ORAL ARGUMENT ON JUNE 2, 2016

15-1363

United States Court of Appeals for the District of Columbia Circuit

STATE OF WEST VIRGINIA, et al.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review of Environmental Protection Agency Final Action

Proof Brief for State and Municipal Intervenors in Support of Respondents by the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington; the District of Columbia; the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami; and Broward County, Florida

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), the undersigned State, District, and City Intervenors-Respondents adopt the certificate as to parties, rulings, and related cases in respondent EPA's brief.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Authorities chiefly relied on are marked with an asterisk (*).

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

State Regulator Decisions

TABLE OF AUTHORITIES (cont'd)

State Regulator Decisions **Page(s)**

Federal Laws

TABLE OF AUTHORITIES (cont'd)

Federal Laws **Page(s)**

State Laws

TABLE OF AUTHORITIES (cont'd)

Miscellaneous Authorities **Page(s)**

GLOSSARY OF ABBREVIATIONS

EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
EPA Br.	Respondent EPA's Initial Brief
Power Co. Br.	Brief of Intervenor Power Companies in Support of Respondents
Br.	Opening Brief of Petitioners on Core Legal Issues
Legal Mem.	Environmental Protection Agency Legal Memorandum Accompanying Clean Power Plan for Certain Issues (Aug. 2015)

CITATIONS IN PAGE-PROOF BRIEF

Iowa Comments:	State of Iowa Coordinated Comments on EPA Proposed 111(d) Regulations (Nov. 12, 2014) (EPA-HQ-OAR-2013-0602-23271)
Nichols Comments:	Comments from Mary Nichols, Chairman of the California Air Resources Board, regarding the Clean Power Plan (Nov. 24, 2014) (EPA-HQ-OAR-2013-0602-23433)
State Comments:	Joint Comments of 14 States from Mary Nichols, Chairman of the California Air Resources Board, regarding the Clean Power Plan (Dec. 1, 2014) (EPA-HQ-OAR-2013-0602-23597)
RGGI Comments:	Regional Greenhouse Gas Initiative States' Comments on Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating

	Units (Nov. 5, 2014) (EPA-HQ-OAR-2013-0602-22395)
RTC:	Environmental Protection Agency's Response to Comments (Oct. 23, 2015) (EPA-HQ-OAR-2013-0602-37106)

PRELIMINARY STATEMENT

The undersigned Intervenor States and Municipalities (State Intervenors) submit this brief in support of the Environmental Protection Agency (EPA). State Intervenors have a compelling and urgent interest in reducing dangerous carbon-dioxide pollution from the largest source of those emissions: fossil-fueled power plants. Our residents and businesses are already experiencing harms from climate change, such as flooding from rising seas, increasingly severe storms, and prolonged droughts. Unless greenhouse gases are significantly reduced, climate change threatens to worsen these harms as well as to increase extreme heat and ozone pollution, which lead to premature deaths. For years, State Intervenors have pursued multiple avenues to reduce carbon-dioxide pollution from power plants—including by implementing their own programs to curtail those emissions, and by demanding that EPA comply with its mandate to provide comprehensive nationwide regulation of power-plant carbon pollution.

The Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"), is an important step towards fulfilling EPA's mandate under section 111(d) of the Clean Air Act. The Rule establishes a nationwide

framework to achieve meaningful and cost-effective reductions of carbon-dioxide emissions from power plants and provides States and power plants flexibility to decide how best to achieve these reductions. The Rule's emission guidelines properly build on existing trends in the industry as well as the experiences of States in addressing such emissions. The Rule is accordingly a legitimate, tailored exercise of EPA's statutory mandate to serve "as primary regulator of greenhouse gas emissions." *Am. Elec. Power Co. v. Conn. ("AEP")*, 564 U.S. 410, 427-28 (2011).

State and industry petitioners challenging the Rule argue that the Rule intrudes on States' traditional authority over the generation and consumption of electricity and commandeers the States to implement a federal program. These arguments are meritless. The Rule properly implements EPA's unambiguous statutory authority to regulate carbon-dioxide emissions from power plants. Any effect that the Rule may have on energy-generation decisions is a permissible consequence of that delegated authority, and does not meaningfully distinguish this rule from prior pollution limits that EPA has established for power plants.

Absent meaningful federal regulation like the Rule, State Intervenors may be unable to obtain needed reductions in carbon-dioxide emissions from existing power plants located in other States. Notably, the Supreme Court held in *AEP* that States cannot bring federal common-law claims against those power plants in light of EPA's comprehensive authority to regulate power plant greenhouse-gas emissions pursuant to section 111(d). EPA has now exercised that authority. This Court should reject petitioners' meritless challenges to the Rule.

ISSUES PRESENTED, STATUTES, AND REGULATIONS

The issues presented are set forth in EPA's brief. All applicable statutes and regulations are attached to EPA's brief, except for those contained in the attached addendum.

STATEMENT OF THE CASE

State Intervenors adopt EPA's Statement of the Case and emphasize the following:

State Intervenors have pursued more than a decade of litigation and regulatory activity in an effort to achieve meaningful limitations on carbon-dioxide emissions. In 2003, certain State Intervenors sued EPA

to compel regulation of greenhouse-gas emissions from new motor vehicles under section 202 of the Clean Air Act. The Supreme Court held that the Act's broad definition of "air pollutant" unambiguously covers greenhouse gases, and that EPA was accordingly obliged "to regulate emissions of the deleterious pollutant" if it found that greenhouse-gas emissions endanger public health or welfare. *Massachusetts v. EPA*, 549 U.S. 497, 528-29, 533 (2007).

EPA subsequently found that greenhouse gases, including carbon dioxide, endanger public health and welfare by causing more intense, frequent, and long-lasting heat waves; worse smog in cities; longer and more severe droughts; more intense storms such as hurricanes and floods; the spread of disease; and a dramatic rise in sea levels. 74 Fed. Reg. 66,496, 66,497, 66,524-25, 66,532-33 (Dec. 15, 2009). These effects harm State Intervenors' residents, infrastructure, and industries, such as farming, tourism, and recreation, as well as the States' wildlife habitats. *See* 80 Fed. Reg. at 64,682-88. This Court upheld EPA's endangerment finding, and its conclusions are not in dispute here. *Coal. for Responsible Regulation, Inc. v. EPA,* 684 F.3d 102, 120-21 (D.C. Cir. 2012) (per curiam), *cert. granted in part on other grounds*, 134 S. Ct.

