

## ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1363

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

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

v.

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

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On Petition for Review of a Final Action of the  
United States Environmental Protection Agency

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**STATE PETITIONERS' MOTION FOR STAY  
AND FOR EXPEDITED CONSIDERATION OF  
PETITION FOR REVIEW**

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Ken Paxton  
Attorney General of Texas  
Charles E. Roy  
First Assistant Attorney General  
Bernard L. McNamee II  
Chief of Staff  
Scott A. Keller  
Solicitor General  
*Counsel of Record*  
P.O. Box 12548  
Austin, Texas 78711-2548  
Email:  
Scott.Keller@texasattorneygeneral.gov  
*Counsel for State of Texas*Patrick Morrisey  
Attorney General of West Virginia  
Elbert Lin  
Solicitor General  
*Counsel of Record*  
Misha Tseytlin  
General Counsel  
J. Zak Ritchie  
Assistant Attorney General  
State Capitol, Bldg. 1, 26-E  
Charleston, WV 25305  
Email: elbert.lin@wvago.gov  
*Counsel for*  
*State of West Virginia*  
*Additional counsel listed on signature block*

## CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rule 18, Petitioners state as follows:

### **Parties and Amici:**

Petitioners include the States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, the State of North Carolina Department of Environmental Quality, and Attorney General Bill Schuette on behalf of the People of Michigan. Respondents include the United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency. There are no intervenors or amici at this time.

## TABLE OF CONTENTS

BACKGROUND.....	3
I. Statutory Overview.....	3
II. The Final Power Plan.....	4
ARGUMENT.....	6
I. Petitioners Are Likely To Prevail On The Merits.....	6
A. Section 111(d) Does Not Authorize EPA To Force The States To Restructure The Electrical Grid.....	6
B. The Section 112 Exclusion Prohibits The Power Plan.....	11
II. The States Will Suffer Irreparable Injury Absent A Stay.....	15
III. The Balance Of Harms And The Public Interest Strongly Favor A Stay.....	19
CONCLUSION.....	20

## TABLE OF AUTHORITIES

### Cases

<i>Alfred L. Snapp &amp; Son, Inc. v. Puerto Rico</i> , 458 U.S. 592 (1982) .....	15
<i>Am. Elec. Power Co., Inc. v. Connecticut</i> , 131 S. Ct. 2527 (2011) .....	12
<i>Am. Petroleum Inst. v. SEC</i> , 714 F.3d 1329 (D.C. Cir. 2013) .....	15
<i>Am. Pub. Gas Ass'n v. Fed. Power Comm'n</i> , 543 F.2d 356 (D.C. Cir. 1976) .....	16
<i>Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n</i> , 461 U.S. 375 (1983) .....	10
<i>Cobell v. Kempthorne</i> , 455 F.3d 301 (D.C. Cir. 2006) .....	6
<i>FDA v. Brown &amp; Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000) .....	6
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991) .....	10
* <i>In re EPA</i> , Nos. 15-3799/3822/3853/3887, -- F.3d --, --, 2015 WL 5893814 (6th Cir. Oct. 9, 2015) .....	19, 20
<i>Jacksonville Port Auth. v. Adams</i> , 556 F.2d 52 (D.C. Cir. 1977) .....	20
<i>Kansas v. United States</i> , 249 F.3d 1213 (10th Cir. 2001) .....	15
<i>King v. Burwell</i> , 135 S. Ct. 2480 (2015) .....	10, 11
<i>Michigan v. EPA</i> , 135 S. Ct. 2699 (2015) .....	2, 3, 12
* <i>New Jersey v. EPA</i> , 517 F.3d 574 (D.C. Cir. 2008) .....	12, 14
<i>New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.</i> , 434 U.S. 1345 (1977) .....	15
<i>Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.</i> , 715 F.3d 1268 (11th Cir. 2013) .....	17
<i>Pac. Gas &amp; Elec. Co. v. State Energy Res. Conservation &amp; Dev. Comm'n</i> , 461 U.S. 190 (1983) .....	10, 11
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943) .....	12

<i>Sierra Club v. Costle</i> , 657 F.2d 298 (D.C. Cir. 1981).....	7
<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994) .....	17
<i>Union Elec. Co v. EPA</i> , 427 U.S. 246 (1976) .....	7
* <i>Util. Air. Regulatory Grp. v. EPA</i> , 134 S. Ct. 2427 (2014).....	6, 8, 9, 13
<i>Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.</i> , 559 F.2d 841 (D.C. Cir. 1977).....	6

### **Statutes**

16 U.S.C. § 824.....	10
* 42 U.S.C. § 7411 .....	1, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14
42 U.S.C. § 7412 .....	4, 5, 12, 13, 14
5 U.S.C. § 705.....	1

### **Regulations**

69 Fed. Reg. 4,652 (Jan. 30, 2004).....	12
70 Fed. Reg. 15,994 (Mar. 29, 2005) .....	12
73 Fed. Reg. 44,354 (July 30, 2008).....	3, 13
77 Fed. Reg. 9,304 (Feb. 16, 2012).....	12
80 Fed. Reg. 64,510 (Oct. 23, 2015).....	8

### **Other Authorities**

Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) .....	3
Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009) .....	9
EPA, Air Emissions from Municipal Solid Waste Landfills, Pub. No. EPA-453/R-94-021 .....	12, 14, 15
Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990).....	14
Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990).....	14
Revisor’s Note, 42 U.S.C. § 7411 .....	14

\* Authorities upon which we chiefly rely are marked with asterisks.

