WL 2155494, at \*n.35 (explaining that the “Miscellaneous Guidance” amendments made numerous substantive revisions to the

CAA). Accordingly, *all* parties agree that Congress in 1990 made an important, substantive change to the Exclusion. But, critically, only the States' argument gives a plausible meaning to the actual text the 1990 amendment added to Section 111(d). *See supra* at pp. 12-13.

*Fourth*, EPA argues that “[n]othing in the CAA suggests . . . that Congress expected EPA to evaluate th[e] tradeoff [between regulating existing power plants under Section 111(d) and Section 112] in deciding whether power plants should be regulated under Section [112].” EPA Opp. 28-29. However, as EPA explained to the D.C. Circuit in 2007, the House of Representatives—which drafted both Section 112(n)(1)’s provision permitting EPA to regulate power plants under Section 112 if such regulations are “appropriate and necessary,” *and* the substantive change in the Exclusion found in the Miscellaneous Guidance section—specifically intended for those two provisions to operate in tandem, such that EPA must make a considered choice whether to regulate emissions from existing power plants under *either* Section 111(d) or Section 112, but never both. 2007 EPA Brief, 2007 WL 2155494; *accord* 70 Fed. Reg. 15,994, 16,030-31 (Mar. 29, 2005). This is reflected in the statutory text, as Section 112(n)(1) mandates that EPA consider “alternative control strategies” for HAPs. 42 U.S.C. § 7412(n)(1)(A). Such “alternative[s]” include regulating *all* pollutants emitted from the source category under Section 111(d), including HAPs, such that Section 112 regulation would not be “appropriate and necessary.” *See also* Statement of Issues ¶ 2, *UARG v. EPA*, No. 01-1074 (D.C. Cir. Mar. 26, 2001) (faulting EPA for assuming that Section 112 is the “sole source of

regulatory authority for hazardous air pollutant emissions from coal- and oil-fired power plants.”).

*Fifth*, EPA seeks to rely upon a conforming amendment, which Office of Law Revision Counsel excluded from the U.S. Code because it “could not be executed.” *See* Revisor’s Note, 42 U.S.C. § 7411. As the States explained in their application, this conforming amendment was a simple clerical error, of the type common in modern complex legislation. States Appl. 35. The States also cited dozens of identical, impossible-to-execute conforming amendments, which have also been excluded from the U.S. Code under a straightforward application of the official drafting manuals. States Appl. 36-37 & n.15. EPA offers no response to this cascade of examples, and simply asserts that the States have cited “no [court] decision” giving these errors no meaning. EPA Opp. 55. But the reason for this lack of caselaw is plain: the argument that a confirming amendment that “cannot be executed” because of substantive amendments should be given substantive meaning is so insubstantial that no one even appears to have made it outside of this specific case. Indeed, no party in this litigation has found an example of any party advancing such an argument in litigation or administrative proceedings, despite numerous such examples throughout the U.S. Code. States Appl. 36-37 & n.15. As EPA recognized just five years after the 1990 Amendments, the conforming amendment is properly not part of the U.S. Code. *See* 1995 EPA Analysis.

EPA also argues that the conforming amendment—originally adopted by the Senate—and the amendment found in the Miscellaneous Guidance section—

originally adopted by the House of Representatives—should both be treated as conforming amendments. EPA Opp. 31. But as EPA explained in 2007, it is factually “incorrect” to describe the House’s Miscellaneous Guidance amendments as conforming amendments because, *inter alia*, the other changes in the Miscellaneous Guidance list were also substantive revisions to the law, and the House included a separate “designated ‘conforming’ or ‘technical’ amendments” section. 2007 EPA Brief, 2007 WL 2155494.

Nor is EPA’s response to the States’ alternative point that its two-version theory of the Exclusion would not salvage the Plan’s legality any more persuasive. While EPA claims that Section 111(d) is an “affirmative grant of regulatory authority,” EPA Opp. 33, the two amendments deal not with two different versions of Section 111(d) itself, but with two different versions of the Exclusion, which is a *limitation* on EPA’s authority. *AEP*, 131 S. Ct. at 2537 n.7. So if the Court were to accept EPA’s unprecedented theory of how to read an un-executable conforming amendment, that would only mean that “effect” would need to be given to “every word” of *both* Exclusions the agency believes Congress enacted, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), rendering the Plan unlawful, *see* States Appl. 38.

Finally, EPA’s claim that this Court should treat the Law Revision Counsel as “irrelevant,” EPA Opp. 32 n.9, while deferring to EPA, *id.* at 34, gets matters backwards. Congress provided that “the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States ,” 1 U.S.C. § 204, meaning that the U.S. Code is *presumed* accurate unless it is plain that some

error has been made. Here, the Law Revision Counsel simply followed uniform legislative practice. *See supra* at pp. 16-17. To the extent anyone is entitled to deference as to the contents of the U.S. Code, it is the statutorily-authorized Law Revision Counsel. *See* 2 U.S.C. §§ 285a-285g. It is not an environmental regulator, whose expertise as to the proper resolution of irreconcilable substantive and conforming amendments, as a matter of legislative drafting protocol, is no greater than IRS's expertise over health care policy. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

## **II. A Stay Is Necessary To Prevent Continued Irreparable Harm To The Applicant States.**

Absent a stay, the Power Plan will continue to immediately and irreparably impact the resources and sovereignty of the States. As explained in the Application, States have been and will keep spending significant time and money in direct response to the Plan. States are also being forced to change laws and regulations, and are suffering an unconstitutional intrusion on their Tenth Amendment rights. EPA and its intervenors offer three broad responses, none of which is persuasive.

### **A. The States' Harms Are Not Voluntary.**

The primary argument of EPA and its intervenors is that any harms to the States during the pendency of the D.C. Circuit litigation are "voluntary." State Int. Opp. 8. States, they contend, "can elect to expend no effort at all and simply opt to not submit any plan." *Id.* at 5 (quotation marks omitted); *accord* EPA Opp. 57. And even those States that intend to develop their own state plans "face no imminent burdens warranting a stay," State Int. Opp. 7, because "a State need not submit a



plan until September 2018 if it seeks a readily procurable extension,” EPA Opp. 58-59. Neither argument withstands scrutiny.

1. As the States have explained, there is no merit to the notion that the States can do nothing now and simply await a Federal Plan that the agency has not even finalized. Stay Appl. 44-45. To maintain a meaningful choice between a state or federal approach, a State must be working right now to evaluate and develop a state plan. *E.g.*, Gross Reply Decl. ¶ 3. Given the uncertainty over when EPA will finalize the Federal Plan, that sort of preparatory work is the only way to ensure that the State has a viable alternative if it ultimately determines that it does not want the Federal Plan. *Id.* (“If the federal plan were finalized and [Kansas] decided it would prefer a state plan, there would not be time to comply with the deadlines. Absent a stay, [Kansas] must act now to develop a state plan.”).

Moreover, “the immediacy of the impact of the [Power Plan] on regulatory decisions, absent a stay, is independent of the type of compliance plan [a State] will ultimately adopt.” Nowak Reply Decl. ¶ 5. This is because under any compliance plan—state or federal—there *will be* a shift in power generation away from fossil fuel-fired energy. *Id.*; *see also* Thomas Reply Decl. ¶ 5. As EPA readily concedes, “generation-shifting” is the only way to achieve the emission reductions under the rule. EPA Opp. 40. Or as the Administration has said, the Power Plan will “aggressive[ly] transform[] . . . the domestic energy industry.”<sup>4</sup> Thus, “[i]f the Court

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<sup>4</sup> Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, WASH. POST (Aug. 1, 2015) (quoting White House Fact Sheet), *available at* <https://www.washingtonpost.com/national/healthscience/white-house-set-to-adopt->

does not grant a stay, the [Power Plan] will immediately and significantly impact nearly every regulatory decision affecting the energy industry in” the States, including approving new generation and transmission construction, while authorizing utilities to raise rates on customers to pay for Power Plan-driven projects. Nowak Reply Decl. ¶¶ 3, 6, 10, 11.

EPA and its intervenors contend that “the Rule merely anticipates that state regulators will continue exercising their traditional oversight in reviewing measures taken by power plants to comply with the Rule, just as state regulators would review any changes caused by other regulations.” State Int. Opp. 6. But that is precisely the point. The Power Plan is “caus[ing]” changes that require regulatory action by the States—whether they opt for a state or federal compliance plan. It is thus entirely false that States “can elect to expend no effort at all.” *Id.* at 5 (quotations omitted).

EPA’s intervenors baldly assert that “[a]ny actions States must take to oversee power plants’ decisions in complying with the Rule are not imminent,” *id.* at 6, but that is disproven by clear facts on the ground. The Public Service Commission of Wisconsin is currently considering an application for a Certification of Public Convenience and Necessity (“CPCN”), requesting approval to construct a new natural gas generator known as the Riverside Energy Center. Nowak Reply Decl. ¶ 10. In determining the need for that new facility, the public service commission must take into account the fact that the Power Plan “forces generation shifting,

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[sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28\\_story.html](http://www.epa.gov/epa-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html).

which alters the evaluation of need.” *Id.* Similarly, “Kansas utilities are already adding new generation resources that help ensure compliance with the final rule.” McClanahan Reply Decl. ¶ 6; *see also* Bracht Reply Decl. ¶ 5. In Nebraska, “public utilities are statutorily required by state law to rely exclusively on ratepayer fees and bonds to pay the costs of compliance with the [Power Plan]”, which means “any increases to rates or the levying of bonds must be decided in the immediate future.” Macy Reply Decl. ¶ 4. The fact of the matter is that no one seriously disputes that absent a stay, the Power Plan will require a massive shift in power generation that has already begun. That is why the intervenors from the clean energy industry explain that “[a] stay would introduce uncertainty among investors” in the billion-dollar “advanced energy market.” Non-State Int. Opp. 22.

2. Equally meritless is the contention that the 2018 deadline for State Plans allows States, at a minimum, to do nothing for the duration of the D.C. Circuit litigation. EPA makes much of the expedited schedule in the D.C. Circuit, asserting that “it is reasonable to expect that court to decide the case on the merits during the late summer or early fall of 2016, approximately two years before the September 2018 deadline.” EPA Opp. 59. According to EPA and its intervenors, those two years are more than sufficient for States to develop State Plans. This reasoning is flawed in numerous respects.