418 (2013), *aff'd in part, rev'd in part*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

While *Massachusetts* was still pending, certain State Intervenors brought common-law public-nuisance claims directly against power plants, seeking reductions in the greenhouse-gas pollution that was harming the health and welfare of their citizens. *See AEP*, 564 U.S. at 418. But when *AEP* reached the Supreme Court (after *Massachusetts*), the Court rejected the States' federal common-law claims, holding that the Clean Air Act "directly" authorized EPA to regulate greenhouse gases from power plants under section 111(d). *Id.* at 424 (quotation marks omitted). Because of this statutory authority, "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Id.*

To spur EPA to regulate greenhouse-gas emissions, some State Intervenors also sued EPA for failing to establish emission standards and guidelines under section 111. *See New York v. EPA*, No. 06-1322 (D.C. Cir., filed Sept. 13, 2006). After the Supreme Court decided *Massachusetts*, this Court remanded *New York* to EPA for further

proceedings, and EPA agreed to proceed with rulemaking under section 111. EPA's rulemaking process culminated in the Clean Power Plan.

SUMMARY OF ARGUMENT

The Clean Power Plan is a reasonable and legitimate exercise of EPA's authority to limit harmful carbon-dioxide emissions from existing power plants. Both the purpose and effect of the Rule are to curtail these emissions and thus address the severe and ongoing harms to individuals and the economy caused by this pollution. The Rule properly incorporates and relies on existing trends and industry strategies to bring about these needed reductions.

Petitioners complain that the Rule improperly intrudes on State decisions about their "generation mix." Br. at 39. This argument is meritless. The Rule does not "control each State's energy mix," as petitioners claim (Br. at 24), and any effect on a State's energy mix is a permissible consequence of EPA's undisputed authority to regulate carbon-dioxide emissions. Indeed, an interpretation of the Clean Air Act that would forbid an emission regulation from affecting the energy sector would prevent EPA from regulating harmful emissions from

power plants at all, despite their being a substantial source of greenhouse gases as well as many other harmful pollutants.

Petitioners are also wrong in arguing that the Rule improperly commandeers or coerces States. Through section 111(d)'s well-established cooperative-federalism structure, States can decline to implement federal emission guidelines, leaving EPA to regulate power plants directly through a federal plan. The fact that States and their regulators may be faced with reviewing power plants' decisions to comply with the federal plan does not constitute commandeering or coercion: to the contrary, the Rule does nothing to restrict or control how States exercise their authority in reviewing those decisions.

Additionally, State Intervenors agree with EPA that petitioners' remaining challenges lack merit. In particular, EPA properly interpreted section 111(d) when it (1) selected the "best system of emission reduction," (2) determined EPA could regulate power plants' carbon-dioxide emission under section 111 while regulating their mercury emissions under section 112, and (3) established a minimum level of reductions in the Rule.

ARGUMENT

POINT I

THE RULE LAWFULLY IMPLEMENTS EPA'S OBLIGATION TO REGULATE CARBON-DIOXIDE EMISSIONS UNDER THE COOPERATIVE-FEDERALISM STRUCTURE OF SECTION 111(d)

A. The Rule Directly Regulates Carbon Pollution Without Improperly Intruding on State Authority.

Under the Clean Air Act, EPA has a mandate to serve "as primary regulator of greenhouse gas emissions" from power plants. *AEP*, 564 U.S. at 427-28; *see also Texas v. EPA*, 726 F.3d 180, 197 (D.C. Cir. 2013). The Rule is a legitimate exercise of this legislative mandate because it establishes a regulatory structure that directly limits carbon-dioxide emissions from existing power plants.

As outlined in its preamble, the Rule's "fundamental goal" is "reduc[ing] harmful emissions" of carbon dioxide from fossil-fueled power plants "in accordance with the requirements of the [Clean Air Act]." 80 Fed. Reg. at 64,665. To achieve this goal, the Rule sets guidelines that States (or EPA under a federal plan) will use to establish standards of performance for different categories of power plants, based on EPA's determination of the "best system of emission reduction" "adequately demonstrated" to reduce carbon-dioxide

emissions, 42 U.S.C. § 7411(a)(1). *See* 80 Fed. Reg. at 64,667, 64,820. Both the justification and operation of the Rule are accordingly "all about, and only about," reducing carbon pollution, *FERC v. Elec. Power Supply Ass'n ("EPSA")*, 136 S. Ct. 760, 776 (2016)—a subject matter squarely within EPA's statutory mandate.

Petitioners challenge the Rule as an illegitimate effort by EPA to "invade" the States' purportedly "exclusive" control over the "mix" of energy inside their borders. *See* Br. at 39-40. Specifically, petitioners object that the Rule's incorporation of "generation-shifting" methods into the "best system" will effectively "mandate[] changes to the power generation mix in individual States, supplanting the States' traditional authority in this area." *Id.* This argument fails for two reasons.

First, contrary to petitioners' assertion (Br. at 40), States do not have "exclusive" control over the mix of energy-generation sources within their borders. States' decisions regarding their energy sectors have long been constrained by the concurrent regulatory authority of Congress, which has delegated authority to federal agencies over many

aspects of operating power plants.[1] For example, a State's decision to incentivize new hydroelectric dams[2] or nuclear power plants is subject to the authority of the Federal Energy Regulatory Commission and Nuclear Regulatory Commission, respectively, to approve such projects. *See* 16 U.S.C. § 817(1); 42 U.S.C. § 2131 & 10 C.F.R. § 50.10(b).[3] Concurrent federal jurisdiction over aspects of running a power plant properly reflects the fact that many of those aspects likely affect multiple States due to safety and environmental risks that cross state lines, as well as the interconnected nature of the electricity market. *See, e.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

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[1] *Cf. EPSA*, 136 S. Ct. at 776 (noting that federally regulated wholesale electricity market and state-regulated retail electricity market "are not hermetically sealed from each other"); *Oneok, Inc. v. Laerjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) ("platonic ideal" of "clear division between areas of state and federal authority in natural-gas regulation" does not exist).

[2] *See, e.g.*, Tex. Utilities Code § 39.904(a) (mandating 5,000 megawatts of new renewable energy sources, including hydroelectric sources, by 2015).

