

**ORAL ARGUMENT NOT YET SCHEDULED****UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

Case No. 15-1380  
Lead Case No. 15-1363  
(and consolidated cases)**PETITIONER STATE OF NORTH DAKOTA'S MOTION FOR STAY  
OF EPA'S FINAL RULE**STATE OF NORTH DAKOTA  
WAYNE STENEHJEM  
ATTORNEY GENERALPaul M. Seby  
Special Assistant Attorney General  
State of North Dakota  
Holland & Hart LLP  
555 Seventeenth Street, Suite 3200  
Denver, CO 80202  
Tel. (303) 295-8430  
Fax (303) 291-9177  
Email: pmseby@hollandhart.comMargaret Olson  
Assistant Attorney General  
North Dakota Attorney General's Office  
600 E. Boulevard Avenue #125  
Bismarck, ND 58505  
Tel. (701) 328-3640  
maiolson@nd.gov***Counsel for Petitioner State of North  
Dakota***

## TABLE OF CONTENTS

|  |    |
|--|----|
| TABLE OF AUTHORITIES .....   | II |
| INTRODUCTION .....   | 1  |
| BACKGROUND .....   | 2  |
| A.    EPA’s Compliance Scenario Assumes North Dakota Power Plant<br>Retirements In 2016 .....  | 6  |
| B.    EPA’s Compliance Scenario Assumes North Dakota Power Plant<br>Retirements in 2018 .....  | 8  |
| STANDARD FOR GRANTING A STAY .....   | 9  |
| ARGUMENT .....   | 9  |
| I.    NORTH DAKOTA WILL SUFFER IRREPARABLE HARM IF THE FINAL<br>RULE IS NOT STAYED.....  | 9  |
| II.   NORTH DAKOTA IS LIKELY TO SUCCEED ON THE MERITS.....   | 15 |
| A.    EPA cannot regulate existing sources under CAA § 111(d) because<br>they are already regulated under CAA § 112.....                         | 15 |
| B.    EPA does not have authority to impose binding CO <sub>2</sub> emission<br>reduction requirements in North Dakota.....                      | 15 |
| 1.    North Dakota, Not EPA, Has the Authority Under<br>CAA § 111(b) to “Establish” Standards of<br>Performance.....                             | 15 |
| 2.    The Final Rule Deprives North Dakota of Authority<br>to Consider the Remaining Useful Lives of<br>Regulated Sources. ....                  | 16 |
| C.    EPA Has No Authority To Apply BSER On A Statewide Basis.....   | 17 |
| D.    The Final Rule violates the CAA and the APA because<br>North Dakota was not afforded sufficient opportunity for<br>Notice and Comment..... | 18 |
| III.  THE BALANCE OF HARMS TIP IN FAVOR OF A STAY.....   | 19 |
| IV.  A STAY IS IN THE PUBLIC INTEREST.....   | 20 |
| CONCLUSION.....  | 20 |

**TABLE OF AUTHORITIES**

| <b><u>CASES</u></b>  | <b>Page(s)</b> |
|--|----------------|
| <i>Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n</i> ,<br>461 U.S. 375 (1983).....                                  | 12             |
| <i>ASARCO Inc. v. EPA</i> ,<br>578 F.2d 319 (D.C. Cir. 1978).....  | 18             |
| <i>California State Bd. of Optometry v. FTC</i> ,<br>No. 89-1190, 1989 U.S. App. LEXIS 16067<br>(D.C. Cir. Aug. 15, 2009)..... | 12             |
| <i>Chamber of Commerce v. Edmondson</i> ,<br>594 F.3d 742 (10th Cir. 2010) .....   | 15             |
| <i>Crowe &amp; Dunley, P.C. v. Stidham</i> ,<br>640 F.3d 1140 (10th Cir. 2011) .....   | 13             |
| <i>Cuomo v. U.S. Nuclear Regulatory Commission</i> ,<br>772 F.2d 972 (D.C. Cir. 1985).....                                     | 9              |
| <i>Gen. Motors Corp. v. United States</i> ,<br>496 U.S. 530 (1990).....  | 2              |
| <i>Iowa Utils. Bd. v. FCC</i> ,<br>109 F.3d 418 (8th Cir. 1996) .....  | 14             |
| <i>Kansas v. United States</i> ,<br>249 F.3d 1213 (10th Cir. 2001) .....   | 10             |
| <i>Long Island Care at Home, Ltd. v. Coke</i> ,<br>551 U.S. 158 (2007).....  | 19             |
| <i>New Motor Vehicle Bd. v. Orrin W. Fox Co.</i> ,<br>434 U.S. 1345 (1977).....  | 12             |

|   |        |
|---|--------|
| <i>Oklahoma ex rel. Oklahoma Tax Com'n v. Int'l Registration Plan, Inc.</i> ,<br>264 F. Supp. 2d 990 (W.D. Okla. 2003)..... | 13, 14 |
| <i>Pac. Gas &amp; Elec. Co. v. State Energy Res. Conservation &amp; Dev. Comm'n</i> ,<br>461 U.S. 190 (1983).....           | 12     |
| <i>Small Refiner Lead Phase-Down Task Force v. EPA</i> ,<br>705 F.2d 506 (D.C. Cir. 1983).....                              | 19     |
| <i>Texas v. United States</i> ,<br>2015 U.S. App. Lexis 8657 (5th Cir. May 2015).....                                       | 20     |
| <i>United States v. Minnkota Power Coop., Inc.</i> ,<br>831 F.Supp.2d 1109 (D. N.D. 2011) .....                             | 11     |
| <i>Univ. of Tex. v. Camenisch</i> ,<br>451 U.S. 390 (1981).....   | 9      |