*First*, EPA’s estimate of the D.C. Circuit proceedings is the most optimistic possible. Taking into account possible rehearing or rehearing *en banc* proceedings, the D.C. Circuit proceedings could stretch well into 2017. *Cf. White Stallion Energy*

*Center, LLC v. EPA*, 748 F.3d 1222 (petition for review filed February 16, 2012, argued December 10, 2013, and decided April 15, 2014), *rev'd by Michigan v. EPA*, 135 S. Ct. 2699 (cert. petition filed July 14, 2014, argued March 25, 2015, and decided June 29, 2015).

*Second*, the arguments of EPA and its intervenors ignore that States are differently situated. The States supporting EPA note that the Power Plan tracks what they have already been doing. *See, e.g.*, Dykes Decl. ¶ 26 (“very similar to the process . . . RGGI participating states took”); Thornton Decl. ¶ 23 (Power Plan “reflect[s] many strategies that Minnesota has demonstrated”). But the fact that certain States have already been phasing out coal-fired generation as a matter of their own policy choices says nothing about the burden the Plan places on States that have made different choices or are more heavily coal-reliant. In a State like Kansas, the unique geographic distribution of resources makes any “shift in generation” from coal-fired power to renewable energy particularly “time consuming and expensive.” McClanahan Reply Decl. ¶ 7. EPA blithely asserts that all States “can join existing state trading programs (such as the Regional Greenhouse Gas Initiative),” EPA Opp. 58, but recent news reports indicate that may be far easier said than done. *See* Emily Holden, *Clean Power Plan: RGGI gets mixed signals on mingling with other states*, E&E News (Feb. 3, 2016). Thus, while some States may not find it challenging to devise a State Plan, it is hardly difficult to understand why regulators in other States would be willing to state under penalty of perjury

that the Power Plan is “the most complex air pollution rulemaking undertaken” by their state agencies. Gore Reply Decl. ¶ 3.

*Third*, EPA and its intervenors also equate the Power Plan’s obligations to creating a state implementation plan under the National Ambient Air Quality Standards (“NAAQS”) program and other similar CAA duties. *See, e.g.*, State Int. Opp. 7 n.8. But that comparison does not stand up. While the Power Plan “shares some process similarities,” it “includes potentially regulating a whole universe of new activities that [state environmental regulators] do[] not have experience with and may not have clear statutory authority to include in a plan without getting changes in state law.” Gross Reply Decl. ¶ 4. In particular, state environmental regulators “must take into consideration new factors . . . never before considered when regulating the environment”—namely, “the reliability of the electric system and the effects of [their] action[s] on the electric rates charged to consumers.” *Id.*; *see also* 80 Fed. Reg. at 64,876 (“[W]e are including in the final rule a requirement that each state demonstrate in its final state plan submittal that it has considered reliability issues in developing its plan.”).

*Fourth*, the assertion by EPA and its intervenors that immediate expenditures are not required is refuted their own statements. Declarants from States supporting EPA admit that their States “already begun [their] efforts to develop a state plan for compliance with the Clean Power Plan . . . includ[ing] stakeholder outreach, ongoing modeling and other analyses of the electric power

system, [and] collaboration” among state agencies. Snyder Decl. ¶ 47 (New York).<sup>5</sup> EPA, too, admits that the Clean Air Act “clearly contemplates that States will begin developing their plans before judicial review is complete.” EPA Opp. 57.

*Finally*, EPA and its intervenors fail to acknowledge the resources that must be expended to meet deadlines prior to the 2018 deadline. Foremost, they entirely ignore that the Power Plan requires States to submit an “update” to EPA by September 2017, describing “the type of approach it will take in the final plan submittal and to draft legislation or regulations for this approach.” 80 Fed. Reg. at 64,859. This is no small task. *E.g.*, McClanahan Reply Decl. ¶ 5; Vehr Reply Decl. ¶¶ 4-11. They also do not dispute that some immediate and unrecoverable resources must be expended to obtain the extension in September 2016.

#### **B. Unrecoverable Compliance Costs Constitute Irreparable Harm.**

EPA and its intervenors fall back to the argument that even if States are incurring massive unrecoverable costs at this time, those costs are insufficient as a matter of law to establish irreparable harm for the purpose of a stay. State Int. Opp. 8; EPA Opp. 56. But they cite no authority from any court or agency that supports this principle. *Contra Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) (“[A] regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.”).

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<sup>5</sup> *Accord* Chang Decl. ¶ 30 (California) (“planning process began . . . in 2015, and is expected to unfold throughout 2016”); Clark Decl. ¶ 16 (Washington) (“begun its efforts”); Klee Decl. ¶ 31 (Connecticut) (“already begun”); McVay Decl. ¶ 18 (Rhode Island) (“already begun”); Pedersen Decl. ¶ 12 (Oregon) (“begun working”); Wright Decl. ¶ 24 (New Hampshire) (“already”).

The only two decisions cited by EPA do not stand for such a sweeping proposition. In *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir. 2005), the irreparable nature of the compliance costs was highly speculative, where the court speculated that “the interest earned on any escrowed funds may not adequately compensate [them] for the time-value of their money.” *Id.* In *A.O. Smith Corp. v. Federal Trade Commission*, 530 F.2d 515 (3d. Cir. 1976), the Third Circuit’s decision also turned on whether the alleged compliance costs were certain and substantial in fact. The court found that the compliance costs, which were “unsupported by basic findings of fact,” would not constitute irreparable harm when they would cause neither “significant changes” to operations nor “permanent[] injury[]” to reputation or goodwill. *Id.* at 527-28. The Third Circuit was also careful to explain that it was not announcing a general rule but only a “specific rule” based on the facts presented before it. *Id.* at 527 & n.9a.

These cases are thus irrelevant to this matter, where the resource costs to the States are indisputably substantial and certain. Here, where no “adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,” for the States’ significant expenditures of time and money, those costs are sufficiently irreparable for purposes of a stay. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015); see *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1 (2010) (Scalia, J., in chambers) (“If expenditures cannot be recouped, the resulting loss may be irreparable”); *Odebrecht Constr., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (“[N]umerous

courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable.”); *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015) (“unrecoverable expenditure of resources” by States “to comply with the new [regulatory] regime” would constitute “irreparable harm”).

With no supporting authority, EPA and its intervenors’ argument reduces to the assertion that “[p]reparation to develop a state plan or consider other compliance options is inherent in every cooperative-federalism scheme.” State Int. Opp. 8; EPA Opp. 56-57 (“The fact that States may devote staff time to development of a plan to implement CAA requirements pursuant to an EPA rule before judicial review is complete is an inherent and foreseeable consequence of the CAA’s basic design.”). “If the cost of such preparatory work were sufficient to establish irreparable harm,” they caution, “then opponents could cite such efforts to support a stay of any rule issued under a cooperative-federalism approach.” State Int. Opp. 8-9.

But as the States explained in their Application, the check on this alleged slippery slope is that courts do not look only to irreparable harm in granting a stay. They also consider likelihood of success, the balance of equities, and the public interest—factors that are satisfied here but that would not be in challenges to most rules. *See Philip Morris USA Inc.*, 131 S. Ct. at 4 (Scalia, J., in chambers) (“A stay will not issue simply because the necessary conditions are satisfied. Rather, sound equitable discretion will deny the stay when a decided balance of convenience weighs against it.” (quotations omitted)).



### C. The States Have And Will Continue To Suffer Irreparable Sovereign Harm.

Lastly, EPA and its intervenors offer half-hearted responses to the States' claims of irreparable sovereign harm. Changes in state laws and lost legislative time during this litigation due to the Power Plan will irrevocably infringe on the States' sovereign power "to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). An example of such a change is the proposal to lift Wisconsin's moratorium on building new nuclear facilities, which recently passed one house of the State's legislature. Nowak Reply Decl. ¶ 13. EPA's only response is that the Power Plan does not "prevent[] a State from exercising its regulatory authority at all." EPA Opp. 55. But they cite no authority for that crabbed view of state sovereignty. To the contrary, this Court has recognized that interference with a State's ability to "effectuat[e]" its laws constitutes "a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quotations omitted).

EPA also cursorily responds to the States' contention that the Power Plan's invasion of the States' Tenth Amendment rights constitutes ongoing and *per se* irreparable harm. EPA asserts that it is not irreparable harm to a State's sovereignty when "its exercise of regulatory authority is constrained by a federal law under a scheme of cooperative federalism." EPA Opp. 55. But this merely assumes that the Power Plan is a constitutional scheme of cooperative federalism, which it is not. *See supra* at pp. 8-11.

### III. Allowing The Power Plan's Immense Consequences Is Contrary To The Public Interest.

This Court has been flooded with an unprecedented number of parties and declarations on the stay issue precisely because the consequences of denying a stay would be so substantial. To the sovereign States on *both* sides of this case, denial of a stay will mean the forced expenditure of thousands of hours of employee time and millions of unrecoverable taxpayer funds, as well as significant changes in laws and regulations. *See supra* at pp. 18-25. To utilities, coal companies, and coal-miners, it will mean the closures of additional power plants in 2016, and lost jobs in some of the poorest areas in this country. States App. 45-47. To the solar and wind energy companies, it will mean continued driving of “billions” of dollars in capital investment to their coffers. Non-State Int. Opp. 22. And to this Administration, it will mean securing additional international commitments by continuing to claim that EPA has the legal authority to “shift” the power grid away from fossil-fuels. EPA Opp. 71-72.

EPA does not and cannot possibly dispute that if this Court agrees with the States that the Power Plan is likely unlawful, then all of these immensely consequential impacts are contrary to the public interest as a matter of law. States Appl. 47. Denying the stay will simply duplicate the unseemly spectacle that followed EPA's loss before this Court in *Michigan v. EPA*, but now on a far-grander scale. When the Plan is ultimately judged unlawful, EPA will again brag that

regulated parties are “already in compliance or well on their way to compliance,”<sup>6</sup> and point out that power plants have shuttered, billions have poured into renewable energy, and international commitments have been cemented.