[3] *See also* Neb. Op. Att'y Gen. No. 04024 (Sept. 7, 2004) at 2, 8 (recognizing that the federal Public Utility Regulatory Policies Act, which encourages use of renewable energies, preempts conflicting Nebraska law).

EPA's pollution regulations are simply another federal constraint that States and power plants must heed in this complex area of overlapping state and federal authority.[4] It is well established that air pollutants—including carbon-dioxide emissions—have substantial interstate effects that the Clean Air Act was designed to address. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593-94 (2014); *Massachusetts*, 549 U.S. at 521-22. State policy choices in this area thus appropriately account for and yield to federal emission regulations. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). Although States make policy-based decisions about their energy markets (and will continue to do so under the Rule),

[4] State regulators and power plants are accustomed to overlapping federal and state constraints in this area. *See, e.g.*, *In re Appalachian Power Co. DBA, Am. Elec. Power*, No. 13-0764-E-CN, 2014 WL 5212906, at *1 (W. Va. Pub. Serv. Comm'n, Feb. 12, 2014) (approving conversion of several coal-fired units to natural gas to "retain needed generation capacity while complying with the recent tightening of federal environmental regulations"). *In re Portland Gen. Elec. Co.*, No. 10-457, 2010 Or. PUC LEXIS 400 (Or. Pub. Util. Comm'n, Nov. 23, 2010) (approving power company's plan to reduce use of coal as least-risk option to meet demand and maintain reliability in response to federal regional haze and mercury rules). *See also infra* 20-22.

no principle of law suggests that States have authority to determine their energy-generation mix regardless of federal environmental laws.

Second, even assuming that energy-generation mix is an area of "exclusive State jurisdiction" (Br. at 40), the Rule remains a lawful exercise of EPA's statutory authority because any changes to energy mix would merely be an incidental effect of the Rule's permissible focus on reducing carbon-dioxide emissions. As the Supreme Court recently explained in *EPSA*, 136 S. Ct. at 776, whether a federal regulation improperly intrudes on an area of state control should be judged by assessing what it directly regulates, not by looking at any downstream effects it may have. In that case, the Court addressed a federal rule that directly "regulate[d] what takes place on the *wholesale* [electricity] market"—an area of federal regulation authorized by the Federal Power Act—but that also "of necessity" "affect[ed]" retail electricity rates—an area expressly reserved to the States under the Act. *Id.* The Court held that the rule's effect on retail rates was "of no legal consequence" and did not "run afoul" of the Act's grant of authority to States over retail electricity. *Id.*

The same is true here. The Rule directly regulates pollution, a subject squarely within EPA's regulatory jurisdiction; it is thus permissible regardless of its potential downstream effects on a State's energy mix. *Cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (recognizing that FERC's "indisputable authority" over entities directly subject to its jurisdiction "may, of course, impinge as a practical matter on the behavior of non-jurisdictional" entities).

Indeed, it would be difficult or even impossible for EPA to require meaningful pollution reductions from power plants if, as petitioners contend (*see* Br. at 39), its regulations could not in any way affect state or private choices about energy generation. Because power-plant emissions are the inherent product of electricity generation, *any* pollution limits will almost certainly affect where and how that energy is produced. *See* 80 Fed. Reg. at 64,689. For example, where pollution limits increase the cost of dirtier energy, they will necessarily cause more expensive dirtier power to be replaced by cheaper cleaner power, because demand for electricity is satisfied by the least expensive option available on an "interconnected grid of near-nationwide scope." *EPSA*,

136 S. Ct. at 768 (quotation marks omitted); *see also* 80 Fed. Reg. at 64,692, 64,780. Thus, power plants commonly comply with pollution limits in part by shifting to lower-emitting fuels or renewable technologies. *See* 80 Fed. Reg. at 64,781 (citing numerous examples where power plants "have reduced their individual generation, or placed limits on their generation, in order to achieve, or obviate, emission standards").

The Clean Air Act itself reflects Congress's understanding of the connection between pollution regulation and electricity generation. As the Supreme Court has recognized, EPA's mandate under section 111(d) is to make an "informed assessment of competing interests[,]" including not only "the environmental benefit potentially achievable," but also "our Nation's energy needs." *AEP*, 564 U.S. at 427; *see* 42 U.S.C. § 7411(a). Congress thus contemplated that pollution limits for power plants would have an indirect effect on energy markets.

The Rule's permissible focus on pollution reduction rather than direct energy regulation is demonstrated by the fact that it is agnostic about the specific means by which States and power plants achieve the Rule's emission limits. Far from "forc[ing]" or "mandat[ing]" any "particular levels" of generation in "individual States" (Br. at 39), the

Rule instead gives States substantial flexibility to determine how emission limits will be met, so long as the Rule's pollution-reduction goals are satisfied. Although EPA determined that cost-effective and available reductions could be achieved in part by increasing electricity generation from cleaner fuels or renewable energy—methods that power plants have used to comply with air quality regulations for years, *see* 80 Fed. Reg. at 64,666-67, 64,710—nothing in the Rule requires States or sources to adopt such measures in the manner or at the level that EPA has determined is achievable. *See* 80 Fed. Reg. at 64,666-67, 64,710. Accordingly, States and power plants may implement the Rule's required emission reductions through a broad range of available measures, including not just the specific "generation shifting" measures identified by EPA as part of the "best system," but also (1) increases in energy efficiency at power plants ("heat rate" improvements); (2) use of natural gas alongside coal to fuel plants ("co-firing"); (3) demand-side measures like energy efficiency programs; or (4) some combination of these and other options. *See* 80 Fed. Reg. at 64,709, 64,755-57, 64,833-36. In addition, a State can use trading programs that provide power plants with the flexibility to continue preexisting carbon-dioxide

emissions by purchasing sufficient credits or allowances. 80 Fed. Reg. at 64,727.

The Rule thus operates in a manner similar to many previous Clean Air Act regulations by controlling air pollution from power plants without dictating the precise manner by which States and sources comply with these pollution limits. *See, e.g.*, *Mich. v. EPA*, 213 F.3d 663, 687-688 (D.C. Cir. 2000) (EPA's rule provided States with "real choice" in implementing the "assigned reduction levels"); *see also Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 303 (3d Cir. 2015) (giving States flexibility in achieving water quality limits preserves State autonomy in areas such as land-use and zoning), *cert. denied*, 84 U.S.L.W. 3475 (Feb. 29, 2016). This balance between federal and State authority appropriately helps to ensure that the Rule will achieve meaningful reductions in carbon-dioxide emissions without unduly intruding on State regulation of energy.