### STATUTES

|                                |       |
|--------------------------------|-------|
| 5 U.S.C. § 553(b)-(c) .....    | 18    |
| 16 U.S.C. § 824(a) .....       | 12    |
| 16 U.S.C. § 824(b)(1) .....    | 12    |
| 18 U.S.C. § 808(d)(2)(A).....  | 12    |
| 42 U.S.C. § 7410.....          | 2, 16 |
| 42 U.S.C. § 7411(a)(1).....    | 3     |
| 42 U.S.C. § 7411(d)(1) .....   | 2     |
| 42 U.S.C. § 7411(d)(1)(B)..... | 3     |
| 42 U.S.C. § 7411(d)(2) .....   | 3     |
| CAA § 111 .....                | 18    |
| CAA § 111(a).....              | 16    |

|  |        |
|--|--------|
| CAA § 111(b) .....                                   | 15     |
| CAA § 111(d) .....                                   | passim |
| CAA § 111(d)(1)(B) .....                             | 11, 17 |
| CAA § 112 .....                                      | 15     |
| Clean Air Act .....                                  | passim |
| Federal Power Act.....                               | 1, 12  |
| North Dakota Air Quality Control Act .....           | 10     |
| North Dakota Century Code Chapter 17-05 et. seq..... | 11     |
| North Dakota Century Code, § 49-01, et seq. ....     | 11     |
| North Dakota Century Code § 54-17.5-01 .....         | 1      |

#### **OTHER AUTHORITIES**

|  |        |
|--|--------|
| 40 C.F.R. § 60.24(f).....  | 17     |
| 40 CFR 60.5855 .....   | 16     |
| 80 Fed. Reg. at 64,669 .....   | 4      |
| 80 Fed. Reg. at 64,675 .....   | 4      |
| 80 Fed. Reg. at 64,745 .....   | 4      |
| 80 Fed. Reg. 64661 (Final Rule).....   | passim |
| 80 Fed.Reg. 64720 .....  | 17     |
| <i>2014 Annual Emissions Inventory Report for the Coyote Station</i> .....     | 7      |
| <i>2014 Annual Emissions Inventory Report for M.R. Young Station</i> .....     | 7      |
| <i>2014 Annual Emissions Inventory Report for the Spiritwood Station</i> ..... | 8      |
| D.C. Cir. Rule 18(a)(1).....   | 9      |

|   |            |
|---|------------|
| EPA, “Documentation for EPA Base Case v.5.13 using the Integrated Planning Model”, November 2013, page 7-1.<br><a href="http://www.epa.gov/airmarkets/documents/ipm/Documentation.pdf">http://www.epa.gov/airmarkets/documents/ipm/Documentation.pdf</a> .....  | 5          |
| EPA, IPM model documentation and run files, system support resources, “Base Case SSR.xls”, “Rate-Based SSR.xls”, and “Mass-Based SSR.xls”, Summary and Tables 1-16 tabs, available at <a href="http://www.epa.gov/airmarkets/programs/ipm/cleanpowerplan.html">http://www.epa.gov/airmarkets/programs/ipm/cleanpowerplan.html</a> ..... | 6, 7       |
| EPA, IPM model run files, “Base Case DAT Replacement File.xlsx”, “Rate-Based DAT.xlsx”, and “Mass-Based DAT.xlsx”, available at <a href="http://www2.epa.gov/airmarkets/analysis-clean-power-plan">http://www2.epa.gov/airmarkets/analysis-clean-power-plan</a> .....   | 5, 6, 8, 9 |
| Mine Safety and Health Administration at <a href="http://www.msha.gov/drs/drshome.htm">http://www.msha.gov/drs/drshome.htm</a> .....  | 7, 8       |
| N.D. Const. Art. 5, § 2 .....   | 11         |
| <i>Regulatory Impact Analysis for the Clean Power Plan Final Rule</i> .....   | 5          |

## INTRODUCTION

North Dakota filed a petition for review in this case to protect its several unique sovereign and fiscal interests. As a major energy producing state (from significant lignite coal, oil and natural gas, and wind resources), North Dakota has an unmistakable sovereign interest in regulating the generation and use of electrical energy. In fact, the North Dakota legislature has declared it to be an essential government function and public purpose to foster and encourage the wise use and development of North Dakota's vast lignite resources to maintain and enhance the economic and general welfare of North Dakota. North Dakota Century Code Ch. 54-17.5-01.