Finally, contrary to EPA’s assertion, EPA Opp. 2, the States’ requested relief is a straightforward APA stay, which “halt[s] or postpone[s] [the Power Plan, [including] by temporarily divesting [the Power Plan] of enforceability.” *Nken v. Holder*, 556 U.S. 418, 428 (2009). That would mean that the States need not comply with *any* of the Plan’s deadlines that will occur during this litigation. *See, e.g., Michigan v. EPA*, Order, No. 98-1497 (D.C. Cir. May 25, 1999) (staying the States’ obligation to submit a revised SIP). As the States’ declarants have explained, if such an order were granted, they would cease both working on State Plans and shaping their sovereign decisions in response to the Power Plan, including no longer approving consumer rate increases attributable to the Power Plan so that utilities can cost recover for new projects that are being driven by the Plan’s generation-shifting mandate. *E.g.*, Nowak Reply Decl. ¶¶ 3, 6, 10, 11; Christmann Decl. ¶ 23; Nowak Decl. ¶¶ 13, 18; McClanahan Decl. ¶ 8.

Nor does the extremely remote possibility of an eventual decision on the tolling of the Plan’s deadlines offer any reason to deny the States’ requested relief. If, as the States expect, the Power Plan is declared unlawful at the conclusion of litigation, then no issue of tolling would ever arise because *all* of the Plan’s mandates—which would have been “divested . . . of enforceability” during litigation,

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<sup>6</sup> Janet McCabe, <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>.

*Nken*, 556 U.S. at 428—would simply be null and void. In the unlikely event the Plan survives judicial review (which would, at minimum, require effectively overruling *UARG*, *see supra* at pp.3-5), tolling would be appropriate as a matter of basic fairness. But the exact shape of such an equitable disposition need not be decided today. *See Michigan v. EPA*, No. 98-1497, Dkt. 524995 (D.C. Cir. May 25, 1999) (accepting post-decision briefing and then tolling the revised SIP deadline, after the stayed SIP rule survived judicial review).<sup>7</sup>

**IV. There Is No Merit To The Suggestion That The States’ Stay Application Should Be Viewed With Special Skepticism.**

Contrary to the assertion of EPA and its intervenors, the States’ Application is not subject to a higher bar than any other request for a stay from this Court. The States’ request is unusual, they suggest, because the States seek a stay “before *any* court has expressed a view about, let alone rendered a final decision concerning, the merits of their legal claims.” EPA Opp. 3; Non-State Int. Opp. 4. It is even more unusual, they assert, because the States seek “to block Executive Branch regulations that no lower court has found faulty.” Non-State Int. Opp. 5. And finally, because the D.C. Circuit has declined to issue a stay, they claim that decision is due “considerable deference.” *Id.* None of these assertions withstand scrutiny.

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<sup>7</sup> EPA’s speculation that “[g]ranting the relief that applicants seek would create an obvious incentive for delay by the applicants in the conduct of the litigation,” EPA Opp. 71, is baseless. The D.C. Circuit has already scheduled oral argument in the case, and subsequent proceedings—whether *en banc* review before the D.C. Circuit or on *certiorari* review before this Court—generally progress on the schedule proscribed by each court’s rules.

There is nothing inherently suspect about a request for equitable relief from a higher court, including the Supreme Court, that comes before any court has passed final judgment on the merits of a case. That is exactly what happens any time a party appeals the denial of a preliminary injunction, which is specifically authorized by statute. *See* 28 U.S.C. § 1292(a)(1). When a district court denies a preliminary injunction, it makes no greater a judgment about the merits of a case than the D.C. Circuit did in denying the stay in this matter. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party denied the injunction is then entitled, by statute, to do exactly what the States have done here: seek a stay “before *any* court has expressed a view about, let alone rendered a final decision concerning, the merits of their legal claims.” EPA Opp. 3 (emphasis in original).

Nor does the analysis change simply because the States’ request for injunctive relief concerns a federal regulation. As the States pointed out in their Application, uncontested by EPA or its intervenors, the Administrative Procedure Act specifically authorizes a higher court to issue “all necessary and appropriate process to postpone the effective date of an agency action” before any court has passed on the merits of any challenge to that agency action. 5 U.S.C. § 705. That provision includes within its grant of authority courts “to which a case *may be taken* on appeal from or on application for certiorari or other writ to a reviewing court.” *Id.* (emphasis added). Congress thus explicitly contemplated the issuance of a stay by a court that has *possible future* jurisdiction, including this Court, the only Court to which “a case may be taken . . . on application for certiorari.” *Id.*

Lastly, the cases cited by EPA and its intervenors for the principle of “considerable deference” to the D.C. Circuit, *see, e.g., Ruckelhaus v. Monsanto Co.*, 463 U.S. 1315 (1983) (Blackmun, J., in chambers), do not suggest that anything other than the “well settled” multi-pronged test for “equitable relief” applies here, *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). For example, in *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J., in chambers), the Court did state that a lower court’s denial of interim relief was entitled to a “rebut[table] . . . presumption” of “correct[ness].” *Id.* at 1308. But in the very next sentence, the Court made clear that the presumption was merely shorthand for the “well established” “four-part showing” for “in-chambers stay applications”: (1) that there is a reasonable probability that four Justices will vote to grant certiorari; (2) that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; (3) that irreparable harm is likely to result from the denial of a stay; and (4) that in a close case, the balance of equities and public interest favor a stay. *Id.* A review of most of the remaining cases cited by EPA and its intervenors reveal similar shorthand use of words like “deference” and “presumption.” *See, e.g., Ruckelhaus*, 463 U.S. at 1316 (Blackmun, J., in chambers); *Nken v. Holder*, 556 U.S. 418, 438-39 (2006) (Kennedy, J., concurring); *Bateman v. Arizona*, 429 U.S. 1302, 1304-05 (1976) (Rehnquist, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers).<sup>8</sup>

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<sup>8</sup> Two cases cited by the opposing intervenors concern requests of Justices to lift a stay imposed by a lower court, which is not the circumstance here and appears to be subject to a different standard. *See Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005)

To the extent the cases suggest any special deference to a lower court's decision denying a stay, they do so only where "the [lower court] opinions attest to a conscientious application of principles enunciated by this Court." *Graves*, 405 U.S. at 1204. Here, the D.C. Circuit did not issue such an opinion, but rather denied the stay in cursory fashion.

To be sure, requests of this Court for a stay of agency action pending review in the court of appeals appear to be rare. The States have not identified any case "in which this Court has granted a stay of a generally-applicable regulation pending initial judicial review in the court of appeals." EPA Opp. 3. At the same time, EPA and its intervenors have not identified a single instance where this Court has rejected such a request. Critically, there is nothing to suggest that the scarce precedent reflects anything more than that the circumstances rarely warrant the time and expense of seeking such a stay from this Court. It certainly should not diminish the fact that Congress plainly contemplated and authorized such stays in the APA.

For a number of reasons, the States believe this is the kind of unique case that Congress had in mind when it passed Section 705. As many experienced regulators in the Applicant States have declared under oath, the Power Plan is the most far-reaching and burdensome rule EPA has ever forced onto the States. *E.g.*, Gross Decl. ¶ 3, Stevens Decl. ¶ 8. It threatens to fundamentally reorder the States'

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(Ginsburg, J., in chambers); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay).

mix of energy generation—a matter that ranks among the highest in economic and political significance and which affects the lives of nearly every American.

The Power Plan is also unique because it has been imposed on the States in a highly irregular manner that has greatly exacerbated the harms that a regulated entity ordinarily incurs during the course of a judicial challenge. EPA unusually chose to ignore the date of Federal Register publication—the date on which judicial challenges may be filed and stays may be sought—in setting the effective date for the Power Plan. Instead, EPA made the States’ obligations due on date-certain deadlines. As a result, the clock began to run and harms began to accrue for States on the day the Power Plan issued, August 3, 2015, even though it would be nearly three more months before the Plan was published in the Federal Register and the States could seek a judicial stay in the normal course. By the time the D.C. Circuit ruled on the stay on January 21, 2016, the States had incurred nearly six months of harm and were almost halfway to their first deadline under the Power Plan.

Finally, it cannot be stressed enough that the *Michigan* case last Term has fundamentally altered the relationship between regulated parties and EPA. The agency’s actions after the *Michigan* decision laid bare its cynical approach to regulation: only the ends matter. Even where the agency had been found to have violated the law, what was important was the amount of compliance that had already been achieved. In the face of such an agency, the need for a stay has become ever more acute.



## CONCLUSION

For the foregoing reasons and those stated in their Application, the States respectfully request an immediate stay of the Power Plan.

Dated: February 5, 2016

Respectfully submitted,

/s/ Scott A. Keller  
Ken Paxton  
Attorney General of Texas  
Charles E. Roy  
First Assistant Attorney General  
Scott A. Keller  
Solicitor General  
P.O. Box 12548  
Austin, Texas 78711-2548  
Tel. (512) 936-1700  
Email:  
Scott.Keller@texasattorneygeneral.gov  
*Counsel for the State of Texas*

/s/ Andrew Brasher  
Luther Strange  
Attorney General of Alabama  
Andrew Brasher  
Solicitor General  
501 Washington Ave.  
Montgomery, AL 36130  
Tel. (334) 590-1029  
Email: abrasher@ago.state.al.us  
*Counsel for the State of Alabama*

/s/ Elbert Lin  
Patrick Morrissey  
Attorney General of West Virginia  
Elbert Lin  
Solicitor General  
*Counsel of Record*  
J. Zak Ritchie  
Assistant Attorney General  
State Capitol Building 1, Room 26-E  
Tel. (304) 558-2021  
Fax (304) 558-0140  
Email: elbert.lin@wvago.gov  
*Counsel for the State of West Virginia*

/s/ John R. Lopez IV  
Mark Brnovich  
Attorney General of Arizona  
John R. Lopez IV  
Dominic E. Draye  
Keith Miller  
Assistant Attorneys General  
Maureen Scott  
Janet Wagner  
Janice Alward  
Arizona Corp. Commission,  
Staff Attorneys  
1275 West Washington  
Phoenix, AZ 85007  
Tel. (602) 542-5025  
Email: john.lopez@azag.gov  
*Counsel for the State of Arizona by the  
Arizona Corporation Commission*

/s/ Jamie L. Ewing

Leslie Rutledge  
Attorney General of Arkansas  
Lee Rudofsky  
Solicitor General  
Jamie L. Ewing  
Assistant Attorney General  
323 Center Street, Ste. 400  
Little Rock, AR 72201  
Tel. (501) 682-5310  
Email: jamie.ewing@arkansasag.gov  
***Counsel for the State of Arkansas***