By contrast, petitioners' expansive view of traditional state authority would insulate power plants from Clean Air Act regulation even though they emit vast quantities of many dangerous air pollutants and are the most significant sources of carbon dioxide, a pollutant that

is gravely affecting public health and welfare. This is not the law. As the Supreme Court recognized, the Clean Air Act requires EPA to address greenhouse-gas emissions from power plants, and this mandate displaces the States' own federal common-law remedies. *AEP*, 564 U.S. at 427. No basis exists for petitioners' narrow interpretation of EPA's authority to curtail carbon-dioxide emissions from the stationary sources most responsible for them.

B. The Rule Does Not "Commandeer" or "Coerce" the States.

1. The option of direct federal regulation under a federal plan defeats petitioners' commandeering argument.

Petitioners argue that the Rule "commandeers" the States by forcing them to "facilitate" implementation of the Rule. Br. at 78-79. But the Rule does not require a State to implement its requirements. To the contrary, as is typical under cooperative-federalism statutes, EPA will itself implement and enforce the Rule under a federal plan if a State chooses not to submit a plan. 80 Fed. Reg. at 64,881-82; *see* 42

U.S.C. § 7411(d)(2).[5] Under the proposed federal plan, EPA would directly regulate power plants, not "States as States," *Hodel*, 452 U.S. at 287-88; and power plants could comply with the federal plan by purchasing allowances under a trading scheme and implementing any other necessary measures to reduce emissions. 80 Fed. Reg. 64,966, 64,970 (Oct. 23, 2015). The federal-plan option removes any "suggestion that the [Rule] commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel*, 452 U.S. at 288; *see also EPSA*, 136 S. Ct. at 780; *Miss. Comm'n on Envt'l Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) (per curiam); *Texas*, 726 F.3d at 196.

Petitioners argue that the Rule nonetheless *indirectly* commandeers States because state regulators may still be "forced to review siting decisions, grant permit applications, and issue certificates of public convenience," or will be compelled to take action to "address reliability issues caused" by power plants' efforts to comply with a federal plan's

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[5] A State's initial decision to accept direct federal regulation of the State's power plants is not irreversible. States that initially decline to submit a plan can submit one later. 40 C.F.R. § 60.5720(b).

emission limits. Petitioners assert that because of these efforts EPA will not bear the "full regulatory burden" of the Rule under a federal plan. Br. at 82-84 (quoting *Hodel*, 452 U.S. at 288). This argument fails.

As an initial matter, petitioners misunderstand *Hodel*'s reference to the "full regulatory burden" of a federal regulation. For purposes of this constitutional analysis, *Hodel* makes clear that the burden of implementing a federal regulation is the burden of imposing it on the activities or individuals "actually regulated"—in this case, power plants. 452 U.S. at 289. The burden does not include the regulation's "conceivable effects" on other areas of traditional State control. *Id.*; *see also Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013) (incidental effects of tobacco regulation on State's tax collection burden were "constitutionally permissible").[6] Thus, the fact that the Rule may have

[6] This point is further supported by the experience of States under the Surface Mining Act, which was upheld in *Hodel*. For example, under that Act, the federal Office of Surface Mining Reclamation and Enforcement imposed a federal coal surface mining program on the State of Washington, but the State continued to handle permitting in order to address the effect of mining on state resources. *See* 30 C.F.R. §§ 947.773(e) (listing related state permits), 947.816(b) (federal "performance standards" require that "[a]ll operators shall have a plan of reclamation approved by the Washington Department of Fisheries").

the "conceivable effect" of causing power plants to seek approval from state regulators for their compliance choices is legally irrelevant.

Additionally, the regulatory actions to which petitioners object are not a result of the Rule, but rather a result of States' continued choice to exercise a role in regulating (or deregulating[7]) their electric utilities and infrastructure. State regulators routinely choose to play a role in this area by reviewing changes in power generation—whether caused by state or federal regulations, economic forces, industry practice, or power-plant owners' private business decisions. It is thus common, even in petitioner States, for state regulators to evaluate and decide applications from power plants seeking to comply with federal air-quality regulations or to recover the costs of such compliance.[8] For

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[7] In deregulated States, such as New Jersey, Michigan, Ohio, and Texas, power plants sell electricity and make investment decisions in wholesale markets overseen by the Federal Energy Regulatory Commission. *See* 80 Fed. Reg. at 64,796. *See also* Br. at 38, n.23 (noting New Jersey's choice to deregulate).

[8] *See In re Tucson Elec. Power Co.*, No. E-01933A-12-0291, 2013 WL 3296522, at *6, 32, 59 (Ariz. Corp. Comm'n, June 27, 2013) (allowing power company to recover costs of complying with federal air pollution rules); *In re Ariz. Pub. Serv. Co.*, No. E-01345A-10-0474, 2012 WL 1455090, at *33-35 (Ariz. Corp. Comm'n, Apr. 24, 2012) (allowing power plant owner to pursue acquisition of additional existing coal

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example, the Kentucky Public Service Commission approved a power plant's plans to convert a unit to natural gas to comply with EPA's Mercury and Air Toxics Rule because the conversion was the most cost-effective option that also ensured a continued reliable supply of energy.[9] Similarly, the Public Service Commission of Wisconsin approved a power plant's request to convert to natural gas to comply with federal environmental standards after determining, under Wisconsin law, that there were no more reliable or cost-effective alternatives and that the project was in the public interest.[10]

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plants on condition owner consider clean and renewable energy options); *In re Montana-Dakota Utilities Co.*, No. PU-11-163, 2012 WL 2849479 (N.D. Pub. Serv. Comm'n, May 9, 2012) (considering options presented by conversion to natural gas and investment in renewable energy when granting application to comply with regional haze regulations); *see also* M.J. Bradley & Associates, *Public Utility Comm'n Study*, EPA Contract No. EP-W-07-064 (Mar. 31, 2011) (describing responses by utility regulators, including in Indiana, Georgia, and West Virginia, to power plant efforts to comply with federal pollution regulations).