**GLOSSARY**

Act (or CAA)	Clean Air Act
BSER	Best system of emission reduction
EPA	United States Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
MWh	Megawatt hour
Power Plan	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

This Court should issue a stay, and expedite consideration of the Petition For Review,<sup>1</sup> because the States are being immediately and irreparably harmed by EPA's illegal effort to force States to reorder their electrical generation systems.<sup>2</sup>

This case involves an unprecedented, unlawful attempt by an environmental regulator to reorganize the nation's energy grid. Relying on a rarely used section of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d), EPA has adopted a final rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Power Plan"), that will "transfor[m] . . . the domestic energy industry."<sup>3</sup> The Power Plan rests on EPA's claim that it may disfavor and phase out certain kinds of energy generation, and force the States to reorganize how they produce, transmit, and consume electricity. But as an environmental regulator, EPA has vastly overstepped its authority by seeking to pick winners and losers in the energy field, and then requiring the States to take part in this unlawful regime. Further, EPA lacks expertise in regulating the energy grid, an area that is primarily the responsibility of the States and, to a more limited extent, the Federal Energy Regulatory Commission ("FERC").

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<sup>1</sup> The States respectfully request an expedited briefing schedule that would allow oral argument to take place in Spring 2016, before the end of this Court's term.

<sup>2</sup> On August 5 and 20, 2015, several of the States filed applications with EPA asking for an immediate stay of the Rule, under 5 U.S.C. § 705. EPA informed some States that the agency would not be granting the relief requested. 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 1572185. The States have informed EPA's counsel by telephone about the present motion.

<sup>3</sup> White House Factsheet, Exh. B at 1.

In addition to exceeding its authority, EPA is imposing immediate and irreparable harms upon the States. In the Power Plan, EPA set a timeline intended to force the States and other entities to make irreversible decisions before judicial review concludes. Less than eleven months remain for States to draft and submit either a State Plan or a detailed request for an extension. Even with an extension, State Plans are due just two years later. To meet these deadlines, each State must begin taking *immediate* steps to determine whether and how it will: reorganize its electrical generation, transmission, and distribution system; decommission coal generation; mandate the use of natural gas generation while imposing strict carbon dioxide emissions limits on that generation; adopt a cap-and-trade regime; radically increase investment in new renewable energy plants; and establish backup generation. This will involve significant legislative and regulatory changes, and massive taxpayer expenditures that can never be recouped. Without a stay, when the Power Plan is vacated as unlawful, EPA will be able to boast that “the majority of [States and] power plants are already in compliance or well on their way to compliance,”<sup>4</sup> just as it did after recently losing in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

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<sup>4</sup> <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>.



## BACKGROUND

### I. Statutory Overview

In 1970, Congress enacted Section 111 of the CAA, entitled “standards of performance for new stationary sources.” Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676, 1683. The primary focus of Section 111 is the regulation of emissions from “new stationary sources.” *Id.* EPA has employed this authority “for more than 70 source categories and subcategories . . . [including] fossil fuel-fired boilers, incinerators, sulfuric acid plants . . . .” 73 Fed. Reg. 44,354, 44,486-87 nn.239 & 242 (July 30, 2008). Each of these regulations of new sources involves a technology-forcing provision, which requires new stationary sources to adopt “adequately demonstrated” pollution-control technologies. 42 U.S.C. § 7411.

Section 111(d) provides a significantly more limited program for State-based regulation of emissions from *existing* sources. If various preconditions are met, EPA may require States to establish “standards of performance” for existing sources. 42 U.S.C. § 7411(d)(1)(B). A standard of performance for an air pollutant from an individual source must “reflect[] 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) the Administrator determines has been adequately demonstrated.” *Id.* § 7411(a)(1). EPA has lawfully invoked Section 111(d) only five times, and just once in the last 25 years. 80 Fed. Reg. at 64,703.

Section 111(d) strictly circumscribes EPA's authority by prohibiting EPA from enacting standards for "any air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." 42 U.S.C. § 7411(d)(1)(A) (hereinafter "Section 112 Exclusion"). The Exclusion reflects the significant changes Congress made in 1990 to expand Section 112, a frequently used program under which EPA establishes standards for "hazardous" pollutant emissions from a particular source category. Congress decided in 1990 that if EPA regulates an existing source under the newly expanded Section 112 program, "any air pollutant" emitted from that source may not be regulated under Section 111(d)'s state-by-state standards.

## II. The Final Power Plan

Signed by the Administrator on August 3, 2015, and published on October 23, 2015, the Power Plan has three features that are relevant for this stay motion.