In an affront to North Dakota's sovereign interests, the U.S. Environmental Protection Agency ("EPA") recently promulgated a final regulation entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule." 80 Fed. Reg. 64661 (October 23, 2015) (the "Final Rule"). The Final Rule assigns a particularly stringent compliance requirement for North Dakota because of North Dakota's development and use of its lignite resources. Specifically, the Final Rule requires North Dakota to reduce its carbon dioxide (CO<sub>2</sub>) emission rate by 44.9%. In doing so, the Final Rule unlawfully exerts federal jurisdiction over North Dakota beyond the limits established by Congress under the Clean Air Act and the Federal Power Act.

North Dakota cannot stand by as its sovereign interests are undermined and its state budget is irreparably harmed by the annual loss of millions of dollars of unlawful regulatory burdens and lost energy production and coal severance taxes.

## **BACKGROUND**

### **The Clean Air Act and Section 111(d)**

The Clean Air Act “made the States and the Federal Government partners in the struggle against air pollution.” *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). As to stationary sources of emissions, the CAA contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, that are then implemented and administered by the states through State Implementation Plans (“SIPs”) prepared by the states. *See generally* 42 U.S.C. § 7410.

CAA § 111(d) is one such program that implements this cooperative approach for setting “standards of performance” for certain existing stationary sources of air pollutants. 42 U.S.C. § 7411(d)(1). It provides for EPA to direct the states to submit plans that “establish[] standards of performance for any existing source for any air pollutant” which would be subject to an EPA-prescribed standard if emitted by a new source and that “provide[] for the implementation and enforcement of such standards of performance.” *Id.* A “standard of performance” is defined as “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 which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1). State plans, however, may also “take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” 42 U.S.C. § 7411(d)(1)(B). Only in the event that a state “fails to submit a satisfactory plan,” or fails “to enforce the provisions of such plan,” may EPA step in and regulate itself by setting and enforcing standards. 42 U.S.C. § 7411(d)(2).

### **EPA’s Final Rule**

Under the guise of imposing “standards of performance” on existing coal-fueled power plants under CAA § 111(d), the Final Rule requires North Dakota (on pain of a potential federal takeover of significant State authority) to submit a State Plan that fundamentally transforms North Dakota’s energy economy, in order to substantially reduce North Dakota’s usage of coal-fueled electricity. The Final Rule’s requirements for North Dakota are based on three “building blocks”:

(Block 1) increasing efficiency at coal-fueled power plants;

(Block 2) shifting statewide demand for coal-fueled power to natural gas generation; and

(Block 3) shifting statewide demand for coal-fueled power to renewable sources. 80 Fed. Reg. at 64,745. Only the first building block involves imposing emissions control measures on coal-fueled power plants. The remaining “blocks” require broad energy changes away from coal-fueled electricity. 80 Fed. Reg. at 64,745.

By September 6, 2016, North Dakota must submit an initial State Plan that contains: (1) “an identification of final plan approach or approaches under consideration, including a description of progress made”; (2) an acceptable explanation for why the State requires more time to submit a final plan; and (3) demonstration or description of opportunity for public comment on the initial submittal and meaningful engagement with stakeholders. 80 Fed. Reg. at 64,669. As EPA says, the requirements in the Final Rule are intended “to assure that states begin to address the urgent needs for reductions quickly.” 80 Fed. Reg. at 64,675. If North Dakota satisfies these EPA requirements, North Dakota will have until September 6, 2018 to submit a final Plan. 80 Fed. Reg. at 64, 669.

### **Final Rule Requirements Specific to North Dakota**

The Final Rule requires North Dakota to reduce its carbon dioxide emission rate by 44.9%. Glatt Decl. ¶ 6. EPA projected the impacts of the Final Rule on power generation, capacity, emissions, and compliance costs using the Integrated Planning Model (“IPM”). Glatt Decl. ¶ 14 and Christmann Decl. ¶ 12.

EPA describes its IPM model analysis of the Final Rule as “illustrative” of the impacts of the Final Rule. *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, page ES-3, et. al. In the RIA, EPA presented two scenarios designed to achieve compliance with the Final Rule: the “rate-based” illustrative plan and the “mass-based” illustrative plan. These scenarios are designed for each state to comply with the corresponding state limits (rate-based and mass-based) in the Final Rule. <http://www2.epa.gov/airmarkets/analysis-clean-power-plan>.

EPA did not run the IPM model for each year, but rather uses individual years to reflect the impacts on the power industry in multi-year periods, as stated by EPA in the model documentation:

Although IPM is capable of representing every individual year in an analysis time horizon, individual years are typically grouped into model run years to increase the speed of modeling. While the model makes decisions only for run years, information on non-run years can be captured by mapping run years to the individual years they represent.<sup>1</sup>

Although not displayed in the RIA, the IPM model also calculated impacts for years prior to 2020 and after 2030. As noted, while EPA only presented the results for the model years 2020, 2025 and 2030 in the RIA, the supporting files available on EPA’s website all contain the IPM model results for the 7 model years shown above, including 2016 and 2018.