[9] *In re Ky. Power Co.*, No. 2013-00430, 2014 Ky. PUC LEXIS 583 (Ky. Pub. Serv. Comm'n, Aug. 1, 2014).

[10] *In re Wis. Electric Power Company*, No. 6630-CU-101, 2014 Wisc. PUC LEXIS 80 (Wis. Pub. Serv. Comm'n, Mar. 17, 2014). As another example, Virginia's State Corporation Commission granted a power plant's application to convert from coal to natural gas after Clean

(*continued on the next page*)

The fact that state regulatory agencies will continue exercising their ordinary oversight over their electric utilities—including over decisions made by power plants to comply with a federal plan—does not mean the Rule commandeers States. The States' regulatory oversight is independent of the Rule, not a new mandate imposed by EPA. And the Rule imposes no constraints on how States may exercise their authority over power plants. *See* EPA Br. at 57-58, 103-104. States thus remain free to deny (for example) a permit, rate change, or plant closure requested by a power plant. It is the obligation of the power plant faced with such a denial to identify and pursue a different compliance option that will be acceptable both to state regulators and to EPA.

As an example, in its regional haze rule, EPA had identified scrubbers as the "best available retrofit technology" for coal plants. *See* 70 Fed. Reg. 39,104, 39,110 (July 6, 2005); *see also* 76 Fed. Reg. 81,728, 81,729 (Dec. 28, 2011) (federal plan). Oklahoma regulators nonetheless

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Air Act requirements made the continued use of coal uneconomical. The Commission made clear that state law governed its decision, regardless of the purpose for the application. *In re Va. Elec. & Power Co.*, No. PUE-2012-00101, 2013 Va. PUC LEXIS 633, at *18-*19 (Va. Corp. Comm'n, Sept. 10, 2013).

denied a request from the Oklahoma Gas and Electric Company to install scrubbers at one plant and convert two other coal plants to natural gas, in part because the company had not appropriately analyzed whether other alternatives, such as renewable energy, would be more cost-effective.[11] The federal plan there did not preclude Oklahoma from reaching this determination, nor did it allow the company to ignore Oklahoma's independent state-law authority to review and deny such an application. The Rule here is similar and would not preclude State regulators from exercising their independent judgment when entertaining power-plant applications.

The Rule's preservation of state regulators' preexisting authority over electricity generation easily distinguishes the Rule from the statutes that were found to impermissibly commandeer States in *Printz v. United States*, 521 U.S. 898, 932-33 (1997), and *New York v. United States*, 505 U.S. 144, 167-68, 176-77 (1992). *See* Br. at 82-83. In both of those cases, the relevant federal statutes supplanted state authority and directed state officials or agencies to act in a specific way. Here, in

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[11] *See In re Ok. Gas & Elec. Co.*, No. PUD 201400229, 2015 Okla. PUC LEXIS 397, at *18-*20 (Ok. Corp. Comm'n, Dec. 2, 2015).

contrast, the Rule places no restrictions on the States' continued exercise of authority over any compliance decisions by power plants.

2. The Rule does not coerce States.

Petitioners repackage their "commandeering" claims to argue that the Rule also "coerces" States by threatening them with "electricity shortfalls" they must address by "facilitat[ing] generation-shifting." Br. at 84-85. But this argument fails for the same reason the commandeering argument fails. State regulators have always considered the need to maintain the reliability of the electricity grid in overseeing the construction and operation of power plants. The Rule preserves this role. The Rule thus does not "coerce" any regulatory action beyond what States have long been accustomed to doing.[12]

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[12] Petitioners are mistaken in their assertion that the proposed federal plan "expressly relies" on state regulators to ensure reliability of the grid. Br. at 83. In the proposed federal rule, EPA recognizes that state planning authorities have a role in ensuring reliability. 80 Fed. Reg. at 64,981. But EPA has proposed that its implementation of a federal plan will principally rely on coordination with other federal agencies (specifically, the Department of Energy and the Federal Energy Regulatory Commission) to help ensure reliability. 80 Fed. Reg. at 64,982.

In any event, as explained by EPA in its brief, EPA Br. at 102, 150-53, and in the Rule, EPA exhaustively studied reliability and found the Rule "does not interfere with the industry's ability to maintain the reliability of the nation's electricity supply." 80 Fed. Reg. at 64,875-76. Petitioners have not met their burden of showing that the Rule is unconstitutional. *See Miss. Comm'n on Envt'l Quality*, 790 F.3d at 178.

POINT II

EPA'S INTERPRETATION OF SECTION 111(d) IS REASONABLE AND CORRECT

As EPA explains, petitioners' other challenges to the Rule are meritless. State Intervenors add only the following points:

A. EPA Reasonably Incorporated Longstanding Pollution-Control Strategies in Determining the Best System.

In determining the guidelines to apply to carbon-dioxide emissions from existing power plants, EPA was required to select the "best system of emission reduction" that is "adequately demonstrated" to achieve pollution reductions. 42 U.S.C. § 7411(a)(1). To satisfy this statutory obligation, EPA appropriately considered "strategies, technologies and approaches already in widespread use by power companies and states"

to address the unique qualities of carbon-dioxide pollution and the interconnected electricity grid. 80 Fed. Reg. at 64,664, 64,689; *see also id.* at 64,667, 64,725, 64,744. EPA's careful consideration of existing practices and emission-reduction strategies highlights the Rule's reasonableness.

As EPA explained in the Rule, the interconnected electricity grid allows cleaner generation to replace dirtier generation—whether that cleaner energy is developed in response to policy measures, economic forces, or other factors. *Id.* at 64,677, 64,795. Because of the ease of transitioning to cleaner power through the grid, power plants throughout the United States and abroad already use methods that include reducing their reliance on dirtier fuels in order to limit their carbon-dioxide emissions. *Id.* at 64,727-28. *See* EPA Br. at 31. In addition, there has been a consistent trend away from coal-fired electricity generation for more than a decade in the United States, largely as a result of market forces. 80 Fed. Reg. at 64,725, 64,795. Because of these industry trends and the unique features of the electricity grid, EPA determined that the set of measures it identified as the "best system"—including the use of more natural gas or renewable

energy—was the *least expensive* manner of reducing carbon-dioxide emissions. *Id.* at 64,727 (discussing other cost-effective methods).

