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August 5, 2015

Via Certified Mail & Email
The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
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Re: EPA Docket No. EPA-HQ-OAR-2013-0602; Application for an Administrative Stay of the Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Dear Administrator McCarthy:

Please find enclosed the Application for an Administrative Stay of EPA's August 3, 2015 final rule: "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," EPA-HQ-OAR-2013-0602; RIN 2060-AR33. This request is being filed by the following parties: the States of West Virginia, Alabama, Arizona, Arkansas, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky. The reasons for the request for administrative stay are set forth in the enclosed Application.

Please contact counsel of record for the State of West Virginia if you have any questions.

Sincerely,

Elbert Lin
Solicitor General of West Virginia

Enclosure

ENVIRONMENTAL PROTECTION AGENCY

Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule

EPA-HQ-OAR-2013-0602; RIN 2060-AR33

APPLICATION FOR ADMINISTRATIVE STAY
BY THE STATE OF WEST VIRGINIA AND 15 OTHER STATES

The States of West Virginia, Alabama, Arizona, Arkansas, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky request that the Environmental Protection Agency ("EPA") immediately stay the Section 111(d) Rule, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, EPA-HQ-OAR-2013-0602, pending completion of the impending litigation regarding the Rule's legality. Absent an immediate stay, the Section 111(d) Rule will coerce the States to expend enormous public resources and to put aside sovereign priorities to prepare State Plans of unprecedented scope and complexity. In addition, the States' citizens will be forced to pay higher energy bills as power plants shut down. In the end, the courts are likely to conclude that the Section 111(d) Rule is unlawful. At the very minimum, the States and their citizens should not be forced to suffer these serious harms until the courts have had an opportunity to review the Rule's legality.

Action on this application is respectfully requested by 4PM EST on August 7, 2015, so that Petitioners can know whether they must seek emergency relief in court. The States will treat the agency's failure to act upon this request within the requested time as a constructive denial of the request.

BACKGROUND

Under the guise of imposing "standards of performance" on existing coal-fired power plants under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), the Section 111(d) Rule requires the States on pain of a potential federal takeover of significant State authority to submit State Plans that entirely reorder their energy economies, in order to reduce usage of coal-fired energy. To avoid a federal takeover, each State must submit a State Plan that reduces statewide carbon dioxide emission from coal-fired power plants by a staggering average of 32% from 2005 levels, in just 15 years. The State Plan emission targets are based on three "building blocks," which State Plans will, as a practical matter, have to track to meet the targets: (1) increasing efficiency at coal-fired power plants; (2) shifting statewide demand for coal-fired power to natural gas generation; and (3) shifting statewide demand for coal-fired power to renewable sources. Final Rule at *27. Only the first building block involves imposing a pollution control device on coal-fired power plants. The remaining "blocks" require broad energy policy changes. The States must submit their State Plans to the agency by September 6, 2016, absent a two year extension if certain conditions are met. Final Rule at *37-39.

ARGUMENT

EPA has the authority to "postpone the effective date of action taken by it" when "justice so requires." 5 U.S.C. § 705; *see Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 153 (D.D.C. 2011). It should do so here. When considering an application for a stay, EPA applies the traditional four-factor test for staying agency action: (1) likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest in granting the stay. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 29-30

(D.D.C. 2012); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). Under these factors, EPA should stay the Final Rule.

I. Petitioners Are Likely To Succeed On The Merits

The "first and most important factor" is whether Petitioners have "established a likelihood of success on the merits." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). That critical factor is easily satisfied here. The Section 111(d) Rule is illegal in numerous respects, which the States do not waive and will bring to the attention of the courts. By way of illustration, two broad categories of illegality, outlined below, are each independently sufficient to establish that the States have a strong "likelihood of success."

A. The Clean Air Act bars EPA from regulating power plants under Section 111(d) because the agency is already regulating those same sources under Section 112 of the Act. Section 111(d) prohibits the regulation of "any air pollutant" emitted from a "source category . . . regulated under [Section 112]." 42 U.S.C. § 7411(d). As EPA has repeatedly admitted, the "literal" terms of this text prohibit EPA from requiring States to regulate a source category under Section 111(d), when EPA already regulates that source category under Section 112. *See, e.g.* EPA, Legal Memorandum at 26 (June 2014); Brief of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 (D.C. Cir. July 23, 2007); 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004); EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, 1-6 (1995). Accordingly, when EPA decided to regulate power plants under Section 112 (*see* 77 Fed. Reg. 9,304 (Feb. 16, 2012)), the agency disabled itself from requiring States to regulate those plans under Section 111(d). *See generally* Final Br. of West Virginia, et al., No. 14-1146, ECF 1540535 (D.C. Cir. Mar. 4, 2015); Final Br. of Intervenor West Virginia, et al.,

No. 14-1112, ECF 1541358 (D.C. Cir. Mar. 9, 2015); Comment Letter of 17 States, EPA-HQ-OAR-2013-0602-25433 (Dec. 15, 2014). EPA's efforts to run away from this repeated concession, Final Rule at *266-70, are simply an impermissible attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445-46 (2014) ("*UARG*").

B. The lion's share of the Section 111(d) Rule relies not upon regulating coal-fired power plants to make them more environmentally friendly, but on requiring States to adopt broad energy policy measures to replace demand for coal-fired energy with demand for EPA's preferred sources of energy. This novel approach is unlawful in numerous respects. *See generally* Comment Letter of 17 States, EPA-HQ-OAR-2013-0602-25433 (Dec. 15, 2014).