---

<sup>1</sup> EPA, “Documentation for EPA Base Case v.5.13 using the Integrated Planning Model”, November 2013, page 7-1. <http://www.epa.gov/airmarkets/documents/ipm/Documentation.pdf>

EPA's own analysis of the impact of the Final Rule shows that several coal-fueled power plants will close immediately in 2016 and 2018 due to the Final Rule.<sup>2</sup> While EPA did not reveal these immediate impacts in the RIA, EPA's IPM modeling results confirm that coal-fueled power plant capacity will be lower in 2016 due to the Final Rule. Those results are publicly available and can be found in tables provided on EPA's website.<sup>3</sup> In addition, further information on the specific coal-fueled power plants which EPA projects will close early due to the Final Rule can be determined from additional IPM model documentation files, which are also available on EPA's website. Glatt Decl. ¶ 14. Several North Dakota power plants with dedicated coal mines are projected by EPA to close in the next few years due to compliance with the Final Rule.

**A. EPA's Compliance Scenario Assumes North Dakota Power Plant Retirements In 2016**

EPA projects the 427 MW Coyote Station to close in 2016 in its rate-based case. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. The Coyote Station is the primary customer for the Beulah lignite mine owned by Westmoreland Coal and it will also have to close if the Coyote Station is closed in 2016. Bender Decl. ¶ 6.

---

<sup>2</sup> The IPM model was run for years 2016 and 2018, but not 2017. The run year 2016 is intended to be representative of 2017 also. EPA, IPM model run files, "Base Case DAT Replacement File.xlsx", "Rate-Based DAT.xlsx", and "Mass-Based DAT.xlsx", available at <http://www2.epa.gov/airmarkets/analysis-clean-power-plan>.

<sup>3</sup> EPA, IPM model documentation and run files, system support resources, "Base Case SSR.xls", "Rate-Based SSR.xls", and "Mass-Based SSR.xls", Summary and Tables 1-16 tabs, available at <http://www.epa.gov/airmarkets/programs/ipm/cleanpowerplan.html>

The Beulah mine produced a total of 2,763,576 tons<sup>4</sup> in 2014, of which 2,248,483 tons (81%) were burned at Coyote. *2014 Annual Emissions Inventory Report for the Coyote Station*. The closure of Coyote Station will force the layoff of all of the 154 employees<sup>5</sup> at the mine.<sup>6</sup> Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. The EPA scenario also includes the shutdown of Unit 1 at the R.M. Heskett Station in 2016. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. This unit also consumed 120,991 tons of lignite from the Beulah Mine in 2014. *2014 Annual Emissions Inventory Report for the R.M Heskett Station*.

In addition, EPA projects the 250 MW Milton R. Young Station (MRYS) Unit 1 will close in EPA's 2016 base and rate-based Final Rule cases. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. MRYS Unit 1 is supplied by the adjacent lignite Center. *Id.* MRYS Units 1 and 2 are the only customers for the Center mine and the mine will have to cut production if Unit 1 is closed in 2016. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. Center mine produced a total of 3,975,634 tons<sup>7</sup> in 2014, of which 1,545,190 tons (39%) were burned at MRYS Unit 1. *2014 Annual*

---

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> NACCO Industries has won a coal supply contract to replace Beulah mine at Coyote, so one could argue that Beulah will have to cut production anyway. However, then the impact of the closure of Coyote plant will fall on the new Coyote Creek mine, which is under construction and already has 52 employees building the mine, so the impact is similar. See Neumann Decl. ¶¶ 6-8 and Binder Decl. ¶ 6.

<sup>7</sup> Mine Safety and Health Administration at <http://www.msha.gov/drs/drshome.htm>.

*Emissions Inventory Report for M.R. Young Station.* The closure of MRYS Unit 1 will force the layoff of 63 of its 162 employees.<sup>8</sup>

EPA also projects the closure of the Spiritwood Station in 2016. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. In 2014, this plant combusted 91,017 tons of lignite from the Falkirk Mine. *Id.* 2014 Annual Emissions Inventory Report for the Spiritwood Station.

**B. EPA's Compliance Scenario Assumes North Dakota Power Plant Retirements in 2018**

EPA projects the 558 MW Coal Creek Station (CCS) Unit 1 in North Dakota will close in 2018 in EPA's rate-based case. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. <http://www2.epa.gov/airmarkets/analysis-clean-power-plan>. CCS is supplied by the adjacent Falkirk lignite mine. Erickson Decl. ¶ 4. CCS Units 1 and 2 and the Spiritwood Station, which EPA also projects will close, are the only customers for the Falkirk mine and will have to cut production if Unit 1 is closed in 2018. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. Falkirk mine produced a total of 7,985,648 tons<sup>9</sup> in 2014, of which 3,407,090 tons (43%) were burned at CCS Unit 1. *Id.* 2014 Annual Emissions Inventory Report for the Coal Creek Station. The closure of CCS Unit 1 will force the layoff of 207 of its 482 employees.<sup>10</sup>

---

<sup>8</sup> Ibid.

<sup>9</sup> Mine Safety and Health Administration at <http://www.msha.gov/drs/drshome.htm>.