*First*, the Power Plan establishes carbon dioxide emission levels for each State based upon three so-called "building blocks": (1) altering coal-fired power plants to increase efficiency; (2) substituting natural gas combined cycle generation for generation from coal; and (3) substituting generation from low or zero-carbon energy generation, such as wind and solar, for generation from fossil fuels. 80 Fed. Reg. at 64,745. Blocks 2 and 3 do not directly regulate *emissions*. Rather, they substitute for the energy lost by reducing *generation* from sources that EPA disfavors. EPA erroneously asserts that this reorganizing of the mix of electric generation across the nation constitutes the statutory "best system of emission reduction" ("BSER"), 42

U.S.C. § 7411(a)(1), claiming that the agency has the authority to “shift[] generation from dirtier to cleaner sources.” 80 Fed. Reg. at 64,726.

*Second*, EPA argues that it can regulate power plants under Section 111(d), even though those plants are regulated under Section 112. The Section 112 Exclusion prohibits EPA from regulating a source category under Section 111(d) where that source category is already “regulated under [Section 112].” § 7411(d)(1)(A). Abandoning its position of the last 20 years, EPA now claims that “the phrase ‘regulated under section 112’ refers only to the regulation of [] emissions [of pollutants actually regulated under Section 112].” 80 Fed. Reg. at 64,714. And because EPA has not (yet) decided to regulate carbon dioxide under Section 112, EPA asserts that it may impose carbon dioxide limitations under Section 111(d) on power plants notwithstanding its Section 112 regulation of those same plants. *Id.*

*Third*, EPA requires States to comply with the Power Plan on an aggressive schedule. A State Plan or detailed request for extension is due by September 2016. Even with an extension, a State Plan must be submitted by September 2018. 80 Fed. Reg. at 64,669. According to EPA, the hard deadlines are meant “to assure that states begin to address the urgent needs for reductions quickly.” 80 Fed. Reg. at 64,675. As outlined below, complying with these deadlines will disrupt sovereign functions, require massive expenditures of State time and resources, and irreparably harm the States’ power and renewable energy programs.

## ARGUMENT

All four traditional factors favor a stay, which is appropriate “to preserve the status quo pending the outcome of litigation.” *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006). The States are likely to prevail on the merits, they will be irreparably harmed if relief is withheld, no others are likely to suffer substantial harm if relief is granted, and the public interest favors a stay. *See Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

### **I. Petitioners Are Likely To Prevail On The Merits.**

#### **A. Section 111(d) Does Not Authorize EPA To Force The States To Restructure The Electrical Grid.**

1. EPA has exceeded its authority under Section 111(d), especially in light of the clear-statement rule set forth in *UARG v. EPA*, 134 S. Ct. 2427 (2014). In *UARG*, the Supreme Court rejected an expansive EPA regulation of carbon dioxide emissions, holding that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.” *Id.* at 2444 (citation omitted). Congress, the Court explained, is expected to “speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). EPA now claims to have found in Section 111(d), a long-extant provision, the power to transform the nation’s energy grid. But the text of Section 111(d) does not begin to

suggest that EPA may make such “decisions of vast economic and political significance,” much less “clearly” authorize it to do so.

Section 111(d) limits EPA to requiring States—if certain prerequisites are met—to establish “standards of performance for any existing source” that reflect emission reductions through improvements to a source’s performance. 42 U.S.C. § 7411(d)(1)(A). A “standard of performance” must be “appl[icable] . . . to a[] particular source,” *id.* § 7411(d)(1)(B), and set forth “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,” *id.* § 7411(a)(1). By its plain terms, Section 111(d) concerns the reduction of emissions by improving a source’s “performance” through measures that can be “appli[ed]” to the source. Section 111(d) is thus simply one of the CAA’s many requirements for the adoption of “pollution control devices,” *Union Elec. Co v. EPA*, 427 U.S. 246, 257 (1976), or other 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).

The Power Plan far exceeds the authority Congress granted to EPA under Section 111(d). The Plan’s building blocks 2 and 3 are not measures that can be applied to an individual source’s “performance.” Rather than imposing “improved design and operational advances” on the source at issue, the Plan imposes measures that favor renewable generation *as substitutes for* fossil-fuel-fired energy. 80 Fed. Reg. at 64,745. The Plan goes well beyond improving efficiency at individual existing

power plants; it attempts to regulate each State's energy generation mix. That is why the emission targets EPA claims are achievable for *existing* power plants are more restrictive than EPA's *new* power plant targets, which are based on technologies applied at each plant. Compare 80 Fed. Reg. at 64,707 (1,305 lb CO<sub>2</sub>/MWh), with 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 2015) (1,400 lb CO<sub>2</sub>/MWh); 80 Fed. Reg. at 64,707 (771 lb CO<sub>2</sub>/MWh), with 80 Fed. Reg. at 64,513 (1,000 lb CO<sub>2</sub>/MWh).

To justify its novel, unauthorized approach, EPA argues that Section 111(d) empowers the agency to set emissions targets based on any measures achievable by a source's "owners and operators," including those measures that "shift[] generation from dirtier to cleaner sources" within the "complex machine" energy grid. 80 Fed. Reg. at 64,726, 64,767-68. But EPA's argument cannot be squared with either the text of Section 111(d) or *UARG*. Section 111(d) provides EPA with authority to regulate emissions only by applying pollution control technology or operational and design advances that improve a source's "performance." 42 U.S.C. § 7411(d)(1)(B). It does not permit EPA to regulate the electric grid as a "complex machine," favor certain methods of energy generation as allegedly "cleaner," or premise emission reductions on the notion that the owners of a source of emissions can pay their "cleaner" competitors to take their customers. 80 Fed. Reg. at 64,726, 64,767-68. Indeed, on EPA's reasoning, the agency could mandate that States require all coal-fired power plants to close, if the power grid could produce sufficient substitute electricity from

sources designated by EPA as “cleaner.” 80 Fed. Reg. at 64,726. That is not a “standard of performance,” but one of non-performance.