First, the Rule's demand-replacement approach is contrary to the plain text of the Clean Air Act. Under Section 111(d), EPA may direct States to establish "standards of performance *for any existing source*." 42 U.S.C. § 7411(d)(1)(A) (emphasis added). And a "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable *through the application* of the best system of emission reduction ['BSER']." *Id.* § 7411(a)(1) (emphasis added). This language limits regulation to an eligible "system of emission reduction" capable of "application" to an "existing source"—that is, "any building, structure, facility, or installation which emits or may emit any air pollutant." *Id.* § 7411(a)(3). Under this regime, EPA is limited to requiring the States to adopt energy policy measures that "hold[] the industry to a standard of improved design and operational advances." *Sierra Club v. Costle*, 657 F.2d 298, 364 (D.C. Cir. 1981). Blocks 2 and 3 go well beyond this, and are thus entirely unlawful.

Second, contrary to the Supreme Court's decision in *UARG*, the Rule asserts "unheralded power to regulate 'a significant portion of the American economy" based upon a "long-extant statute," absent "clear" congressional authorization. 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). As the Administration has admitted, the Section 111(d) Rule's shift to renewable energy and energy efficiency "will drive a more aggressive transformation in the domestic energy industry,"[1] resulting in the reduction of demand for coal-fired energy in favor of other forms of electricity generation. Nothing in Section 111(d)—an obscure, narrow provision of the Clean Air Act, which EPA has only invoked once in the last thirty-five years—comes close to "clear[ly]" permitting the agency to require States to reorganize their entire energy economies.

Third, the Rule violates the States' constitutional rights over intrastate generation and consumption of electricity, which is "one of the most important functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Consistent with the Constitution, Congress recognized the States' primacy over the intrastate consumer energy market in the Federal Power Act. 16 U.S.C. § 824(a). But under the Section 111(d) Rule, a federal *environmental* regulator now seeks to force the States to subordinate their own energy policies to the agency's desire that coal-fired energy play a reduced role in the energy mix. This requirement unlawfully violates the States' authority to best determine the contours of their own intrastate energy sector. *See Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983).

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[1] Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, Washington Post (Aug. 1, 2015) (quoting "White House fact sheet"), http://www.washingtonpost.com/national/health-science/white-house-set-to-adopt-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html.

II. Absent An Immediate Stay, The States Will Suffer Irreparable Harm

Absent a stay, the States would need to prepare their State Plans immediately because of the date certain submission deadline of September 6, 2016, and limited extension period. The character and enormous scope of the obligations that the Section 111(d) Rule imposes upon the States is far beyond anything the States have ever experienced under the Clean Air Act, or any other federal rule. Preparing these State Plans will be a complicated endeavor, which experienced state regulators believe will take the States many years to complete. This will involve, *inter alia*, interagency analyses and consultation with various stakeholders to determine what is technically feasible. These evaluations will also include possible cooperative interstate regimes, which would require negotiations of memoranda of understanding with other States.

Once the mechanism for compliance is determined, the States will need to actively engage their legislative process, taking valuable time away from achieving the States' sovereign objectives and making policy changes that would otherwise not be adopted. The massive, statewide changes that the Section 111(d) Rule requires will mean that the States will need to significantly alter the regulatory authority of various state agencies, which will often require legislation and, in some cases, even constitutional amendment. Drafting, debating, and enacting these changes will mean massive expenditures of finite legislative and agency time that would instead be directed toward the States' sovereign objectives.

The Section 111(d) Rule will also require significant changes in intrastate energy generation, which will demand substantial resources from State energy regulators. The system-wide changes to energy production that the Section 111(d) Rule mandates must be implemented gradually to preserve as much as possible the reliability of the supply of energy. Accordingly, energy regulators in the States will need to begin working with the regulated community to

facilitate the shutdown of some coal-fired power plants and to issue permits for the sources of energy favored by the Section 111(d) Rule. The efforts State energy regulators will be forced to expend will take time away from serving consumers' energy needs.

These economic and sovereign harms will be entirely irreparable if the courts ultimately declare that the Section 111(d) Rule is invalid, and will impose substantial, irreparable harms upon the States. *See 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 because of sovereign immunity renders the harm suffered irreparable."); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996); *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring). Accordingly, a stay is necessary to protect the States.

III. The Public Interest Strongly Favors A Stay, And No Harm Would Result From Such A Stay

Unless the Rule is stayed, the public will suffer great harm. To begin with, the Rule will impose severe and irreparable harm upon the States' and their citizens by forcing the States to spend immediate sovereign resources to prepare State Plans, as described above. In addition, the threat that the Rule will become effective before completion of litigation will cause private entities to take compliance steps, causing a reduction in the supply of one of the most reliable, cost-efficient sources of energy. As EPA boasted after losing before the Supreme Court in *Michigan v. EPA*, No. 14-46, 2015 WL 2473453 (U.S. June 29, 2015), "the majority of power plants are already in compliance or well on their way to compliance." https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/. This will impose great harm upon the public, in terms of increased energy prices, threatened blackouts during periods of increased demand, and lost jobs. A stay pending the

completion of litigation will ensure that the American people are not forced to suffer these harms until the courts have had a full and fair opportunity to review the Rule's legality.

Nor would anyone suffer any harm as a result of a stay. EPA has repeatedly missed its own self-imposed deadlines for issuing the Section 111(d) Rule, including missing by three years the deadlines contained in EPA's settlement agreement with certain environmental and sovereign parties. *See* 75 Fed. Reg. 82,392, 82,392 (Dec. 30, 2010) (EPA will sign a final Section 111(d) rule by May 26, 2012). Implicit in EPA's delays is that there is no particular pressing need to impose the Section 111(d) Rule immediately. An additional delay, while the courts review the Rule's legality, would not impose any meaningful prejudice on anyone.

CONCLUSION

For the foregoing reasons, the request to stay should be granted.

Dated: August 5, 2015

Respectfully submitted,

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