<sup>10</sup> Ibid.

EPA also projects the closure of Unit 2 at the R.M. Heskett Station in 2018. Christmann Decl. ¶ 12 and Glatt Decl. ¶ 14. This unit combusted 396,712 tons of lignite from the Beulah Mine in 2014. *Id.* 2014 Annual Emissions Inventory Report for the RM. Heskett Station.

### **STANDARD FOR GRANTING A STAY**

This Court considers four factors to determine whether a stay pending review is warranted: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. *Cuomo v. U.S. Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985); *see also* D.C. Cir. Rule 18(a)(1). A stay is warranted here because halting the Final Rule, and its overreaching expansion of federal regulatory authority, will “preserve the relative position of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

### **ARGUMENT**

#### **I. NORTH DAKOTA WILL SUFFER IRREPARABLE HARM IF THE FINAL RULE IS NOT STAYED.**

North Dakota’s irreparable harm in this case rests on three independent bases: (1) the Final Rule deprives North Dakota of its sovereign authority, interests, and policies and deprivation of these interests during the pendency of this

action is irreparable; (2) North Dakota will suffer irreparable economic loss because the Final Rule will immediately harm the State's budget in the impending and future budget years; and (3) even if it is successful on the merits of its challenge to the Final Rule, North Dakota will not be able to recover economic damages from the federal government to compensate the State for the significant state resources immediately needed to implement the Final Rule.

First, the Final Rule runs roughshod over North Dakota's sovereign interests in administering its own comprehensive regulatory programs governing air quality and public utility regulation and energy generation and use within its borders. A federal agency's temporary infringement upon a state's sovereignty constitutes irreparable harm. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). When a federal agency's decision places a state's "sovereign interests and public policies at stake, [the Court] deem[s] the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Id.* at 1227.

The North Dakota Department of Health (NDDH) is the agency charged with implementing and enforcing North Dakota's laws and regulations implementing North Dakota's Air Quality Control Act and the federal CAA. Glatt Decl. ¶ 3. Specifically, the NDDH oversees programs to implement New Source Performance Standards (NSPS) and the State's permitting programs for stationary

sources under Titles I and V of the CAA. *Id.* at 3; *see also United States v. Minnkota Power Coop., Inc.*, 831 F.Supp.2d 1109 (D. N.D. 2011).

Even if EPA has authority to issue CAA § 111(d) regulations governing CO<sub>2</sub> emissions from coal-fueled electric generating units, the Final Rule impermissibly intrudes on North Dakota's express authority under CAA § 111(d) to "establish" standards of performance. Under CAA § 111(d), EPA's authority is limited to adopting a "procedure" under which "each State shall submit to the Administrator a plan which (A) establishes standards of performance. . . ." The Final Rule usurps North Dakota's authority to "establish" performance standards by dictating what the standards must be. Glatt Decl. ¶¶ 6-9. Additionally, the Final Rule prevents North Dakota from, as provided in CAA § 111(d)(1)(B), considering "the remaining useful life of the existing source" to which a state-established performance standard applies. Glatt Decl. ¶ 9. The Final Rule will also interfere with North Dakota's significant and ongoing air quality improvement efforts. Helms Decl. ¶¶ 11-14.

The North Dakota Public Service Commission (Commission) is a state agency created by the North Dakota Constitution. N.D. Const. Art. 5, § 2. The authority of the Commission is set forth in the North Dakota Century Code. § 49-01, et seq. The North Dakota Transmission Authority was created by the North Dakota legislature and its purpose and authority are set forth in North Dakota

Century Code Chapter 17-05 et. seq. Hamman Decl. ¶¶ 4-6 North Dakota's authority over the intrastate generation and consumption of electricity 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). Congress recognized State authority in the Federal Power Act ("FPA"), which confines federal authority over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a); *see also id.* § 824(b)(1). The FPA and other federal energy statutes respect the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); *cf.* 18 U.S.C. § 808(d)(2)(A). The Final Rule infringes upon North Dakota's sovereign authority over intrastate energy production and consumption. Christmann Decl. ¶¶ 16-17; Hamman Decl. ¶¶ 13-14.

Absent a stay, North Dakota will be irreparably injured by EPA's abrogation of North Dakota's cooperative-federalism rights under both the CAA and the FPA. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (a State's interest "is infringed by the very fact that the state is prevented from engaging in" its regulatory process); *California State Bd. of Optometry v. FTC*,

No. 89-1190, 1989 U.S. App. LEXIS 16067, at \*1 (D.C. Cir. Aug. 15, 2009)

(“[A]ny time a state is enjoined from effectuating statutes enacted by representatives of the people, it suffers ... irreparable injury.”)