At a minimum, it is hardly “clear[]” from the text of Section 111(d) that Congress intended that rarely-used provision to transform EPA from an environmental regulator into the nation’s most powerful central planner, making “decisions of vast economic and political significance.” *UARG*, 134 S. Ct. at 2444 (quotations omitted). Under EPA’s view, it has authority under Section 111(d) to pick winners and losers not only among different sources of electricity generation, but “any” existing stationary source categories, 42 U.S.C. § 7411(d). EPA cannot show the clear statement required under *UARG* for such a capacious assertion of authority.

EPA’s repeated claim that its interpretation has historical support in Congress’s authorization of a cap-and-trade regime for sulfur-dioxide emissions under Title IV of the CAA, *see* 80 Fed. Reg. at 64,665, 64,734, 64,761, 64,770-71, 64,778, only underscores the Power Plan’s illegality and illustrates the manner in which the agency has sought to evade the legislative process. Congress understood that it was necessary to enact the detailed Title IV regime precisely because such a regime must come from a “clear” congressional directive. *UARG*, 134 S. Ct. at 2444. Here, in contrast, Congress rejected the present Administration’s effort to pass Title IV-like cap-and-trade authority over carbon dioxide emissions from fossil fuel-fired power plants. *See* Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009). Under EPA’s

reading of Section 111(d), the Administration's efforts to seek congressional authorization for a carbon dioxide cap-and-trade regime were entirely unnecessary.

2. The Power Plan's illegality is reinforced by the statutory canons that an agency is afforded no deference when it seeks to invade "areas traditionally regulated by the States," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), or asserts power where it lacks "expertise," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

The authority and expertise to regulate the electrical grid lies primarily with the States and, to a more limited degree, with FERC. States' power over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress recognized this State authority in the Federal Power Act ("FPA"), which respects 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). The FPA confines federal jurisdiction over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," and it assigns that limited authority to FERC, not EPA. 16 U.S.C. § 824(a).

EPA's view of Section 111(d) runs roughshod over States' sovereign rights, while asserting EPA authority over an area in which the agency *has admitted it lacks expertise*. By setting emission targets premised on disfavoring coal and reordering of



electricity generation for intrastate use, the Power Plan encroaches on the States' authority to independently assess the intrastate "[n]eed for new power facilities, their economic feasibility, and rates and services." *Pac. Gas*, 461 U.S. at 205; *see also* Lloyd Decl. ¶¶ 9-93; Nowak Decl. ¶ 7; McClanahan Decl. ¶¶ 5, 11; Bracht Decl. ¶ 13. In addition, EPA supports its reading of Section 111(d) with the agency's understanding of the electrical grid as a "complex machine." 80 Fed. Reg. at 64,725. But EPA has no "expertise" as to the functioning of this grid, *King*, 135 S. Ct. at 2489, as the agency itself has acknowledged. *See* Melanie King, EPA Office of Air Energy Strategies Division, Response to Public Comments in Dkt. EPA-HQ-OAR-2008-0708, at 50 (Jan. 14, 2013) ("The issues related [to] management of energy markets and competition between various forms of electric generation are far afield from EPA's responsibilities for setting standards under the CAA.").

In sum, Congress did not delegate to EPA the authority to regulate the electric grid, and any claim by EPA to deference in interpreting Section 111(d) to reach such a result, *see* 80 Fed. Reg. at 64,768, is contrary to controlling caselaw.

#### **B. The Section 112 Exclusion Prohibits The Power Plan.**

The Section 112 Exclusion prohibits EPA from regulating under Section 111(d) "any air pollutant" emitted from a "source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d)(1)(A)(i). As EPA has repeatedly admitted, starting with the Clinton Administration and continuing to the proposed version of the Power Plan itself, this text in the U.S. Code means what it says: EPA may not

require States to regulate a source category under Section 111(d) when EPA already regulates that source category under Section 112.<sup>5</sup> Or, as the Supreme Court has explained, “EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated . . . under [Section 112].” *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011).

Under EPA’s own longstanding reading of the text in the U.S. Code, the Exclusion is an independent and outright bar on the Power Plan. EPA states that it has issued the Power Plan as a regulation of fossil fueled electric generation under Section 111(d). 80 Fed. Reg. at 64,662. But given that such power plants are extensively regulated under Section 112, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012), the Exclusion forecloses EPA from invoking Section 111(d) to doubly regulate those same plants. This Court should strike down the Plan for violating the Exclusion, just as it did the last time EPA attempted to regulate power plants under Section 111(d). *See New Jersey v. EPA*, 517 F.3d 574, 583-84 (D.C. Cir. 2008).<sup>6</sup>

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<sup>5</sup> *See, e.g.*, EPA 2014 Legal Memo at 26; 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, Pub. No. EPA-453/R-94-021, 1-5, 1-6 (1995) (“1995 EPA Landfill Memo”).