EPA's chosen system of emission reduction also comports with the strategies States and industry have "long relied" on to reduce pollution from fossil-fueled power plants.[13] *See* Power Co. Br. at I. State Intervenors were uniquely positioned to inform EPA's determination because they have years of direct experience reducing power-plant carbon-dioxide emissions. For example, through the Regional Greenhouse Gas Initiative (RGGI), nine northeast and mid-Atlantic States (all intervenors here) agreed on limits for such emissions and created a trading program through which plants can buy and sell allowances to meet the agreed-upon limits. Natural-gas combustion turbines run more cleanly than coal plants and thus require fewer allowances to generate the same energy. Therefore, one practical effect of the RGGI trading program is that natural gas-fired plants are "called on to operate more often" than more polluting (and thus more

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[13] State Comments at 15-19; *see also* RGGI Comments at 3; RTC Ch. 3.2, at 2; 80 Fed. Reg. at 64,735, 64,783, 64,796, 64,803.

expensive) coal- and oil-fired generation units.[14] Encouraging these shifts, among other steps, helped RGGI states reduce carbon pollution from the power sector by over forty percent between 2005 and 2012.[15] Other programs in Minnesota and California have also led plants to make meaningful reductions to greenhouse-gas emissions through some of the same measures EPA included in the "best system" here.[16]

The experience of power plants in our States has shown that these reductions in carbon-dioxide emissions can be achieved without impeding economic growth or threatening grid reliability. Indeed, State Intervenors' carbon-reduction initiatives have delivered significant economic benefits.[17] For example, in RGGI's first three years, participating States realized $1.6 billion in net economic benefits, largely from reduced energy bills for consumers.[18] Similarly, in Illinois, growth in the wind industry spurred by state regulations created 10,000

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[14] State Comments at 18.

[15] *Id.* at 26.

[16] *Id.* at 23-24. *See also* Iowa Comments at 6.

[17] *See* RGGI Comments at 23, 27-28; State Comments at 12, 15, 19-24.

[18] State Comments at 22.

new local jobs and economic benefits totaling $3.2 billion between 2003 and 2010.[19]

Petitioners' narrow view of the "best system," Br. at 41-50, would require EPA to *ignore* well-demonstrated systems of emission reduction despite undisputed evidence that power plants are already using these methods and will continue to do so. *See* 80 Fed. Reg. at 64,784-85. Such disregard of directly relevant evidence would be contrary to basic principles of rational agency rulemaking. *See Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-50 (1983); *see also* 80 Fed. Reg. at 64,761, 64,769.

B. EPA's Hazardous Air Pollution Regulations Do Not Bar the Clean Power Plan.

Petitioners argue that EPA is barred from regulating carbon-dioxide from existing power plants because those plants are already regulated—for other pollutants—under the hazardous-air-pollutant program of section 112. Br. at 61-62. This argument must be rejected

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[19] Nichols Comments, Attachments, at 43.

because, among other reasons, it would create a loophole that is incompatible with the Clean Air Act's design and purpose.[20]

The Act establishes three general areas of regulatory authority to ensure comprehensive pollution control for existing sources. The first two areas cover specific pollutants: namely, (1) a small number of "criteria" pollutants, 42 U.S.C. §§ 7408-7410; and (2) a longer list of "hazardous" pollutants, *id.* § 7412. The third area, section 111(d), provides a catchall source of regulatory authority for harmful air pollutants from existing sources to ensure "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91-1196, at 20 (1970).

Along with power plants, many other large facilities, such as petroleum refineries, Portland cement facilities, landfills, fertilizer plants, and chemical plants are already regulated for certain hazardous air pollutants under section 112. *See* 40 C.F.R. pt. 61. Petitioners' interpretation of section 111(d), *see* Br. at 68, would create a large gap

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[20] State Intervenors also agree with EPA that petitioners misconstrue the statutory language, and that petitioners' interpretation conflicts with section 112(d)(7). *See* EPA Br. at 76-94.

in the Act's comprehensive coverage because it would preclude EPA's regulation of *any* non-criteria pollutants—including greenhouse gases—under section 111(d) from these sources.[21]

Petitioners argue that Congress meant to bar "double regulation" of power plants under section 111(d) and section 112 (Br. at 68), but regulating different pollutants under different programs is not "double regulation." And, in fact, EPA and States have long used section 111(d) to limit harmful pollution, such as sulfuric acid mist and fluoride compounds, even though those sources are regulated for other pollutants under section 112.[22] Petitioners' nonsensical interpretation would threaten the viability of these regulations.

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[21] For example, although EPA has proposed to limit methane emissions from new oil and gas sources, *see* 80 Fed. Reg. 56,593 (Sept. 18, 2015), under petitioners' interpretation, EPA would be barred from requiring pollution reductions from existing sources—even though they are among the largest sources of this potent greenhouse gas—because this source category is regulated under section 112 for hazardous pollutants.

[22] Methane and non-methane organic compounds from landfills are regulated under section 111(d) while emissions of vinyl chloride, ethyl benzene, toluene, and benzene from those same sources are regulated under section 112. 61 Fed. Reg. 9,905 (Mar. 12, 1996) & 40 C.F.R. pt. 63, subpt. AAAA. Similarly, fluorides from phosphate fertilizer plants are regulated under section 111(d) and hydrogen fluoride and other

(*continued on the next page*)

Petitioners' argument is not only wrong, but opportunistic. The power plant defendants in *AEP*, some of which are petitioners here,[23] took a contrary position to the one adopted here to defeat the States' common-law public-nuisance claims in that earlier litigation. At the time *AEP* was argued, EPA had already proposed to regulate hazardous air pollutants from existing power plants—regulations that, under petitioners' arguments now, would have precluded section 111(d) regulation of the same plants.[24] But petitioners in *AEP* never advanced such a constraint on EPA's authority under 111(d). To the contrary,

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pollutants from those sources are regulated under section 112, 42 Fed. Reg. 12,022 (Mar. 1, 1977) & 40 C.F.R. pt. 63, subpt. BB.

[23] For example, Alabama Power Company is a wholly-owned subsidiary of Southern Company (a defendant in *AEP*). American Electric Power Company, Cinergy Corporation, and Southern Company (defendants in *AEP*) are members of Utility Air Regulatory Group, a petitioner here. Many petitioners here were also amici in support of industry in *AEP,* including the Chamber of Commerce, National Rural Electric Cooperative Association, National Mining Association, and nineteen States.