/s/ Allen Winsor

Pamela Jo Bondi  
Attorney General of Florida  
Allen Winsor  
Solicitor General of Florida  
Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, FL 32399-1050  
Tel. (850) 414-3681  
Fax (850) 410-2672  
Email: allen.winsor@myfloridalegal.com  
***Counsel for the State of Florida***

/s/ Timothy Junk

Gregory F. Zoeller  
Attorney General of Indiana  
Timothy Junk  
Deputy Attorney General  
Indiana Government Ctr. South, Fifth  
Floor  
302 West Washington Street  
Indianapolis, IN 46205  
Tel. (317) 232-6247  
Email: tim.junk@atg.in.gov  
***Counsel for the State of Indiana***

/s/ Frederick Yarger

Cynthia H. Coffman  
Attorney General of Colorado  
Frederick Yarger  
Solicitor General  
1300 Broadway, 10th Floor  
Denver, CO 80203  
Tel. (720) 508-6168  
Email: fred.yarger@state.co.us  
***Counsel for the State of Colorado***

/s/ Britt C. Grant

Samuel S. Olens  
Attorney General of Georgia  
Britt C. Grant  
Solicitor General  
40 Capitol Square SW  
Atlanta, GA 30334  
Tel. (404) 656-3300  
Fax (404) 463-9453  
Email: bgrant@law.ga.gov  
***Counsel for the State of Georgia***

/s/ Jeffrey A. Chanay

Derek Schmidt  
Attorney General of Kansas  
Jeffrey A. Chanay  
Chief Deputy Attorney General  
Bryan C. Clark  
Assistant Solicitor General  
120 SW 10th Avenue, 3d Floor  
Topeka, KS 66612  
Tel. (785) 368-8435  
Fax (785) 291-3767  
Email: jeff.chanay@ag.ks.gov  
***Counsel for the State of Kansas***

/s/ Gregory Dutton

Andy Beshear  
Attorney General of Kentucky  
Gregory Dutton  
Assistant Attorney General  
700 Capital Avenue  
Suite 118  
Frankfort, KY 40601  
Tel: (502) 696-5453  
Email: gregory.dutton@ky.gov  
***Counsel for the Commonwealth  
of Kentucky***

/s/ Aaron D. Lindstrom

Bill Schuette  
Attorney General for the People of  
Michigan  
Aaron D. Lindstrom  
Michigan Solicitor General  
P.O. Box 30212  
Lansing, MI 48909  
Tel. (515) 373-1124  
Fax (517) 373-3042  
Email: LindstromA@michigan.gov  
***Counsel for the People of the State of  
Michigan***

/s/ Donna J. Hodges

Donna J. Hodges  
Senior Counsel  
Mississippi Department of  
Environmental Quality  
P.O. Box 2261  
Jackson, MS 39225-2261  
Tel. (601) 961-5369  
Fax (601) 961-5349  
Email: donna\_hodges@deq.state.ms.us  
***Counsel for the Mississippi Department  
of Environmental Quality***

/s/ Steven B. "Beaux" Jones

Jeff Landry  
Attorney General of Louisiana  
Steven B. "Beaux" Jones  
Duncan S. Kemp, IV  
Assistant Attorneys General  
Environmental Section – Civil Division  
1885 N. Third Street  
Baton Rouge, LA 70804  
Tel. (225) 326-6705  
Email: JonesST@ag.state.la.us  
***Counsel for the State of  
Louisiana***

/s/ Harold E. Pizzetta, III

Jim Hood  
Attorney General of Mississippi  
Harold E. Pizzetta, III  
Assistant Attorney General  
Civil Litigation Division  
Office of the Attorney General  
P.O. Box 220  
Jackson, MS 39205  
Tel. (601) 359-3816  
Fax (601) 359-2003  
Email: hpizz@ago.state.ms.us  
***Counsel for the State of Mississippi***

/s/ Todd E. Palmer

Todd E. Palmer  
Valerie L. Green  
Michael, Best & Friedrich LLP  
601 Pennsylvania Ave. NW, Suite 700  
Washington, DC 20004-2601  
Tel. (202) 747-9560  
Fax (202) 347-1819  
Email: tepalmer@michaelbest.com  
vlgreen@michaelbest.com  
***Counsel for the Mississippi Public Service  
Commission***

/s/ James R. Layton

Chris Koster  
Attorney General of Missouri  
James R. Layton  
Solicitor General  
P.O. Box 899  
207 W. High Street  
Jefferson City, Missouri 65102  
Tel. (573) 751-1800  
Fax (573) 751-0774  
Email: james.layton@ago.mo.gov  
***Counsel for the State of Missouri***

/s/ Justin D. Lavene

Doug Peterson  
Attorney General of Nebraska  
Dave Bydlaek  
Chief Deputy Attorney General  
Justin D. Lavene  
Assistant Attorney General  
***Counsel of Record***  
2115 State Capitol  
Lincoln, NE 68509  
Tel. (402) 471-2834  
Email: justin.lavene@nebraska.gov  
***Counsel for the State of Nebraska***

/s/ Dale Schowengerdt

Timothy C. Fox  
Attorney General of Montana  
Alan Joscelyn  
Chief Deputy Attorney General  
Dale Schowengerdt  
Solicitor General  
215 North Sanders  
Helena, Montana 59620-1401  
Tel: (406) 444-7008  
Email: dales@mt.gov  
***Counsel for the State of Montana***

/s/ Robert J. Kinney

John J. Hoffman  
Acting Attorney General of New Jersey  
David C. Apy  
Assistant Attorney General  
Robert J. Kinney  
Deputy Attorney General  
Division of Law  
R.J. Hughes Justice Complex  
P.O. Box 093  
25 Market Street  
Trenton, NJ 08625-0093  
Tel. (609) 292-6945  
Fax (609)341-5030  
Email: Robert.Kinney@dol.lps.state.nj.us  
***Counsel for the State of New Jersey***

/s/ Sam M. Hayes

Sam M. Hayes  
General Counsel  
Craig Bromby  
Deputy General Counsel  
Andrew Norton  
Deputy General Counsel  
North Carolina Department of  
Environmental Quality  
1601 Mail Service Center  
Raleigh, NC 27699-1601  
Tel. (919) 707-8616  
Email: sam.hayes@ncdenr.gov  
***Counsel for the North Carolina  
Department of Environmental Quality***

/s/ David B. Rivkin, Jr.

David B. Rivkin, Jr.  
Mark W. DeLaquil  
Andrew M. Grossman  
Baker & Hostetler LLP  
Washington Square, Suite 1100  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Tel. (202) 861-1731  
Email: drivkin@bakerlaw.com  
***Counsel for the State of Oklahoma and Oklahoma Department of Environmental  
Quality***

/s/ James Emory Smith, Jr.

Alan Wilson  
Attorney General of South Carolina  
Robert D. Cook  
Solicitor General  
James Emory Smith, Jr.  
Deputy Solicitor General  
P.O. Box 11549  
Columbia, SC 29211  
Tel. (803) 734-3680  
Fax (803) 734-3677  
Email: ESmith@scag.gov  
***Counsel for the State of South Carolina***

/s/ Eric E. Murphy

Michael DeWine  
Attorney General of Ohio  
Eric E. Murphy  
State Solicitor  
30 E. Broad St., 17th Floor  
Columbus, OH 43215  
Tel. (614) 466-8980  
Email: eric.murphy@ohioattorneygeneral.gov  
***Counsel for the State of Ohio***

E. Scott Pruitt  
Attorney General Of Oklahoma  
Patrick R. Wyrick  
Solicitor General  
313 NE 21st Street  
Oklahoma City, OK 73105  
Tel. (405) 521-4396  
Fax (405) 522-0669  
Service email: fc.docket@oag.state.ok.us  
Email: Scott.Pruitt@oag.ok.gov

/s/ Steven R. Blair

Marty J. Jackley  
Attorney General of South Dakota  
Steven R. Blair  
Assistant Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501  
Tel. (605) 773-3215  
Email: steven.blair@state.sd.us  
***Counsel for the State of South Dakota***

/s/ Tyler R. Green

Sean Reyes  
Attorney General of Utah  
Tyler R. Green  
Solicitor General  
Parker Douglas  
Federal Solicitor  
Utah State Capitol Complex  
350 North State Street, Suite 230  
Salt Lake City, Utah 84114-2320  
Email: pdouglas@utah.gov  
***Counsel for the State of Utah***

/s/ Misha Tseytlin

Brad Schimel  
Attorney General of Wisconsin  
Misha Tseytlin  
Solicitor General  
Andrew Cook  
Deputy Attorney General  
Delanie M. Breuer  
Assistant Deputy Attorney General  
Wisconsin Department of Justice  
17 West Main Street  
Madison, WI 53707  
Tel: (608) 267-9323  
Email: tseytlinm@doj.state.wi.us  
***Counsel for the State of Wisconsin***

/s/ James Kaste

Peter K. Michael  
Attorney General of Wyoming  
James Kaste  
Deputy Attorney General  
Michael J. McGrady  
Erik Petersen  
Senior Assistant Attorneys General  
Elizabeth Morrisseau  
Assistant Attorney General  
2320 Capitol Avenue  
Cheyenne, WY 82002  
Tel. (307) 777-6946  
Fax (307) 777-3542  
Email: james.kaste@wyo.gov  
***Counsel for the State of Wyoming***

## CERTIFICATE OF SERVICE

I certify that on this 5th day of February, 2016, I caused to be served the above document on the following by overnight commercial carrier and electronic mail:

Solicitor General of the United States  
Room 5616  
Department of Justice  
950 Pennsylvania Ave., N. W.  
Washington, DC 20530-0001  
SupremeCtBriefs@usdoj.gov

Eric G. Hostetler  
U.S. Department of Justice  
Environmental Defense Section  
Suite 8000  
601 D. St., N.W.  
Washington, D.C. 20004  
Phone: (202) 305-2326  
Email: eric.hostetler@usdoj.gov  
*Counsel for Respondents*

/s/ Elbert Lin  
Elbert Lin  
*Counsel of Record*



No. 15A773

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IN THE SUPREME COURT OF THE UNITED STATES

---

STATE OF WEST VIRGINIA,  
STATE OF TEXAS, *et al.*,

*Applicants,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and  
REGINA A. MCCARTHY, Administrator,  
United States Environmental Protection Agency

*Respondents.*

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ON APPLICATION FOR  
IMMEDIATE STAY OF FINAL AGENCY ACTION

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REPLY APPENDIX

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IN THE SUPREME COURT  
OF THE UNITED STATES

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15-1363

---

REPLY DECLARATION OF DAVID L. BRACHT, DIRECTOR,  
NEBRASKA ENERGY OFFICE

---

I, David L. Bracht, declare as follows:

1. I am the Director of the Nebraska Energy Office (“NEO”). I have been employed at the NEO since January 2015. I have over 30 years of business, government and legal experience, including as a senior executive in private industry and government agencies and, for the last 10 years, as a private practice attorney working in the energy industry. As part of my duties, I have authority to monitor, track, and interact with stakeholders and regulators on the development and implementation of state and federal environmental rules impacting public utilities.