<sup>6</sup> This Court’s forthcoming decision on remand from *Michigan v. EPA*, 135 S. Ct. 2699 (2015), reviewing EPA’s Section 112 regulation of power plants, has no impact on the present challenge because agency action can be upheld only on the “grounds upon which [EPA] itself based its action.” *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

In an effort to escape this result, EPA has abandoned its longstanding interpretation of the statutory text and adopted a new, impermissible interpretation of the Exclusion's phrase "regulated under [Section 112]." EPA now argues that the Exclusion "only exclud[es] the regulation of [] emissions under CAA section 111(d) [that are actually regulated under Section 112] and only when th[e] source category [at issue] is regulated under CAA section 112." 80 Fed. Reg. at 64,714. This is indefensible. EPA would rewrite the plain terms of the prohibition against Section 111(d) regulation of any "source category which is regulated under Section 112" into a prohibition against Section 111(d) regulation of any "source category which is regulated under [Section 112], *where the air pollutant is a hazardous air pollutant actually regulated under Section 112.*" EPA has no authority to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

EPA's argument that its rewrite is necessary to avoid a regulatory "gap" is based on an understanding of the CAA that predates the substantial amendments to that statute in 1990. 80 Fed. Reg. at 64,711 (discussing the 1970 CAA). That year, Congress enacted the present Exclusion and also vastly expanded the scope of Section 112, such that EPA has never identified any pollutant that could be covered under Section 111(d) but not the post-1990 version of Section 112—including carbon dioxide. *See* 73 Fed. Reg. 44,354, 44,493-95 (July 30, 2008) (EPA concluding that carbon dioxide falls under both the Section 111 and Section 112 definitions of "air pollutants"). Notably, EPA has used Section 111(d) for only two regulations since

1990, and both regulations were consistent with the Exclusion's plain terms, as they appear in the U.S. Code. In the first, EPA sought to regulate power plants under Section 111(d) only after the agency attempted to deregulate those power plants under Section 112. *See New Jersey*, 517 F.3d at 583-84. In the second, the agency explained that the Exclusion did not apply because the source category was not "actually being regulated under section 112." 1995 EPA Landfill Memo, at 1-6.

Finally, EPA's new approach confirms the States' argument that EPA's alternative, "two versions" approach to the Exclusion lacks merit. Once EPA's primary attempt to escape the Exclusion, the "two versions" approach relied upon the fact that the 1990 Statutes at Large included two amendments to the Exclusion—one clerical, one substantive. EPA 2014 Legal Memo at 23.<sup>7</sup> The clerical amendment made a "conforming" edit to the pre-1990 Exclusion, updating a cross-reference in light of other revisions to the CAA in 1990. Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990). The substantive amendment revised the scope of the Exclusion entirely, and in the process eliminated the cross-reference updated by the clerical amendment. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). Having been rendered moot by the substantive amendment, the clerical amendment was excluded from the U.S. Code, under uniform practice. *See* Revisor's Note, 42 U.S.C. § 7411. But EPA took the remarkable position that the obsolete clerical amendment created a version-in-

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<sup>7</sup> <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf>.

exile of the Exclusion—retaining the pre-1990 scope of the Exclusion—that produced an ambiguity EPA was entitled to resolve. EPA 2014 Legal Memo at 23.

In response to the States’ criticism, this position is now relegated to a footnote. 80 Fed. Reg. at 64,714 n.294. Notably, EPA points to no case or decision by any court or agency giving meaning to such a clerical error, and has no response to the dozens of examples uniformly treating such errors as irrelevant. *See* Letter of 17 States, EPA-HQ-OAR-2013-0602-25433, at \*5-6 (posted Dec. 15, 2014). As this Court has made clear, these routine errors, which are common in modern, complex legislation, do not create any statutory “ambiguity.” *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). In fact, that is the view the Clinton EPA took just five years after the 1990 Amendments. 1995 EPA Landfill Memo at 1-5.

## **II. The States Will Suffer Irreparable Injury Absent A Stay.**

Absent an immediate stay, the Power Plan will impose immense sovereign and financial harms upon the States, on a scale exceeding any environmental regulations the States have ever faced. Gross Decl. ¶ 3; Stevens Decl. ¶ 8; Martin Decl. ¶ 8.

A. The Power Plan will inflict upon the States significant sovereign harms, which are irreparable as a matter of law. *See New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). The Power Plan will require the States immediately to debate, design, and enact significant legislative and regulatory changes to programs

governing intra-state electricity markets. For example, many States will need to enact legislation in the next 1 to 2 years to ensure the growth in renewable energy sources and natural gas that will be needed to be in place by 2022 to enable compliance with the Power Plan's stringent targets. Lloyd Decl. ¶¶ 78-81; Nowak Decl. ¶ 17; Bracht Decl. ¶ 12; McClanahan Decl. ¶ 11; Martin Decl. ¶ 8. States will also need to amend innumerable rules, including those that might prevent their state public utility commissions from mitigating the Plan's negative market and energy reliability impacts. Lloyd Decl. ¶¶ 88-93; Bracht Decl. ¶¶ 12-13; Nowak Decl. ¶¶ 7, 16; Hodanbosi Decl. ¶¶ 5, 8; McClanahan Decl. ¶ 4; Hyde Decl. ¶ 35; Hays Decl. ¶¶ 5, 9.