[24] EPA released the proposed Mercury and Air Toxics Standards for power plants on March 16, 2011. *See* EPA, Mercury and Air Toxics Standards: History of This Regulation, *available at* https://www3.epa.gov/mats/actions.html (last visited Mar. 23, 2016). The proposal had been in development, with industry input, since 2009. *See* 74 Fed. Reg. 31,725, 31,727 (July 2, 2009).

they argued *in favor* of EPA's "comprehensive" regulatory authority under the Clean Air Act to regulate greenhouse-gas emissions—including under section 111(d)—as a means of displacing the States' federal common-law nuisance remedies against existing power plants.[25]

C. EPA Correctly Interpreted Its Authority to Require a Minimum Level of Reductions.

Petitioners assert the Rule improperly set "standards of performance" for existing power plants because under section 111(d) EPA can only promulgate a "procedure" for submitting state plans, under which States can establish emissions standards that are collectively "less stringent." Br. at 75. But the statute gives EPA supervisory authority to ensure state plans contain "satisfactory" "standards of performance," 42 U.S.C. § 7411(d)(1), (2)(A). That supervisory role necessarily entails authority to set criteria for

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[25] *See* Br. for Pets., 2011 WL 334707, at 41-42 (Jan. 31, 2011); Oral Argument, *AEP*, 2011 WL 1480855, at *15 (Apr. 19, 2011); *see also* Amicus Br. for Nat'l Rural Elec. Coop. Ass'n, et al., *AEP*, 2011 WL 396513, at *9 (Feb. 7, 2011) (asserting EPA could "produce hard emissions standards" under section 111(d) for "air pollutants that are not regulated under certain other provisions of the Clean Air Act, such as GHGs").

evaluating the standards of performance proposed in state plans. EPA has consistently and reasonably set substantive emission guidelines that set minimum levels of reductions for regulated sources, while allowing States to establish source-specific performance standards. *See* 40 C.F.R. § 60.24(c),(f); 40 Fed. Reg. 53,340, 53,342 (Nov. 17, 1975); Legal Mem. at 21-23. That familiar procedure—followed in the Rule—represents a reasonable interpretation of the proper relationship between EPA and the States under section 111(d).

Petitioners assert a "right" to "relax[]" the rates reflected in the guidelines, Br. at 77-78, relying on language in section 111(d) requiring EPA to "permit" States to "take into consideration, among other factors, the remaining useful life of the existing source" in their plans. 42 U.S.C. § 7411(d)(1). But allowing States to "take into consideration" a particular plant's remaining useful life cannot plausibly be read to grant petitioners a "right" to establish less stringent emissions standards overall. *Cf. id.* § 7416 (preserving the "right of any State" to establish more stringent emission standards). Instead, as EPA reasonably found, States have sufficient flexibility, as well as "headroom" in the levels, to allow them to "take into consideration" a

particular plant's remaining useful life when establishing performance standards for that plant. *See* 80 Fed. Reg. at 64,869-74, 64,872; Legal Mem. at 40-44.

Accepting petitioners' argument that they can establish emission rates that are collectively "less stringent" than the Rule requires, Br. at 75, would also undermine one of section 111's key functions: to guard against a "race to the bottom" in which some States can create "pollution havens" by setting more relaxed standards in order to create a regulatory environment more favorable to regulated industries. Legal Mem. at 19, n.34; *see also* H.R. Rep. No. 91-1146, at 3 (June 3, 1970). Such "pollution havens" undermine the protective purpose of the Clean Air Act by allowing increases in harmful emissions that cross state lines and injure the health and welfare of other States' residents. By contrast, when EPA sets a floor in its emission guidelines, as it has done with the Rule, it protects *all* States from the harmful effects of pollution, better serving the underlying purposes of the Act. *See Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 486 (2004) (EPA's federal supervisory authority helps guard States against the threat of pollution from more "permissive" neighboring States).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Dated: March 29, 2016

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief for State Intervenors in Support of Respondent, dated March 29, 2016, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on January 28, 2016, which limited the briefs for Intervenors in Support of Respondent to a total of 20,000 words. I certify that this brief contains 6,786 words, as counted by the Microsoft Word software used to produce this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word court of the other Intervenors-Respondents, the total does not exceed 20,000 words.

/s/ Bethany Davis Noll
BETHANY DAVIS NOLL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Proof Brief for State Intervenors in Support of Respondent was filed on March 29, 2016 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Bethany Davis Noll
BETHANY DAVIS NOLL

ADDENDUM

ADDENDUM -- TABLE OF CONTENTS

FEDERAL STATUTES

CODE OF FEDERAL REGULATIONS

STATE STATUTES

LEGISLATIVE HISTORY

16 U.S.C. § 817(1)

§ 817. Projects not affecting navigable waters; necessity for Federal license; permit or right-of-way; unauthorized activities

(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act [16 USCS §§ 791a et seq.]. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act [16 USCS §§ 791a et seq.]. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

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42 U.S.C. § 2131

§ 2131. License required

It shall be unlawful, except as provided in section 91 [42 USCS § 2121], for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 103 or 104 [42 USCS § 2133 or 2134].

10 C.F.R. § 50.10(b)

§ 50.10 License required; limited work authorization.

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(b) Requirement for license. Except as provided in § 50.11 of this chapter, no person within the United States shall transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, or use any production or utilization facility except as authorized by a license issued by the Commission.

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30 C.F.R. § 947.773(e)

§ 947.773 Requirements for permits and permit processing.