2. I have personal knowledge to understand what steps Nebraska has taken and will likely need to take in response to the EPA’s Section 111(d) Rule, including future resource planning for system reliability. In general, the Section 111(d) Rule will dramatically transform the way electric power will be generated and transmitted to consumers in Nebraska and throughout the United States. The Rule will, at the very least, require the construction of new power generation and transmission facilities and associated infrastructure, the updating or decommissioning of existing power generation and transmission facilities that are not fully depreciated, and changes to the

electric power system that will affect the availability, cost and reliability of electric power for every single current and future consumer. In short, the Section 111(d) Rule will transform the American energy economy.

3. Based on my work experience and position, I have determined that implementing the Section 111(d) Rule will be a complicated, time consuming, and expensive endeavor, which will require the expenditure of substantial State resources, immediately and over the next calendar year.

4. Based on my knowledge and experience, the Section 111(d) Rule represents an unprecedented infringement by the EPA on the traditional authority of Nebraska to manage energy resources within our jurisdiction because the mandates of the Section 111(d) require NEO to undertake specific changes to how energy is provided to consumers. The Section 111(d) Rule also disrupts the well-settled division of authority over electricity markets under the Federal Power Act, and raises significant uncertainty about the role of the Federal Energy Regulatory Commission to ensure the reliability of electricity through the wholesale market.

5. Absent a stay from this Court, compliance planning must begin immediately. The system-wide changes necessary for compliance must be gradual to preserve reliability of the electric grid. Because compliance is calculated based on a rolling average, the longer Nebraska waits to begin compliance, the more expensive and difficult it will be to meet the requirements of the Rule.

6. Absent a stay from this Court, evaluation of specific compliance measures, such as new facilities or retirements, must also begin immediately. The lengthy application and approval process for utilities to construct, upgrade, or retire facilities to comply with the Section 111(d) Rule, as well as the in-depth evaluation of public necessity and convenience for each facility,

requires utilities to plan and submit applications for upgrades almost immediately in order to have equipment constructed, upgraded, or decommissioned before the compliance period begins in 2022.

7. Absent a stay from this Court, the Section 111(d) Rule will also severely threaten reliability and increase the cost of electricity by forcing Nebraska to move immediately toward reliance on a limited number of fuel sources. The risks associated with this type of system-wide transformation will occur in the next year, unless the Rule is stayed. The threats posed by this shift in resources and transformation of Nebraska's existing power system are particularly significant in the more sparsely populated rural areas of Nebraska that have limited transmission capabilities. The rural areas will also face a significant economic burden due to more limited tax base and the distributed nature of Nebraska's public power system. Nebraska's relatively small total population will also limit the resources available for implementing this significant change, thereby increasing the impact on ratepayers resulting in a negative impact on the entire state economy.

8. Changes made for the sake of compliance with the Section 111(d) Rule immediately and over the next calendar year will be irreversible and will impact the electric grid for decades. System planning is typically based on the 30-40 year lives of generation and transmission facilities. Building, redesigning, and adjusting power generation facilities takes years, and decisions made in these areas are often irreversible once they are made. For example, the decision to prematurely retire an electric generating unit could have significant consequences for system reliability and may unnecessarily increase costs to ratepayers for decades to come. This is particularly true because of Nebraska's relatively small total population and the significant areas of the state that are sparsely populated.

9. Absent a stay from this Court, implementation of the Section 111(d) Rule will require legislative and constitutional changes on the state level that may permanently alter the daily operation of utilities. Nebraska would have to immediately set in motion the chain of events, including statutory changes, larger investment in customer-side behavior, and further rate restructuring, in order for these compliance options to contribute to the Section 111(d) Rule's emission reduction targets.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 5, 2016.



---

David L. Bracht  
Director, Nebraska Energy Office

**IN THE  
SUPREME COURT OF THE UNITED STATES**

STATE OF WEST VIRGINIA, *et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15A773

---

**REPLY DECLARATION OF RONALD W. GORE, CHIEF,  
AIR DIVISION, ALABAMA DEPARTMENT  
OF ENVIRONMENTAL MANAGEMENT**

---

I, Ronald W. Gore, hereby declare as follows:

1. I am the Chief of the Air Division within the Alabama Department of Environmental Management (ADEM). I have been employed by ADEM for 42 years. As part of my duties, I am responsible for the Division's development of State plans to implement federal air quality rules and regulations.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will need to undertake in response to EPA's finalized *Carbon Pollution*

*Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (October 23, 2015) (“Section 111(d) Rule” or “Rule”). This includes personal knowledge and experience in preparing a State plan consistent with the Rule. Under that Rule, the State must submit a plan to the Environmental Protection Agency (“EPA”) by September, 2016, absent special circumstances.

3. Based on my knowledge and experience, I believe that developing Alabama’s response to the Section 111(d) Rule will be the most complex air pollution rulemaking undertaken by ADEM in the last 42 years. I have been responsible for and worked on many State plans designed to be submitted to and approved by EPA, including plans for attaining air quality standards, construction and operating permit plans, visibility rules, etc. The Clean Air Act recognizes the time and resources necessary to draft and finalize such plans by providing three to five years, at a minimum, for States to submit them. In the 111(d) Rule, EPA requires that States submit a vastly more complex rule in one to three years.

4. EPA has proposed that GHG reductions can be maximized by viewing the electric utility system in a very broad way, i.e., that States can and should regulate facilities and consumer behavior in ways never before considered to be authorized by the CAA. This broadening of authority means that ADEM will likely have to seek authorization from the State Legislature to implement EPA’s proposal. It is likely that other Alabama agencies will need to participate in enforcing parts of Alabama’s plan and broad new State Legislative authority will be needed for them as well. ADEM historically has been the agency solely responsible for air quality compliance in the State. Having several other State agencies closely involved in the development and administration of air quality rules presents a daunting challenge for ADEM.



5. Since EPA proposed the Section 111(d) Rule in June of 2014, ADEM has expended considerable resources in attempting to understand the State's necessary response. Two employees have been assigned full-time to analyzing the proposal. I estimate that in addition to the two full time employees mentioned above, an additional three man years<sup>1</sup> per year of effort are being expended by fifteen other employees who devote part of their work time on 111(d) issues. In total, I estimate that five man-years per year of effort, (equating to approximately \$475,000 in additional personnel costs per year) are being deployed at present responding to the Section 111(d) Rule. Efforts on which resources have been spent include, but are not limited to, the following examples:

- Checking EPA's calculations and assumptions on the emissions reduction goals the State should attain
- Generating possible responses to check whether they are achievable in practice
- Meeting with trade groups, EPA, other states, environmental groups, individual utilities, etc. to consider their input and viewpoints
- Traveling to and speaking at EPA's Regional Public Hearing
- Traveling to and participating in several national workshops on Section 111(d)
- Holding many internal meetings to facilitate information flow up and down the management chain

6. Now that the Section 111(d) Rule has been finalized and adopted, additional man-years of effort will be needed for ADEM to prepare and submit a plan. Assuming ADEM chooses to prepare and submit a plan, my best estimate is that eight man-years of effort per year (equating to \$760,000 per year for several years) would be needed.

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<sup>1</sup> The approximate dollar value of a "man year" is estimated to be \$95,000, counting salary, fringe benefits, and overhead.

7. EPA has not provided additional funding for States to prepare and respond to the Rule. The manpower expended as described in Paragraphs 5 and 6 must be redirected from other EPA calls for action, such as:

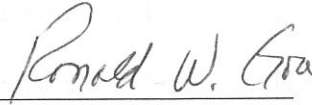
- Changes to State regulations regarding start-up, shutdown, and emergencies
- Changes to the Cross State Air Pollution Rule
- Responses to the tightened National Ambient Air Quality Standard for ozone

This redirection of resources will cause less effort to be spent on these programs and a possible delay in final action.

8. Should the Court grant the requested stay, ADEM's efforts would cease for the time being. However, should the Court not grant a stay and later determine on the merits that the Rule is invalid, then all the resources expended by ADEM on developing a State plan will have been for naught.

I declare under penalty of perjury that the foregoing is correct.

Executed on this 5<sup>th</sup> day of February 2016, in Montgomery, Alabama.

  
\_\_\_\_\_  
Ronald W. Gore

**IN THE  
SUPREME COURT OF THE UNITED STATES**

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15A773

---

**REPLY DECLARATION OF TOM GROSS, CHIEF,  
MONITORING AND PLANNING SECTION,  
KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT**

---

I, Thomas Gross, hereby declare as follows:

1. I am the Chief of the Monitoring and Planning Section in the Kansas Department of Health and Environment Bureau of Air Quality. I have been employed by the Kansas Department of Health and Environment for 39 years. As part of my duties, I am responsible for managing the group that develops state plans to implement federal air quality rules and regulations.

2. Based on my position, I have the personal knowledge and experience to understand what steps Kansas will need to undertake in response to EPA's Clean Power Plan (CPP), including the preparation of a state plan consistent with the Rule.

3. If the Court denies the stay, there is no reasonable prospect that KDHE can simply do nothing and await an unknown federal plan. KDHE must take action to develop a state plan to

even attempt to meet the aggressive timeline of the Clean Power Plan. The first CPP deadline for submittal of a state plan or request for an extension is only seven months away, in September 2016. Although the final compliance deadline under the CPP is in 2030, the rule requires a substantial reduction in CO<sub>2</sub> emissions by the first interim compliance period. Kansas' baseline emissions in 2012 were 2,319 lbs/MWh of CO<sub>2</sub>. The first interim target goal is 1,519 lbs/MWh of CO<sub>2</sub> to be achieved by 2022. EPA expects Kansas to have completed a substantial shift in its electric generating system by 2030, down to 1,293 lbs/MWh, with what may be a more challenging goal to meet by the first compliance period. That type of shift in generation and transmission would require far more than the six years provided for in the CPP to complete the planning and implementation; therefore, KDHE cannot wait for the outcome of this litigation before it acts. KDHE and Kansas's electric utilities must take action now to adapt to generation shifting regardless of the state or federal plan.