This will undermine the States' sovereign choices. The changes will displace the policies States have carefully crafted over decades concerning the regulation of electrical utilities and questions of need, reliability, and cost. Lloyd Decl. ¶¶ 31-46, 87. Once made, many of these changes will be "impossible" to reverse. Lloyd Decl. ¶ 47; McClanahan Decl. ¶ 11; Nowak Decl. ¶ 12; Bracht Decl. ¶¶ 11, 14; Mroz Decl. ¶¶ 3, 8. The time spent by legislators and state agencies to satisfy EPA's unlawful mandate will limit the finite time that they can devote to their own sovereign priorities, a problem exacerbated by the fact that many state legislatures sit briefly every year or every other year. Lloyd Decl. ¶¶ 39, 75, 80; Parfitt Decl. ¶ 10; Easterly Decl. ¶ 9.

B. The Power Plan will also require massive and immediate efforts by State energy and environmental regulators, imposing irreparable financial harms upon the States. *See Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 543 F.2d 356, 358 (D.C. Cir.

1976); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). These efforts will cost the States tens of thousands of unrecoverable hours and millions of unrefundable dollars. *See, e.g.*, Durham Decl. ¶ 6 (7,100 hours of 9 senior staff members); McClanahan Decl. ¶ 6 (\$500,000 to \$1 million on consultants alone); Gore Decl. ¶ 6 (\$760,000 per year).

Just a few examples of State regulators' responsibilities under the Power Plan illustrate the point. To design State Plans that shift the States' energy grids away from coal-fired generation, States will need to conduct interagency analyses and then consult with stakeholders to determine what changes can plausibly be made to increase natural gas and add renewable energy generation. Nowak Decl. ¶¶ 4-13; McClanahan ¶¶ 4-10; Martin Decl. ¶¶ 8-9. This process will include an assessment of the forms of energy available to the State, whether developing more new energy sources is feasible, and what changes to state law would be required. Bracht Decl. ¶¶ 2, 8, 10, 12; McClanahan Decl. ¶¶ 5, 7-8; Hodanbosi Decl. ¶ 5; Gore Decl. ¶¶ 5-6; Lloyd Decl. ¶¶ 47-48, 82-87; Martin Decl. ¶ 8. States will then need to undertake to change state laws and regulations governing their electricity markets. Gustafson Decl. ¶ 15. And since the Power Plan contemplates interstate regimes, States will need to engage in time-consuming interstate consultation. Lloyd Decl. ¶¶ 85-86; Bracht Decl. ¶ 14; Stevens Decl. ¶ 10; Macy ¶ 5; McClanahan Decl. ¶ 14.

C. Critically, the regulatory and statutory steps that the States will need to take must begin “immediately.” Hyde Decl. ¶ 10; Lloyd Decl. ¶¶ 86, 93; Stevens Decl. ¶¶ 5-10; Thomas Decl. ¶ 7; Bracht Decl. ¶¶ 7-8. As EPA explained, the Plan’s submission deadlines—the first in September 2016, and the last in September 2018—are based on EPA’s view of “the need to begin promptly what will be a lengthy effort to implement the requirements of” the Rule. 80 Fed. Reg. at 64,855.

By September 2016, the States must submit their Plans or seek extensions by: (1) identifying the State Plans that are “under consideration”; (2) providing an “appropriate explanation” for the extension; and (3) describing how they have provided for “meaningful engagement” with the public. 80 Fed. Reg. at 64,856. Even the steps for an extension requires immediate and substantial expenditures, as deciding between the Rule’s various options—outlined in *500 pages*, 80 Fed. Reg. at 64,826-64,914—involves a massive effort by each State, as described in the States’ declarations. Hyde Decl. ¶ 9; Stevens Decl. ¶¶ 5-10; McClanahan Decl. ¶¶ 4-10; Bracht Decl. ¶¶ 2, 7-8, 12; Spencer Decl. ¶ 4; Nowak Decl. ¶¶ 4-13; Hodanbosi Decl. ¶¶ 5-6; Gore Decl. ¶¶ 5-6; Martin Decl. ¶ 8. Awaiting completion of this litigation to begin these efforts will likely result in the States missing the September 2016 deadline, which would permit EPA to impose its own Federal Plan, taking over those States’ sovereign functions over their own energy grids. 80 Fed. Reg. at 64,856-57.

Moreover, States that intend to seek an extension until September 2018 cannot simply do the work required for the extension and then await completion of this



litigation to continue work on their Plans. The Rule is the most complex rule the States have faced, requiring some States 3 to 5 years to finish their State Plans. Gross Decl. ¶ 3; Stevens Decl. ¶ 8. Given that the massive changes required by the Rule can take years, States will need to act well before the end of this litigation if they have any hope of meeting the September 2018 deadline. Lloyd Decl. ¶ 86; Hyde Decl. ¶¶ 9, 20, 22; Martin Decl. ¶ 7. Notably, the Rule requires States to submit an “update” to EPA by September 2017, describing “the type of approach it will take in the final plan submittal and to draft legislation or regulations for this approach.” 80 Fed. Reg. at 64,859. Crafting such legislation and regulations is a complex endeavor, which will divert sovereign resources. States cannot wait until litigation is completed to begin these time-consuming tasks. Lloyd Decl. ¶ 93; Hyde Decl. ¶ 31; Martin Decl. ¶ 7, 8.