Second, the Final Rule will have irreparable and far-reaching consequences on North Dakota’s economic interests in the form of substantially decreased revenues. Schmidt Decl. ¶¶ 13-14; Rauschenberger Decl. ¶¶ 11-12; Gaebe Decl. ¶ 13. While economic loss—on its own—does not ordinarily constitute irreparable harm because such losses may be later recovered through money damages, *Crowe & Dunley, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011), this rule does not apply to a state alleging economic harm because “such a stringent test could never be met.” *Oklahoma ex rel. Oklahoma Tax Com’n v. Int’l Registration Plan, Inc.*, 264 F. Supp. 2d 990, 996 (W.D. Okla. 2003). When a state alleges economic harm occasioned from the loss of tax income, the appropriate test is “whether the financial loss is temporary or not.” *Id.*

North Dakota generates significant revenue from taxes on coal conversion and coal severance. Rauschenberger Decl. ¶ 9. North Dakota also generates significant revenue from royalty and lease payments from coal on state lands. Gaebe Decl. ¶¶ 6-9. Over the last ten years, North Dakota has received more than \$250 million under the coal conversion tax and \$110 million under the coal

severance tax. Rauschenberger Decl. ¶ 9. In addition, the State also collects substantial royalties from coal extracted from state lands. Gaebe Decl. ¶ 9.

Like the court's finding in *Oklahoma Tax Commission*, North Dakota will suffer a unique economic harm because the tremendous losses of revenue from taxes will directly impact funding for the provision of "critical state services." 264 F. Supp. 2d at 997. The funds collected from taxes and royalties are distributed into funds which make financial distributions to school districts, public facilities and services, roads, and townships. Schmidt Decl. ¶ 8. These funds finance health districts, emergency management, human services, roads, schools, and law enforcement. Gaebe Decl. ¶ 10; Schmidt Decl. ¶ 8; Binder Decl. ¶ 10.

Third, North Dakota's economic harm is irreparable because significant expenditures now and reduced tax and royalty revenue cannot be recovered from EPA. North Dakota will needlessly expend substantial taxpayers' dollars to analyze and attempt to implement this complex and contradictory Final Rule, which is likely to be overturned by this Court. Substantial economic and human resources would be required to develop a Plan in an effort to implement the Final Rule. Glatt Decl. ¶¶ 13, 16-17 and Christmann Decl. ¶¶ 18-19. The threat of unrecoverable economic losses is sufficient to warrant the issuance of a stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996). The Final Rule will also cause severe adverse economic and social impacts. Erickson Decl. ¶ 6; Binder

Decl. ¶ 10; Neumann Decl. ¶¶ 11-19. Because neither the CAA or APA affords North Dakota a mechanism for recovering economic damages caused by the Final Rule following a successful adjudication of the merits of North Dakota's claims, those damages are considered to be "irreparable." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

## **II. NORTH DAKOTA IS LIKELY TO SUCCEED ON THE MERITS.**

### **A. EPA cannot regulate existing sources under CAA § 111(d) because they are already regulated under CAA § 112.**

By its own plain terms, CAA § 111(d) prohibits EPA from regulating under that section any existing source that is a member of a source category already regulated under CAA § 112 as a source of hazardous air pollutants. EPA issued its Mercury and Air Toxics Standards in 2012 for the express purpose of subjecting coal-fired electric generating units to hazardous air pollutant regulation under CAA § 112. EPA is therefore now barred from regulating the same electric generating units under CAA § 111(d) and the Final Rule.

### **B. EPA does not have authority to impose binding CO<sub>2</sub> emission reduction requirements in North Dakota.**

#### **1. North Dakota, Not EPA, Has the Authority Under CAA § 111(b) to "Establish" Standards of Performance.**

CAA § 111(d) provides, in pertinent part, that EPA “shall prescribe regulations which shall establish a procedure similar to that provided by §7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant...” Under this language, EPA may not set emission reduction requirements for states. EPA may establish a procedure for states to submit plans containing state-established standards, and it may review those plans to determine if they are “satisfactory.” But EPA’s power to disapprove a state plan is limited and cannot be used, as set forth in the Final Rule, to dictate a minimum required level of emission reduction.

Under the Final Rule, whatever plan North Dakota submits, however, must ensure that emissions from the regulated source category must decline to the level of EPA’s specific requirements. *40 CFR 60.5855*. Thus, directly or indirectly, EPA is dictating the level of emission reduction North Dakota power plants must make, and it has determined that level by applying the BSER factors. As a result, EPA is promulgating performance standards within the meaning of CAA § 111(a). Under CAA § 111(d), however, Congress gave states, not EPA, authority to establish those standards.

**2. The Final Rule Deprives North Dakota of Authority to Consider the Remaining Useful Lives of Regulated Sources.**

Under CAA § 111(d)(1)(B), “[r]egulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” EPA previously recognized this requirement in its general CAA § 111(d) regulations,<sup>11</sup> by providing that states may deviate from EPA-mandated guidelines for a specific facility based on, among other factors, “[u]nreasonable cost of control resulting from plant age.” The Final Rule fails to provide North Dakota with the authority and discretion it is entitled to under the CAA.