The proposed federal plan has not been finalized by EPA, so KDHE cannot consider that option when the clock is ticking on the deadlines for a state plan. If the federal plan were finalized and KDHE decided it would prefer a state plan, there would not be time to comply with the deadlines. Absent a stay, KDHE must act now to develop a state plan.

4. Kansas's obligations under the Clean Power Plan are more complicated than the requirements of any National Ambient Air Quality Standards, or NAAQS, promulgated under the Clean Air Act. The NAAQS are established by EPA based on a comprehensive review of epidemiological and toxicological studies to ensure that the ambient air does not cause negative health impacts to those most at risk. To determine compliance with the NAAQS, KDHE relies on its ambient air monitoring system, which has been in place for several decades. KDHE also relies on established inspection, enforcement, permitting, modeling and SIP development processes that

have been refined over many years. If there is an actual or potential violation of a NAAQS, KDHE proscribes control equipment or limits on operations at stationary sources. The CPP State Plan development process shares some process similarities, but includes potentially regulating a whole universe of new activities that KDHE does not have experience with and may not have clear statutory authority to include in a plan without getting changes in state law.


To comply with the CPP, KDHE will have to change this entire process. It will not rely on meeting a standard for a pollutant in the ambient air through monitoring or modeling. It will not approach a stationary source to install control equipment. There is no control-equipment solution to the CPP goal. KDHE will instead have to look at the entire energy generation, transmission and commercial, industrial and retail sale of electricity in Kansas and choose winners and losers to achieve a standard that is not based on health effects. KDHE may be forced to require the shuttering of multiple fossil generation units and the construction of new renewable energy and associated transmission lines.

KDHE must take into consideration new factors that it has never before considered when regulating the environment of the state of Kansas: the reliability of the electric system and the effects of its action on the electric rates charged to consumers. These new concerns greatly complicate KDHE's work. These issues are outside KDHE's jurisdiction, and accordingly, KDHE does not have the requisite expertise. KDHE defers to Kansas's public utility commission, the Kansas Corporation Commission, or KCC, on the cost and reliability of the state's electric system. KDHE has a good working relationship with the KCC, but this interdependence adds a substantial amount of work and complication to KDHE's role as the state's environmental regulator.

5. Kansas' burden under the Clean Power Plan is greater than other states that did not make substantial improvements in emission reductions for criteria pollutants in recent years. This

is through no fault of the Kansas utilities. The Kansas units were not subject to the NOx SIP call, the Clean Air Interstate Rule, or state-specific rules that caused units in other states to install controls during a time window when most of the capital costs would have been recovered to date. Kansas' largest coal fired units were subject to the BART provisions of the Clean Air Visibility Rule. This was a result of the dates of their initial construction and impacted Kansas' six largest coal fired units. As a result, these units were required to install pollutant controls in the past five years, an insufficient amount of time to recover the capital costs. The total cost for these improvements is more than 3 billion dollars. A substantial share of these costs for improving air quality in Kansas and downwind states will be stranded under the provisions of the Clean Power Plan.

I declare under penalty of perjury that the foregoing is correct. Executed on this 5th day of February, 2016, at Topeka, Kansas.

  
Thomas Gross

**IN THE SUPREME COURT  
OF THE UNITED STATES**

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15-1363

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**REPLY DECLARATION OF JIM MACY, DIRECTOR,  
NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY**

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I, Jim Macy, declare as follows:

1. I am the Director at the Nebraska Department of Environmental Quality (“NDEQ”). I have over 30 years of experience in the environmental field as a regulatory official in the State of Missouri, as a consultant, and now as the head of the State of Nebraska’s environmental agency. As part of my duties, I am responsible for overseeing and supervising the agency in Nebraska with exclusive jurisdiction to act as the state air pollution control agency for all purposes of the Clean Air Act, as amended, 42 U.S.C. 7401 et seq., including development and administration of State Plans under Section 111(d) of the Clean Air Act. I have personal knowledge and experience to understand what steps that Nebraska has taken and will need to undertake in response to the EPA’s final Section 111(d) Rule: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units.

2. I write this declaration in response to points made by the Environmental Protection Agency (“EPA”) in its opposition to the Applicants’ application for stay. Specifically,

I respond to EPA's argument that the denial of a stay of the Clean Power Plan ("CPP") will not have immediate impacts upon the States.

3. Absent a stay, the CPP will immediately and significantly impact Nebraska's public power industry. Specifically, the unique nature of Nebraska's public power industry has forced NDEQ to expend resources in order to determine the necessary regulatory decisions that must be made this year to comply with the CPP's generation-shifting mandate.

4. Given the statutory deadlines set out in the CPP, there are important decisions that cannot be postponed until the conclusion of litigation. And many of these decisions will have to be made before the proposed Federal Plan is finalized. Furthermore, Nebraska faces additional challenges because Nebraska's public utilities are statutorily required by state law to rely exclusively on ratepayer fees and bonds to pay the costs of compliance with the CPP. Therefore, any increases to rates or the levying of bonds must be decided in the immediate future.

5. The CPP will likely require Nebraska to pass laws and possibly even a state constitutional amendment to enable compliance. Once passed, these legislative enactments will significantly impact Nebraska's public power sector and will render the effect of success on the merits in the litigation meaningless.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 5<sup>th</sup>, 2016.



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Jim Macy  
Director, Nebraska Department of  
Environmental Quality



**IN THE  
SUPREME COURT OF THE UNITED STATES**

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15A773

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**REPLY DECLARATION OF JEFF MCCLANAHAN  
DIRECTOR, UTILITIES DIVISION  
KANSAS CORPORATION COMMISSION**

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I, Jeff McClanahan, hereby declare as follows:

1. I am the Director of the Utilities Division of the Kansas Corporation Commission (KCC). The KCC regulates public utilities, common carriers, motor carriers, and oil and gas producers. Public utilities include local telephone, natural gas, and investor-owned electric service providers. As part of its duties, the KCC is responsible for ensuring that reliable and affordable energy is available and deliverable to Kansas citizens and businesses.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will need to undertake in response to the Environmental

Protection Agency's (EPA's) Section 111(d) Rule, including the difficulties that will be encountered in attempting to comply with the Rule. In general, the Section 111(d) Rule will dramatically transform the way electric power will be generated, dispatched, and transmitted to consumers in the State of Kansas and throughout the United States.

3. Absent a stay from this Court, Kansas ratepayers will incur more rate increases related to generation shifting as Kansas' affected plant owners continue to add renewable resources and build transmission facilities. In other words, due to the practical realities and complexity of resource planning, utilities will commit – and are already committing – ratepayer funds before any final decision on the legality of EPA's rule is issued.

4. In its opposition to staying the final rule, the EPA asserts that immediate action by the Court is “unwarranted.” The EPA's assertions are based on its claim that state plans need not be submitted until 2018, which will be well after judicial review is completed. EPA further asserts that compliance obligations do not begin until 2022 and the obligations are phased in over eight years. Based on these assertions, EPA's position appears to be that plant owners cannot know what requirements will be imposed on plants until a plan is filed with EPA in 2018 and that there will be plenty of time for the plant owners to take action to comply between 2018 and when compliance obligations begin in 2022. EPA further supports its position by noting that plant owners cannot reliably identify what their requirements will be until a plan is filed. This leads the EPA to the conclusion that states cannot show with certainty that compliance obligations created by a state's final plan will force them to take any particular action during the period of litigation.

5. The EPA's argument is inappropriate because it ignores practical realities. The EPA's argument is based on the unrealistic time lines included within the final rule and the time

required for a state to ensure that its state plan is enforceable. For instance, the EPA fails to note that by September 6, 2017, states must submit a progress report. The progress report must include a summary of the status of each component of the final plan, including an update from the 2016 initial submittal and a list of which final plan components are not complete as well as a commitment to a plan approach. This progress report will almost certainly require draft rules and regulations to ensure that enforceable final rules will be in place in 2018. Moreover, in order to meet the September 2017 progress report date, Kansas must have a draft plan and draft rules and regulations completed around June of 2017. Therefore, states will have most, if not all, of the major components of their final plan drafted no later than June of 2017, which will allow plant owners to know the plan requirements at, or prior to, the conclusion of the litigation in this case.

6. The EPA's position noted above also fails to consider the fact that Kansas' affected plant owners have already performed re-dispatch modeling to evaluate compliance options available to them. Because the Best System of Emission Reduction (BSER) places heavy reliance on renewable resources, affected plant owners have determined the approximate amount of wind generation that can be added to their respective systems to help achieve compliance with the final rule as it exists today. Several affected plant owners have recently acquired additional wind resources either through purchased power agreements or ownership, despite the fact that there is a more than adequate capacity margin within the Southwest Power Pool's Integrated Market. The cost for the ownership option will be approximately \$400 million dollars. Therefore, Kansas utilities are already adding new generation resources that help ensure compliance with the final rule. Because of the long lead times to build generation and transmission, Kansas utilities are compelled to make investments today in anticipation of the

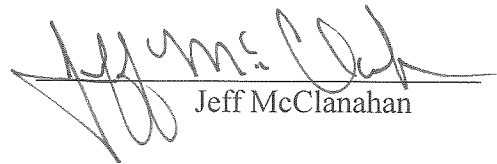
final rule, despite the fact that the final rule could be altered or struck down through litigation. This puts Kansas' utilities in the untenable position of beginning compliance actions today in order to hedge against the risk of waiting until a final plan is issued post litigation and not being able to comply due to long construction lead times.