### **III. The Balance Of Harms And The Public Interest Strongly Favor A Stay.**

As the Sixth Circuit recently explained in staying another far-reaching EPA rule, “the sheer breadth of the ripple effects caused by the Rule[] . . . counsels strongly in favor of maintaining the status quo for the time being.” *In re EPA*, Nos. 15-3799/3822/3853/3887, -- F.3d --, --, 2015 WL 5893814, at \*3 (6th Cir. Oct. 9, 2015). EPA designed the Power Plan to have massive, immediate “ripple effects” throughout the energy economy, including forcing significant early retirement of coal-fired power plants as early as 2016. *See* Energy Ventures Analysis, “Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry,” at 16, 66-68 (Sept.

2015).<sup>8</sup> These retirements will reduce the supply of one of the most reliable sources of energy, resulting in higher energy prices, threatened blackouts during periods of increased demand, and lost jobs. Lloyd Decl. ¶¶ 31, 33, 41-46. A stay would “silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing [while] honor[ing] the policy of cooperative federalism.” *In re EPA*, 2015 WL 5893814, at \*3. If the Plan’s massive obligations are to be imposed upon the States and their citizens, while fundamentally changing the CAA’s “cooperative federalism” regime, *id.*, this should occur only after this Court has had a full opportunity to review the Plan.

Nor is there any persuasive reason to deny the stay. EPA has repeatedly missed its own deadlines for issuing the Power Plan, indicating that no harm will occur from a delay in the implementation of just one of the Administration’s cascade of carbon-dioxide-focused rules. *See* No. 14-1146, ECF 1540020, JA 3 (EPA committing to sign final Power Plan by May 26, 2012). In any event, given that the Power Plan is illegal, there is no legally cognizable interest in compliance with the Plan’s deadlines. *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 58-59 (D.C. Cir. 1977).

## CONCLUSION

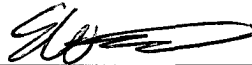
The States respectfully request that the Motion for Stay and for Expedited Consideration of the Petition for Review be granted.

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<sup>8</sup> <http://www.nma.org/pdf/EVA-Report-Final.pdf>

Dated: October 23, 2015

Respectfully submitted,



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Patrick Morrisey

Attorney General of West Virginia

Elbert Lin

Solicitor General

*Counsel of Record*

Misha Tseytlin

General Counsel

J. Zak Ritchie

Assistant Attorney General

State Capitol Building 1, Room 26-E

Tel. (304) 558-2021

Fax (304) 558-0140

Email: elbert.lin@wvago.gov

***Counsel for Petitioner State of West Virginia***

---

/s/ Scott A. Keller

Ken Paxton

Attorney General of Texas

Charles E. Roy

First Assistant Attorney General

Bernard L. McNamee II

Chief of Staff

Scott A. Keller

Solicitor General

*Counsel of Record*

P.O. Box 12548

Austin, Texas 78711-2548

Tel. (512) 936-1700

Email: Scott.Keller@texasattorneygeneral.gov

***Counsel for Petitioner State of Texas***

---

/s/ Andrew Brasher

Luther Strange

Attorney General of Alabama

Andrew Brasher

Solicitor General

*Counsel of Record*

501 Washington Ave.  
Montgomery, AL 36130  
Tel. (334) 590-1029  
Email: abrasher@ago.state.al.us  
***Counsel for Petitioner State of Alabama***

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

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

/s/ Frederick Yarger  
Cynthia H. Coffman  
Attorney General of Colorado

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

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

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

/s/ Timothy Junk  
Gregory F. Zoeller  
Attorney General of Indiana  
Timothy Junk  
Deputy Attorney General

*Counsel of Record*

Indiana Government Ctr. South, Fifth Floor  
302 West Washington Street  
Indianapolis, IN 46205  
Tel. (317) 232-6247  
Email: tim.junk@atg.in.gov  
***Counsel for Petitioner State of Indiana***

/s/ Jeffrey A. Chanay

Derek Schmidt  
Attorney General of Kansas  
Jeffrey A. Chanay  
Chief Deputy Attorney General

*Counsel of Record*

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

/s/ Jack Conway

Jack Conway  
Attorney General of Kentucky

*Counsel of Record*

700 Capital Avenue  
Suite 118  
Frankfort, KY 40601  
Tel: (502) 696-5650  
Email: Sean.Riley@ky.gov  
***Counsel for Petitioner Commonwealth of Kentucky***

/s/ Megan K. Terrell

James D. "Buddy" Caldwell  
Attorney General of Louisiana  
Megan K. Terrell  
Deputy Director, Civil Division  
*Counsel of Record*

1885 N. Third Street  
Baton Rouge, LA 70804  
Tel. (225) 326-6705  
Email: TerrellM@ag.state.la.us  
***Counsel for Petitioner State of Louisiana***