**C. EPA Has No Authority To Apply BSER On A Statewide Basis.**

The “system” that EPA has constructed—the “regularly interacting or interdependent group of items forming a unified whole”—is not a “system” of reducing emissions at coal-fueled power plants but in reality is a restructuring of North Dakota’s electric utility system. According to EPA, the “regularly interacting or interdependent group of items” in this system are EPA’s building blocks, which it calls “components” of this system. *80 Fed.Reg. 64720 and 64728.* But natural gas, renewable, and energy efficiency resources are obviously not components of coal-fueled power plants; they are components of a state electric

---

<sup>11</sup> 40 C.F.R. § 60.24(f).

utility system. Under CAA § 111, however, BSER is not the “best system” for operating a state’s utility system. Rather, it is the best system for reducing emissions from the source category being regulated.

As does the Final Rule, standards of performance cannot be established on an entire state-by-state basis; they must be established on a unit-by-unit basis. This is clear from CAA § 111(d), which provides for EPA to adopt regulations calling on states to submit plans establishing “standards of performance for *any existing source*.” Indeed, in an early NSPS case, this Court held that EPA could not combine into a single source multiple units at a single plant. As this Court stated, “[t]he regulations plainly indicate that EPA has attempted to change the basic unit to which the NSPSs apply from a single building, structure, facility, or installation (the unit prescribed in the statute) to a combination of such units. The agency has no authority to rewrite the statute in this fashion.” *See, ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).

**D. The Final Rule violates the CAA and the APA because North Dakota was not afforded sufficient opportunity for Notice and Comment.**

The APA requires EPA to publish a proposed rule including “the terms or substance of the proposed rule or a description of the subjects and issues involved” and afford “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” *See* 5 U.S.C. § 553(b)-

(c). Where a final rule adopted differs from the rule proposed, the final rule must be a “logical outgrowth of the rule proposed.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). A final rule cannot stand unless reasonable parties “should have anticipated that [the] requirement” could be promulgated from the proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The Final Rule imposes a four-fold increase in EPA-mandated CO<sub>2</sub> emission reduction requirements over the proposed rule for North Dakota. EPA improperly made numerous material changes to the Final Rule after the close of the public comment period that a reasonable person would not have anticipated based on the rule as proposed. *Id.* Glatt Decl. ¶¶ 19-20 and Christmann Decl. ¶ 24. Erickson Decl. ¶¶ 9-10.

### **III. THE BALANCE OF HARMS TIP IN FAVOR OF A STAY.**

If the Final Rule is not stayed, North Dakota and its citizens will suffer significant harm. Granting a Stay will freeze the status quo. North Dakota will be forced to expend significant state resources to comply with the Rule even though it is likely to be invalidated. North Dakota would also incur the loss of significant state revenues associated with the use of coal for electric generation. Moreover, ratepayers in North Dakota would see their electricity bills increase as a result of the Final Rule.

#### IV. A STAY IS IN THE PUBLIC INTEREST.

The public interest favors granting a stay of the Final Rule. There is no public interest in subjecting North Dakota to the harms set forth herein. In contrast, staying the Final Rule will cause EPA no harm. *See e.g. Texas v. United States*, 2015 U.S. App. Lexis 8657, 74-75 (5th Cir. May 2015).

#### CONCLUSION

For the foregoing reasons, the State of North Dakota respectfully requests that this Court enter an order Staying the Final Rule.

DATED: October 29, 2015

Respectfully submitted,

STATE OF NORTH DAKOTA  
WAYNE STENEHJEM  
ATTORNEY GENERAL

*/s/ Paul M. Seby*

Paul M. Seby  
Special Assistant Attorney General  
State of North Dakota  
Holland & Hart LLP  
555 Seventeenth Street, Suite 3200  
Denver, CO 80202  
Tel. (303) 295-8430  
Fax (303) 291-9177  
Email: pmseby@hollandhart.com

Margaret Olson  
Assistant Attorney General  
North Dakota Attorney General's Office  
600 E. Boulevard Avenue #125  
Bismarck, ND 58505  
Tel. (701) 328-3640  
maiolson@nd.gov

*Counsel for Petitioner State of North Dakota*

**Certificate of Service**

I hereby certify that on October 29, 2015, I electronically filed the foregoing **Petitioner State of North Dakota's Motion to Stay and For Expedited Review**, and accompanying addenda and attachments, with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: /s/Paul M. Seby  
Paul M. Seby  
Special Assistant Attorney General  
State of North Dakota  
***Counsel for Petitioner State of North  
Dakota***

**Certificate of Compliance with Circuit Rule 18(a)**

Pursuant to Circuit Rule 18(a)(1), I hereby certify that North Dakota applied to EPA for an immediate stay of the Rule. EPA informed some States that the agency would not be granting the relief requested. Pursuant to Circuit Rule 18(a)(2), I hereby certify that on October 29, 2015, counsel for the Respondent was informed by telephone of this Motion.