7. The EPA places a heavy reliance on the fact that certain states have shifted generation from one type of generation resource to another in order to meet environmental standards. The EPA also places a heavy reliance on its assertion that the bulk electric system is highly integrated, electricity is fungible, and generation is substitutable. EPA's analysis is again flawed. EPA ignores the fact that coal heavy states such as Kansas must shift a significant amount of generation from coal to other resources, primarily renewable resources, in order to meet the stringent emissions standards set by EPA. Shifting generation from coal to wind resources in Kansas will create a significant burden and cost. Kansas' coal generation is primarily located in the eastern half of the state, while our best wind resource is located in the western half of the state. Shifting generation from the eastern half to the western half of the state will also require the transmission system in Kansas to be significantly upgraded in the western half, while transmission improvements already made in the eastern half may no longer be used and useful. This shift in generation will be time consuming and expensive. Clearly, the magnitude of changes required in Kansas does not match the EPA's conclusory assertion that significant changes to the grid are not necessary. Moreover, it is also highly questionable as to whether waiting to begin this shift in generation after a final plan is filed in 2018, as EPA asserts is appropriate, will allow affected plant owners the time needed to achieve compliance within the unrealistic timeline established by EPA. If the Court does not grant a stay, the final rule will immediately impact generation and transmission resource planning in Kansas due to the long

lead times needed to plan and construct generation and transmission facilities. As stated above, affected plant owners are already beginning to acquire renewable generation resources to aid in their respective compliance requirements. The acquisition of the renewable generation resources also requires an irreversible increase in Kansans utility rates prior to a resolution on the legality of the rule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/5/16

  
Jeff McClanahan

**IN THE  
SUPREME COURT OF THE UNITED STATES**

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

Case No. 15A773

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

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**REPLY DECLARATION OF ELLEN NOWAK, CHAIR, WISCONSIN  
PUBLIC SERVICE COMMISSION**

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I, Ellen Nowak, declare as follows:

1. I am the Chair of the Public Service Commission of Wisconsin ("PSCW"). I have been employed at the PSCW for four years. As part of my duties, I have authority to monitor, track, and interact with stakeholders<sup>1</sup> and regulators on the development and implementation of state and federal environmental rules impacting public utilities.

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<sup>1</sup> Stakeholders include regulated utilities, merchant-owned EGUs, municipal utilities, utility cooperatives, environmental groups, industry groups, residential and small business representatives, Midcontinent Independent System Operator, Inc. ("MISO"), Midwest Renewable Energy Tracking System ("M-RETS"), and representatives from other entities interested in or impacted by state and federal environmental rules impacting public utilities.

2. I write this declaration in response to certain points made by the Environmental Protection Agency (“EPA”) in its opposition to the Application for Stay. In particular, I respond to the EPA’s argument that refusing to stay the Clean Power Plan (“CPP”) will not have immediate impacts upon the states.

3. If the Court does not grant a stay, the CPP will immediately and significantly impact nearly every regulatory decision affecting the energy industry in Wisconsin. Simply put, consideration of the CPP’s generation-shifting mandate will be one of the most important factors the PSCW will be forced to consider in making its regulatory decisions over the next year and beyond.

4. Many regulatory decisions cannot be delayed until litigation is complete, or even until there is more certainty on the proposed Federal Plan. Specifically, state statutory deadlines determine how long the PSCW has to make decisions on construction applications. In addition, utility rate cases must be decided so utilities can implement the appropriate rates to recover their costs for a given year.

5. The immediacy of the impact of the CPP on regulatory decisions, absent a stay, is independent of the type of compliance plan the state of Wisconsin will ultimately adopt. Specifically, regardless of whether Wisconsin ultimately adopts a state plan, or some version of the still-uncertain federal plan, utilities will begin investing in carbon reduction measures that would be unnecessary absent the

CPP. That is because under *any* CPP plan—federal or state—utilities need to massively shift generation away from coal-fired energy, a process that takes many years. These investments will begin before litigation is complete, and in some cases, have already begun.

6. In addition, absent a stay from this Court, the CPP will significantly and immediately impact the PSCW-approved gas and energy rates for Wisconsin citizens. Again, this will occur regardless of whether Wisconsin ultimately chooses to adopt a state plan or awaits the issuance of a federal plan. That is because rate increases result from utilities having to invest resources in planning and implementing generation-shifting, whether such shifting is required under a state plan or a federal plan.

7. Wisconsin sets electric rates based on projected expenses for the upcoming year (a forward-looking test year). The rate cases that will be completed in 2016 will establish electric and gas rates for customers of investor owned utilities in Wisconsin for 2017 through 2018. If the Court does not stay the CPP, these rates will likely include significant expenditures by the utilities to begin compliance planning, and may also include some implementation costs for the CPP's generational-shifting mandate.

8. The rate cases, which will include significant dollar amounts for CPP planning, will be filed in Spring 2016, with auditing and adjustments completed in



Summer 2016, well before CPP litigation is complete. Regulators will be forced to evaluate utilities' requests to begin significant spending on CPP compliance planning, which, if approved, will lock in rates and impact utility rate payers for at least the next two years.

9. To make such a significant generation shift as will be required by the CPP under either a state or federal plan, construction applications will have to be filed and processed as soon as possible. In addition to the rate increases necessary to recover the cost of CPP planning, regulators will also be forced to evaluate utilities' requests to begin significant spending on CPP implementation, including compliance construction projects. Again, the evaluation of any new compliance projects will be impacted, absent a stay, regardless of whether the state ultimately chooses a state plan or awaits issuance of a federal plan because the need for these projects is impacted by the CPP's generation-shifting mandate. These projects, if approved, will increase rates and quickly and significantly impact utility rate payers for the next several years.

10. PSCW's approvals of new generation construction are already, and will continue to be impacted by the CPP. The CPP is currently being considered in a recent application for a Certification of Public Convenience and Necessity ("CPCN"), requesting approval to construct a new natural gas generator known as the Riverside Energy Center. A determination of need is vital to obtaining a

certificate, and whether a facility is needed depends, in part, on the projected generation mix. The CPP forces generation shifting, which alters the evaluation of need, and impacts which projects may receive a certification. Any CPCN applications pending between now and the completion of litigation may likely be irreversibly impacted by the CPP.

11. In addition, CPCN applications for large transmission lines will be impacted. Since the CPP will force significant generation shifting to out-of-state wind resources, the need for large scale transmission build-out will be inflated while litigation is pending. While the PSCW strives to mitigate the impacts of transmissions lines, at least minimal impacts to property values, wildlife, and wetlands are possible. Any CPCNs decided before the completion of litigation may result in unnecessary overbuilding and irreversible impacts.

12. Wisconsin's long-established energy efficiency program, Focus on Energy, will likely be impacted by the absence of a stay. Currently, state statute mandates how much utilities spend on efficiency, with specific four-year energy savings goals. Absent a stay, the program will likely need to be re-evaluated to prioritize carbon reduction rather than cost-effective energy efficiency. The program has several contractual relationships, including many with small, local businesses. It also provides services to all energy users, from residential to large industrial customers. All of the current contracts and queued efficiency projects

would need to be re-evaluated to maximize carbon reduction rather than energy efficiency, impacting many residents and job-creators in Wisconsin.

13. Other laws are already being re-evaluated based on the CPP. For example, a proposal to lift Wisconsin's moratorium on building new nuclear facilities recently passed one house of the legislature. Assemb. B. 384, 2015 Assemb., 2015-2016 Sess. (Wis. 2016). This legislative change was impacted by the CPP and likely would not have advanced without the CPP.

14. Absent a stay, I expect significant statutory changes that reshape energy policy in our state which may render success on the merits of this case meaningless.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/5/2016

Ellen E. Nowak  
Ellen Nowak

**IN THE  
SUPREME COURT OF THE UNITED STATES**

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15A773

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**REPLY DECLARATION OF STUART SPENCER, ASSOCIATE  
DIRECTOR, OFFICE OF AIR QUALITY, ARKANSAS DEPARTMENT OF  
ENVIRONMENTAL QUALITY**

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I, Stuart Spencer, declare as follows:

1. I am the Associate Director of the Office of Air Quality at the Arkansas Department of Environmental Quality (“ADEQ”). I have been employed at the ADEQ for approximately five years. As part of my duties, I supervise a staff of approximately eighty employees. The ADEQ Office of Air Quality has received all delegable air programs, including the Title V program for major sources of pollutants, from Region 6 of the United States Environmental Protection Agency (“EPA”). I have personal knowledge and experience to understand the steps that

the State of Arkansas has taken and will need to undertake in response to the EPA's Section 111(d) Rule.

2. I write this declaration in response to certain points made by the Environmental Protection Agency ("EPA") in its opposition. In particular, I respond to EPA's argument that refusing to stay the Clean Power Plan ("CPP") will not have immediate impacts upon the States.

3. Based on my experience, I have determined that implementing the Section 111(d) Rule will be a complicated and time-consuming endeavor unlike previous Clean Air Act implementations undertaken by the State of Arkansas.

4. To date, four employees have expended approximately 2,500 hours on understanding the Section 111(d) Rule and preparing for its implementation.

5. The CPP requires States to submit a final state plan by September 6, 2016. States may request an extension to September 6, 2018, by filing an initial submittal by September 6, 2016, along with a request for an extension. For an extension to be granted, the State must submit: 1) an identification of the final plan approach or approaches under consideration by the state and a description of progress made to date on the final plan components; 2) an explanation of why the state requires additional time to submit a final plan; and 3) a demonstration or description of the opportunity for public comment the state has provided on the initial submittal and opportunities for meaningful engagement with stakeholders,

including vulnerable communities, during preparation of the initial submittal, and plans for public engagement during development of the final plan.

6. Thus, even if the State seeks an extension to September 8, 2018, absent a stay, Arkansas is required to expend significant time and resources to meet the initial submittal requirements.

7. The ADEQ and the Arkansas Public Service Commission (“APSC”) have initiated a stakeholder process, at the direction of Arkansas’ Governor. To date, two day-long meetings have been attended by several ADEQ staff members, approximately two dozen primary stakeholder representatives, and several other interested individuals, entities, and organizations. In addition, a separate series of stakeholder conference calls were held to gather feedback on the proposed Federal Plan issued under the CPP.

8. Absent a stay, the ADEQ will need to devote five employees and approximately 3,000 hours to the preparation of the initial submittal that is due on September 6, 2018.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 5<sup>th</sup>, 2016

  
Stuart Spencer

ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF Pulaski

On this 5 day of February, 2016, before me, ~~Stuart Spencer~~ the undersigned officer, personally appeared Stuart Spencer, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Sarah Martin  
Notary Public

My Commission Expires: 9-7-2024



**IN THE  
SUPREME COURT OF THE UNITED STATES**

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15A773

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**REPLY DECLARATION OF TED THOMAS, CHAIR, ARKANSAS  
PUBLIC SERVICE COMMISSION**

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I, Ted Thomas, declare as follows:

1. I am the Chair of the Arkansas Public Service Commission (“APSC”). I have been employed at the APSC since January 2015 and was previously employed at the APSC as an administrative law judge for 7 years. As part of my duties, I have authority to monitor, track, and interact with stakeholders and regulators on the development and implementation of state and federal environmental rules impacting public utilities.