/s/ Donald Trahan  
Herman Robinson  
Executive Counsel  
Donald Trahan  
*Counsel of Record*  
Elliott Vega  
Louisiana Department of Environmental  
Quality  
Legal Division  
P.O. Box 4302  
Baton Rouge, LA 70821-4302  
Tel: (225) 219-3985  
Fax: (225) 219-4068  
Email: Donald.Trahan@La.Gov  
***Counsel for Petitioner State of Louisiana***  
***Department of Environmental Quality***

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

/s/ James R. Layton  
Chris Koster  
Attorney General of Missouri  
James R. Layton  
Solicitor General

*Counsel of Record*  
P.O. Box 899  
207 W. High Street  
Jefferson City, Missouri 65102  
Tel. (573) 751-1800  
Fax (573) 751-0774  
Email: james.layton@ago.mo.gov  
***Counsel for Petitioner State of Missouri***

/s/ Dale Schowengerdt  
Timothy C. Fox  
Attorney General of Montana  
Alan Joscelyn  
Chief Deputy Attorney General  
Dale Schowengerdt  
Solicitor General

*Counsel of Record*  
215 North Sanders  
Helena, Montana 59620-1401  
Tel: (406) 444-7008  
Email: dales@mt.gov  
***Counsel for Petitioner State of Montana***

/s/ Justin D. Lavene  
Doug Peterson  
Attorney General of Nebraska  
Dave Bydlaek  
Chief Deputy Attorney General  
Justin D. Lavene  
Assistant Attorney General

*Counsel of Record*  
2115 State Capitol  
Lincoln, NE 68509  
Tel. (402) 471-2834  
Email: justin.lavene@nebraska.gov  
***Counsel for Petitioner State of Nebraska***

/s/ Robert J. Kinney  
John J. Hoffman  
Acting Attorney General of New Jersey  
David C. Apy



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

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

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

***Counsel for Petitioner State of South  
Carolina***

/s/ Steven R. Blair

Marty J. Jackley

Attorney General of South Dakota

Steven R. Blair

Assistant Attorney General

*Counsel of Record*

1302 E. Highway 14, Suite 1

Pierre, SD 57501

Tel. (605) 773-3215

Email: steven.blair@state.sd.us

***Counsel for Petitioner State of South  
Dakota***

/s/ Parker Douglas

Sean Reyes

Attorney General of Utah

Parker Douglas

Federal Solicitor

*Counsel of Record*

Utah State Capitol Complex

350 North State Street, Suite 230

Salt Lake City, Utah 84114-2320

Email: pdouglas@utah.gov

***Counsel for Petitioner State of Utah***

/s/ Delanie M. Breuer

Brad Schimel

Attorney General of Wisconsin

Andrew Cook

Deputy Attorney General

Delanie M. Breuer

Assistant Deputy Attorney General

*Counsel of Record*

Wisconsin Department of Justice

17 West Main Street

Madison, WI 53707

Tel: (608) 267-8901

Email: Breuerdm@doj.state.wi.us

***Counsel for Petitioner State of Wisconsin***

/s/ James Kaste

Peter K. Michael

Attorney General of Wyoming

James Kaste

Deputy Attorney General

*Counsel of Record*

Michael J. McGrady

Senior Assistant Attorney General

123 State Capitol

Cheyenne, WY 82002

Tel. (307) 777-6946

Fax (307) 777-3542

Email: james.kaste@wyo.gov

***Counsel for Petitioner State of Wyoming***

/s/ Sam M. Hayes

Sam M. Hayes

General Counsel

*Counsel of Record*

Craig Bromby

Deputy General Counsel

Andrew Norton

Deputy General Counsel

North Carolina Department of

Environmental Quality

1601 Mail Service Center

Raleigh, NC 27699-1601

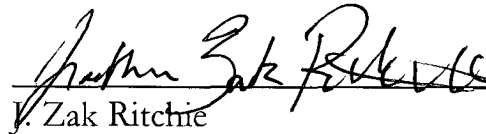
Tel. (919) 707-8616

Email: sam.hayes@ncdenr.gov

***Counsel for Petitioner State of North  
Carolina Department of Environmental  
Quality***

**CERTIFICATE OF COMPLIANCE**

This motion complies with Federal Rule of Appellate Procedure 21(d) because it does not exceed 20 pages, excluding the parts of the motion exempted by 21(d). This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

A handwritten signature in black ink, appearing to read "Zak Ritchie", written over a horizontal line.

Zak Ritchie

Counsel for Petitioner State of West Virginia

**CERTIFICATE OF SERVICE**

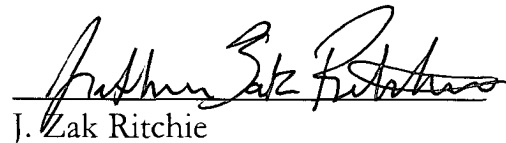
I certify that on this October 23, 2015, a copy of the foregoing *State Petitioners' Motion To Stay And For Expedited Consideration* was transmitted by email on each the following with their consent:

Eric Hostetler: eric.hostetler@usdoj.gov

Norman Rave: norman.rave@usdoj.gov

Scott Jordan: jordan.scott@epa.gov

Howard Hoffman: hoffman.howard@epa.gov



J. Zak Ritchie

Counsel for Petitioner State of West Virginia