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(e) The Secretary shall coordinate the SMCRA permit with appropriate State and regional or local agencies to the extent possible, to avoid duplication with the following state and regional or local regulations:

(1) Department of Ecology:
Surface Water Rights Permit, RCW 90.03.250
Dam Safety Approval, RCW 90.03.350
Reservoir Permit, RCW 90.03.370
Approval of Change of Place or Purpose of Use (water) RCW 90.03.380
Ground Water Permit, RCW 90.44.050
New Source Construction Approval, RCW 79.94.152
Burning Permit, RCW 70.94.650
Flood Control Zone Permit, RCW 86.16.080
Waste Discharge Permit, RCW 90.48.180
National Pollution Discharge Elimination System (NPDES) Permit, RCW 90.48
Approval of Change of Point of Diversion, RCW 90.03.380
Sewage Facilities Approval, RCW 90.48.110
Water Quality Certification, RCW 90.48.160

(2) Department of Natural Resources:
Burning Permit, RCW 77.04.150 & .170
Dumping Permit, RCW 76.04.242
Operating Permit for Machinery, RCW 76.04.275
Cutting Permit, RCW 76.08.030
Forest Practices, RCW 76.09.060
Right of Way Clearing, RCW 76.04.310
Drilling Permit, RCW 78.52.120

(3) Regional Air Pollution Control Agencies:
New Source Construction Approval (RCW 70.94.152)
Burning Permit, RCW 70.94.650

(4) Department of Fisheries:
Hydraulic Permit, RCW 75.20

(5) Department of Game:
Hydraulic Permit, RCW 75.20.100

(6) Department of Social Health Services:
Public Sewage, WAC 248.92
Public Water Supply, WAC 248.54

(7) Department of Labor and Industries:
Explosive license, RCW 70.74.135
Blaster's license, WAC 296.52.040
Purchaser's license, WAC 296.52.220
Storage Magazine license, WAC 296.52.170

(8) Cities and Counties:
New Source Construction Approval. RCW 70.94.152
Burning Permit, RCW 79.94.650
Shoreline Substantial Development Permit, RCW 90.58.140
Zoning and Building Permits, Local Ordinances

****

30 C.F.R. § 947.816(b)

§ 947.816 Performance standards -- surface mining activities.

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(b) All operators shall have a plan of reclamation approved by the Washington Department of Fisheries for operation in affected streams, RCW 75, and shall comply with the Hydraulic Project Approval Law, RCW 75.20.100, the Shoreline Management Act, RCW 90.58, the Forest Practices Act, RCW 76.09, the Water Pollution Control Act, RCW 90.48, the Minimum Water Flows and Levels Act, RCW 90.22, and the Pesticide Control Act, RCW 15.58, and regulations promulgated pursuant to these laws.

****

40 C.F.R. § 60.5720(b)

§ 60.5720 What if I do not submit a plan or my plan is not approvable?

***

(b) After a Federal plan has been implemented in your State, it will be withdrawn when your State submits, and the EPA approves, a final plan.

***

Tex. Utilities Code § 39.904

Sec. 39.904. Goal for Renewable Energy.

(a) It is the intent of the legislature that by January 1, 2015, an additional 5,000 megawatts of generating capacity from renewable energy technologies will have been installed in this state. The cumulative installed renewable capacity in this state shall total 5,880 megawatts by January 1, 2015, and the commission shall establish a target of 10,000 megawatts of installed renewable capacity by January 1, 2025. The cumulative installed renewable capacity in this state shall total 2,280 megawatts by January 1, 2007, 3,272 megawatts by January 1, 2009, 4,264 megawatts by January 1, 2011, 5,256 megawatts by January 1, 2013, and 5,880 megawatts by January 1, 2015. Of the renewable energy technology generating capacity installed to meet the goal of this subsection after September 1, 2005, the commission shall establish a target of having at least 500 megawatts of capacity from a renewable energy technology other than a source using wind energy.

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91ST CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 91-1146

CLEAN AIR ACT AMENDMENTS OF 1970

JUNE 3, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H.R. 17255]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 17255) to amend the Clean Air Act to provide for a more effective program to improve the quality of the Nation's air, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

The amendment strikes out all after the enacting clause and inserts in lieu thereof a substitute which appears in the reported bill in italic type.

PURPOSE OF LEGISLATION

The purpose of the legislation reported unanimously by your committee is to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again. The Air Quality Act of 1967 (Public Law 90-148) and its predecessor acts have been instrumental in starting us off in this direction. A review of achievements to date, however, make abundantly clear that the strategies which we have pursued in the war against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been.

SUMMARY OF PROVISIONS AND COMPARISON WITH EXISTING LAW

(1) National ambient air quality standards

The Secretary of HEW will be authorized and directed to establish nationwide ambient air quality standards. The States will be left free to establish stricter standards for all or part of their geographic areas.

37-006 O—70——1

up to $10,000 for each day during which any person fails to take action ordered by the Secretary to abate the pollution.

The Secretary may inspect any establishment for the purpose of determining whether the State plan is enforced or whether the establishment contributes to or fails to take required action to abate pollution.

Under existing law, procedures are more complex and more time-consuming, and no authority is provided for the Secretary to inspect establishments.

(4) *Federal emission standards for new stationary sources*

The Secretary is authorized and directed to establish Federal emission standards for new stationary sources where emissions from such sources are extremely hazardous or where such emissions contribute substantially to the endangerment of the public health or welfare. The purpose of this new authority is to prevent the occurrence anywhere in the United States of significant new air pollution problems arising from such sources either because they generate extra-hazardous pollutants or because they are large-scale polluters.

At present emission standards for stationary sources are established exclusively by the States.

The promulgation of Federal emission standards for new sources in the aforementioned categories will preclude efforts on the part of States to compete with each other in trying to attract new plants and facilities without assuring adequate control of extra-hazardous or large-scale emissions therefrom.

Such emission standards may be enforced either by a State as part of that State's plan or by the Secretary if a State fails to include such standards within its plan. The provisions for court actions to secure abatement and the imposition of penalties are comparable to the provisions described under (3) above.

(5) *Automotive emission control—Motor vehicle testing and certification*

The Secretary is authorized and directed to test, or require to be tested in such manner as he deems appropriate, any new motor vehicle or motor vehicle engine as it comes off the assembly line in order to determine whether the vehicle or engine conforms with the applicable emission standards. Such tests are in addition to testing the prototypes furnished by the automobile manufacturers for purposes of securing certificates of conformity. On the basis of the assembly line testing, the Secretary may suspend or revoke any such certificate in whole or in part. Hearings on the record are to be conducted by the Secretary at the request of any manufacturer who desires to challenge the Secretary's decision to suspend or revoke a certificate, but such hearings shall not stay the suspension or revocation. Determinations made by the Secretary on the basis of such hearings are subject to judicial review.

Experience has shown that the testing and certification of prototypes does not of itself assure that automobiles coming off the assembly line which are sold to the public comply with the Federal emission standards. Therefore, the legislation authorizes inspection of assembly plants and the testing of automobiles and engines coming off the assembly line.

Additionally, the legislation provides that States must require inspection of motor vehicles in actual use if the Secretary, after consultation with the State, determines that the achievement of ambient