2. I write this declaration in response to certain points made by the Environmental Protection Agency (“EPA”) in its opposition. In particular, I respond to EPA’s argument that refusing to stay the Clean Power Plan (“CPP”) will not have immediate impacts upon the States.

3. If the Court does not grant a stay, the CPP will immediately and significantly impact nearly every regulatory decision affecting the energy industry in Arkansas. Simply put, consideration of the CPP’s generation-shifting mandate will be one of the most important factors the APSC will be forced to consider in making its regulatory decisions over the next year and beyond.

4. Many regulatory decisions cannot be delayed until litigation is complete, or even until there is more certainty on the proposed Federal Plan. Specifically, state statutory deadlines determine how long the APSC has to make decisions on construction applications. In addition, utility rate cases must be decided so utilities can implement the appropriate rates to recover their costs for a given year.

5. The immediacy of the impact of the CPP on regulatory decisions, absent a stay, will be independent of the type of compliance plan the state of Arkansas will ultimately adopt. Specifically, regardless of whether Arkansas ultimately adopts a state plan, or some version of the still-uncertain federal plan,

utilities will begin investing in carbon reduction measures that would be unnecessary absent the CPP.

6. In addition, absent a stay from this Court, the CPP will significantly and immediately impact the APSC-approved gas and energy rates for Arkansas citizens. Again, this will occur immediately, regardless of whether Arkansas ultimately chooses to adopt a state plan or awaits the issuance of a federal plan.

7. Arkansas sets electric rates based, in part, on projected expenses for the upcoming year (a partially forward-looking test year). The rate cases that will be completed in 2016 will establish electric and gas rates for customers of all investor owned utilities in Arkansas for 2017 and beyond. If the Court does not stay the CPP, these rates will likely include significant expenditures by the utilities to begin compliance planning and implementation for the CPP's generational-shifting mandate.

8. Current rate cases will be completed in Fall of 2016, well before CPP litigation is complete. Regulators will be forced to evaluate utilities' requests to begin significant compliance spending, which, if approved, will lock in rates and immediately impact utility rate payers for at least the next year.

9. APSC's approvals of new generation construction are already, and will continue to, be impacted by the CPP. Again, the evaluation of any new construction projects will be impacted, absent a stay, regardless of whether the


State ultimately chooses a state plan or awaits issuance of a federal plan because the need for these projects is impacted by the CPP's generation-shifting mandate.

10. The CPP must be considered in applications for a Certificate of Convenience and Necessity ("CCN") or a Certificate of Environmental Compatibility and Public Need ("CECPN"). Part of consideration by the APSC concerns whether the construction option chosen is the most appropriate in view of other options; the choice of options is irreversibly shaped by the CPP.

11. In addition, CCN applications for large transmission lines will be impacted. Since the CPP will force significant generation shifting to some out-of-state resources, the need for large scale transmission build-out will be inflated while litigation is pending. Transmission line construction impacts property values, wildlife and wetlands, and reliability. Any CCNs decided before the completion of litigation may result in unnecessary overbuilding and irreversibly impact the state's natural resources.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/5/16

  
\_\_\_\_\_  
Ted Thomas

ACKNOWLEDGMENT

STATE OF ARKANSAS

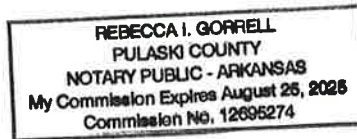
COUNTY OF PULASKI

On this 5<sup>th</sup> day of February, 2015, before me, Rebecca Gorrell, the undersigned officer, personally appeared Ted Thomas, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

*Rebecca Gorrell*

Notary Public



My Commission Expires: 8.25.25

**IN THE  
SUPREME COURT OF THE UNITED STATES**

STATE OF WEST VIRGINIA,  
*et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15A773

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**REPLY DECLARATION OF NANCY E. VEHR, ADMINISTRATOR,  
WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, AIR  
QUALITY DIVISION**

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I, Nancy E. Vehr, declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge or on information contained in the records of the Wyoming Department of Environmental Quality, Air Quality Division:

1. I am the Administrator of the Wyoming Department of Environmental Quality, Air Quality Division (“DEQ/AQD”). As part of my duties, I am responsible for assisting with the development of a Clean Power Plan (“CPP”) initial extension request for submittal to the U.S. Environmental Protection Agency (“EPA”) by September 6, 2016.

2. I write this declaration in response to certain points made by EPA in its opposition. In particular, I respond to EPA's arguments that our state burdens are no greater than those of other states that have previously chosen to proceed with generation shifting through state policy choices or "sector trends" (Fed. Resp. Br. at 64; Non-State Resp. Br. at 9-10); and that states have no harm or "near-term effects that are traceable to the Rule" (Fed. Resp. Br. at 54).

3. Over the upcoming days, weeks, and months, the administrative priorities and resource expenditures of the DEQ/AQD will be significantly impacted by the CPP requirements, including efforts to meet the September 6, 2016 submittal.

4. Under the CPP, "plans must be submitted to the EPA in 2016, though an extension to 2018 is available to allow for the **completion** of stakeholder and administrative processes." 80 Fed. Reg. 64664 (emphasis added). This means that states such as Wyoming must **now start** the stakeholder and administrative processes in order to meet the September 6, 2016 deadline to submit either a Plan or an EPA-approvable plan extension request. *See* 80 Fed. Reg. at 64669. If Wyoming fails to satisfy these requirements by September 6, 2016, EPA will promulgate a federal plan. *See* 80 Fed. Reg. at 64942.

5. Therefore, as a direct result of the CPP and in order to avoid EPA's imposition of a Federal Plan, the DEQ/AQD has expended and will continue to expend significant time and resources to develop an EPA-approvable extension

request for submittal by September 6, 2016. *See* 80 Fed. Reg. at 64675 (EPA established the September 2016 deadline so that states such as Wyoming start plan development now).

6. EPA mandated three elements that a state – including Wyoming - must satisfy before EPA would approve an extension request: 1) identify the State Plans that are “under consideration” including any progress to date; 2) provide an “appropriate explanation” for why the state requires an extension; and (3) describe how the state has provided for “meaningful engagement” with the public, including “vulnerable communities”. *See* 80 Fed. Reg. at 64,856; *see also* EPA Memorandum, Initial Clean Power Plan Submittals under Section 111(d) of the Clean Air Act (Oct. 22, 2015) (“Initial Plan Memo”).

7. Element 1 – Identify State Plans Under Consideration. In order to be eligible to request an extension, Wyoming must identify the state plans under consideration. However, EPA expects Wyoming to do this without the benefit of knowing the final model plans for state consideration because EPA “intends to promulgate in the near future” but as of yet has not promulgated any model plan for state consideration. (Fed. Resp. Br. at 58).

8. Element 2 – Appropriate Explanation for Requesting an Extension. Under Element 2, Wyoming must describe and specify its timeline for evaluation of potential impacts of different state plan approaches, work efforts with other states

and stakeholders, state regulatory actions, legislative approval or consultation, data analysis, and schedule for public outreach. *See* Initial Plan Memo at p. 3. In order to satisfy Element 2, Wyoming must continue to expend significant time and resources to address these points for its September 6, 2016 submittal.

9. Element 3 – “Meaningful Engagement” with the Public. In order to satisfy Element 3, Wyoming must provide “an opportunity for public comment and meaningful stakeholder engagement on the **initial** submittal, including outreach to vulnerable communities; and (2) a description of the state’s plans for meaningful public engagement on the **final** state plan, including outreach to vulnerable communities.” *See* Initial Plan Memo at p. 3.

10. In order to satisfy Element 3, Wyoming must continue to expend significant time and resources to address these points for its September 6, 2016 submittal. Examples of Wyoming’s time and resource expenditures are associated with planning, traveling, and holding outreach meetings throughout Wyoming, including the communities of Wheatland, Powell, Greybull, Riverton, Torrington, Gillette, Casper, Rock Springs, Kemmerer, and Cheyenne. Some of these meetings will require overnight trips for multiple DEQ employees. The DEQ is currently in the process of making those arrangements and allocating significant staff resource time towards those efforts.



11. The DEQ/AQD has and continues to expend staff resources and incur other costs all related to the CPP. To date, the DEQ/AQD has expended 2,368 hours of 10 senior staff members for efforts required under the CPP. These efforts include consultation, analyses, presentation development, securing URLs, planning and outreach efforts with other state agencies such as the Public Service Commission, Wyoming utilities, vulnerable Wyoming communities and populations, multi-state planning groups, other states – including their environmental and utility regulators, and the EPA.

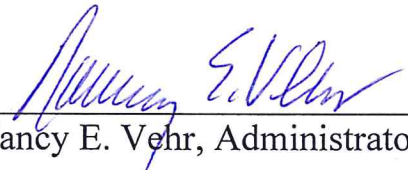
12. Another example of a near-term effect traceable to the final rule is EPA’s failure to consider “non-air environmental impacts” or engage in consultation under the Endangered Species Act (ESA) before issuing the Final Rule may have a significant impact on threatened and endangered species in Wyoming during the pendency of the underlying litigation. *See* Wyoming Petition for Reconsideration at p. 13-16 (Dec. 21, 2015); *see also* Wyoming DEQ Comments, Docket ID No. EPA-HQ-OAR-2013-0602-22977 at p. 9 (Dec. 1, 2014).

13. DEQ submitted comments to EPA noting that “Wyoming is dedicated to protecting the Greater Sage-Grouse, which lives in the sagebrush steppes of our State. Wyoming has devoted significant resources towards developing a conservation plan for this species. One of the important safeguards for this species is protection of its core habitat areas. The level of wind infrastructure development

imagined by the Proposed Rule would negatively impact significant portions of the Greater Sage- Grouse's core habitat. [EPA's] oversight is not limited to the Greater Sage-Grouse; EPA has also failed to consider the environmental impact to other species such as bald eagles and bats." Wyoming DEQ Comments, Docket ID No. EPA-HQ-OAR-2013-0602-22977 at p. 9 (Dec. 1, 2014).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/5/2016

  
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Nancy E. Vehr, Administrator