By: /s/Paul M. Seby  
Paul M. Seby  
Special Assistant Attorney General  
State of North Dakota  
***Counsel for Petitioner State of North  
Dakota***

**Certificate as to Parties, Ruling, and Related Cases**

**(a) Parties, Intervenors, and Amici**

The following are petitioners in Case No. 15-1380 and consolidated cases:

State of Oklahoma

Oklahoma Department of Environmental Quality

State of West Virginia

State of Alabama

State of Arkansas

State of Colorado

State of Florida

State of Georgia

State of Indiana

State of Kansas

State of Louisiana

State of Missouri

State of Montana

State of Nebraska

State of New Jersey

State of Ohio

State of Oklahoma

State of South Carolina

State of South Dakota

State of Utah

State of Wisconsin

State of Wyoming

Commonwealth of Kentucky

Arizona Corporation Commission

State of Louisiana Department of Environmental Quality

State of North Carolina Department of Environmental Quality

Attorney General Bill Schuette on behalf of the People of Michigan

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths,

Forgers and Helpers, AFL-CIO

Murray Energy Corporation

National Mining Association

American Coalition for Clean Coal Electricity

Utility Air Regulatory Group

American Public Power Association

Alabama Power Company

Georgia Power Company

Gulf Power Company

Mississippi Power Company

CO2 Task Force of the Florida Electric Power Coordinating Group, Inc.

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

Tri-State Generation and Transmission Association, Inc.

United Mine Workers of America

National Rural Electric Cooperative Association

Westar Energy, Inc.

NorthWestern Corporation, doing business as NorthWestern Energy

National Association of Home Builders

State of North Dakota

Chamber of Commerce of the United States of America

National Association of Manufacturers

American Fuel & Petrochemical Manufacturers

National Federation of Independent Business

American Chemistry Council

American Coke and Coal Chemicals Institute

American Foundry Society

American Forest & Paper Association

American Iron and Steel Institute

American Wood Council

Brick Industry Association

Electricity Consumers Resource Council

Lignite Energy Council

National Lime Association

National Oilseed Processors Association

Portland Cement Association

Association of American Railroads

Luminant Generation Company, LLC

Oak Grove Management Company, LLC

Big Brown Power Company, LLC

Sadow Power Company, LLC

Big Brown Lignite Company, LLC

Luminant Mining Company, LLC

Luminant Big Brown Mining Company, LLC

Respondents are the United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency.

Movant-Intervenors for Respondents are American Wind Energy Association, Advanced Energy Economy, American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law

Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club.

No amici curiae have entered appearances.

**(b) Ruling Under Review**

Under review is the EPA rule Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015). The Rule is attached to this motion as Attachment B.

**(c) Related Cases**

On June 9, 2015, this Court denied petitions challenging EPA's authority to issue the rule under review, holding that the petitions were premature because they were filed before the agency took final action. *In Re Murray Energy Corp.*, No. 14-1112; *West Virginia v. EPA*, No. 14-1146. *See* 788 F.3d 330 (D.C. Cir. 2015). On September 9, 2015, this Court denied several States' petition under the All Writs Act for a stay before publication of the Power Plan in the *Federal Register*. No. 15-1277, ECF No. 1572185.

By: /s/Paul M. Seby  
Paul M. Seby  
Special Assistant Attorney General  
State of North Dakota  
***Counsel for Petitioner State of North  
Dakota***

**ORAL ARGUMENT NOT YET SCHEDULED**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

Case No. 15-1380  
Lead Case No. 15-1363  
(and consolidated cases)

**PETITIONER STATE OF NORTH DAKOTA’S MOTION FOR STAY  
OF EPA’S FINAL RULE**

**Addendum  
Part I of II**

STATE OF NORTH DAKOTA  
WAYNE STENEHJEM  
ATTORNEY GENERAL

Paul M. Seby  
Special Assistant Attorney General  
State of North Dakota  
Holland & Hart LLP  
555 Seventeenth Street, Suite 3200  
Denver, CO 80202  
Tel. (303) 295-8430  
Fax (303) 291-9177  
Email: pmseby@hollandhart.com

Margaret Olson  
Assistant Attorney General  
North Dakota Attorney General’s Office  
600 E. Boulevard Avenue #125  
Bismarck, ND 58505  
Tel. (701) 328-3640  
maiolson@nd.gov

*Counsel for Petitioner State of North  
Dakota*

**ATTACHMENT A**

**DECLARATIONS**

**ORAL ARGUMENT NOT YET SCHEDULED**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

Case No. 15-1380  
Lead Case No. 15-1363  
(and consolidated cases)

**PETITIONER STATE OF NORTH DAKOTA’S MOTION FOR STAY  
OF EPA’S FINAL RULE**

**Addendum  
Part II of II**

STATE OF NORTH DAKOTA  
WAYNE STENEHJEM  
ATTORNEY GENERAL

Paul M. Seby  
Special Assistant Attorney General  
State of North Dakota  
Holland & Hart LLP  
555 Seventeenth Street, Suite 3200  
Denver, CO 80202  
Tel. (303) 295-8430  
Fax (303) 291-9177  
Email: pmseby@hollandhart.com

Margaret Olson  
Assistant Attorney General  
North Dakota Attorney General’s Office  
600 E. Boulevard Avenue #125  
Bismarck, ND 58505  
Tel. (701) 328-3640  
maiolson@nd.gov

*Counsel for Petitioner State of North  
Dakota*

# **ATTACHMENT B**

## **FEDERAL REGISTER CLEAN POWER PLANT**