

4. The Proposed Rule, in contravention of these prohibitions, considers instances carbon capture and storage (“CCS”) technology deployment financed with federal assistance under the Act to support the finding that CCS is “adequately demonstrated” for purposes of section 111 of the Clean Air Act (“CAA”), 42 U.S.C. § 7411.

5. The State challenges the Proposed Rule’s consideration of these facilities’ deployment of CCS as unlawful final agency action pursuant to the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 701 *et seq.* The State seeks a declaration that the Proposed Rule’s consideration of federally-financed CCS projects is “not in accordance with law” and “in excess of statutory . . . authority.” 5 U.S.C. § 706(2)(A), (C). The State also requests injunctive relief, including an order from this Court directing EPA to cease further action on the NSPS rulemaking and withdraw the Proposed Rule.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, because the States allege a violation of federal law; the APA, 5 U.S.C. §§ 701-706; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, which provides for declaratory and other relief.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e).

PARTIES

8. The Nebraska Department of Environmental Quality (“NDEQ”) has assumed authority to implement and enforce many of the CAA permitting and standard-setting programs within its borders. In particular, the State implements an EPA-approved preconstruction permit program for major stationary sources under the CAA’s Prevention of Significant Deterioration

(“PSD”) and nonattainment new source review (“NSR”) provisions, for which NSPS serve as the baseline emission standard. See generally, 42 U.S.C. §§ 7470-7479; §§ 7501-7503. Furthermore, finalization of the Proposed Rule would arguably trigger the commencement of the rulemaking process for new source performance standards for existing electric utility generating units for which the State is primarily responsible. See, 42 U.S.C. § 7411(d).

9. The United States Environmental Protection Agency is the federal agency responsible for the implementing the CAA in cooperation with the State.

10. Gina McCarthy, Administrator of the EPA, is charged with the supervision and management of the Agency’s responsibilities under the CAA. The State names Administrator McCarthy as Defendant in her official capacity only.

STATUTORY AND REGULATORY FRAMEWORK

I. Establishment of NSPS and Regulation of Stationary Sources under the CAA

11. The CAA authorizes regulation of emissions of air pollutants from new stationary sources which may reasonably be anticipated to endanger public health or welfare through the establishment of Federal performance standards, i.e. NSPS. See, 42 U.S.C. § 7411(b)(1)(B).

12. The NSPS for new stationary sources must be based on the “best system of emission reduction” that the “Administrator determines has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1).

13. The NSPS then serves as the baseline for the State when determining the appropriate emission standard representing the “best available control technology” to be included in permits issued under the CAA’s PSD program. See, 42 U.S.C. § 7465(a)(4); see also, 42 U.S.C. § 7469(3). Similarly, the NSPS serves as the baseline for the State when determining the

appropriate emission standard representing the “lowest achievable emission rate” to be included in permits issued under the CAA’s NSR program. See, 42 U.S.C. § 7503(a)(2); 42 U.S.C. § 7501(3).

II. The Energy Policy Act of 2005

14. The Clean Coal Power Initiative (“CCPI”) was established in 2002 as a partnership between government and industry, with a focus on implementing the President’s National Energy Policy recommendation to increase investment in clean coal technology. See, “Notice of Intent to Prepare an Environmental Impact Statement and Notice of Proposed Floodplain and Wetlands Involvement for the Kemper County IGCC Project, Kemper County, MS,” 73 Fed. Reg. 54,570 (September 22, 2008).

15. On August 8, 2005, the CCPI was codified as part of the Energy Policy Act of 2005. Pub. L. 109-58. Title IV of the Act addresses development of coal resources. Subtitle A of that Title, which codifies the CCPI, authorizes the appropriation of funds to the Secretary of Energy to assist projects seeking to “advance efficiency, environmental performance, and cost competitiveness.” See, 42 U.S.C. §§ 15961 (a); 15962(a).

16. Section 402 specifies that in order “to be eligible to receive assistance” under the CCPI a project must “advance efficiency, environmental performance, and cost competitiveness well beyond the level of technologies” that are currently in “commercial service” or which have been “demonstrated on a scale that the Secretary [of DOE] determines is sufficient to demonstrate that commercial service is viable as of the date of enactment” of the Energy Policy Act. 42 U.S.C. § 15962(a).

17. The Act’s objective of financing and developing only those projects seeking to achieve a level of efficiency, environmental performance, and cost-competitiveness beyond that

achieved by current, commercially available and demonstrated technologies is supported by the protection provided against premature regulatory mandates based on such projects:

(i) Applicability.—No technology, or level of emission reduction, solely by reason of the use of the technology, or achievement of the emission reduction, by 1 or more facilities receiving assistance under this Act, shall be considered to be—

(1) adequately demonstrated for purposes of section 111 of the Clean Air Act (42 U.S.C. 7411);

(2) achievable for purposes of section 169 of that Act (42 U.S.C. 7479); or

(3) achievable in practice for purposes of section 171 of that Act (42 U.S.C. 7501).

42 U.S.C. § 15962(i).

III. The Proposed Rule

18. The Proposed Rule would establish an emission limit of 1,100 pounds of CO₂ per megawatt hour (“MWh”) for utility boilers and Integrated Gasification Combined Cycle units based on partial implementation of carbon capture and storage (“CCS”) as the “best system of emission reduction”. 79 Fed. Reg. 1430, 1433. EPA states it considered the expected performance of the CCS technology at a number of facilities, including the Kemper County Energy Facility (“Kemper”), Texas Clean Energy Project (“TCEP”), and Hydrogen Energy California (“HECA”) facilities, in finding that CCS is “adequately demonstrated.” See, e.g., 79 Fed. Reg. 1434 (“The existence and apparent ongoing viability of these projects which include CCS justify a separate BSER determination for new fossil fuel-fired utility boilers and IGCC power plants.”); see also 79 Fed. Reg. at 1478 (a “segment of the industry consists of the several coal-fired EGU projects that already incorporate at least partial CCS. These projects, which are each progressing, include Kemper, TCEP, and HECA.”); see also, 79 Fed. Reg. at 1479 (“additional knowledge will be gained from deployment and operation of at least two new coal-

fired generation projects that include CCS...Kemper County Energy Facility IGCC with CCS and the Boundry Dam CCS project on a conventional coal-fired power plant in Canada."); see also, 79 Fed. Reg. at 1482 ("EPA expect that for the immediate future, captured CO₂ from affected units will be injected underground for geologic sequestration at sites where EOR ("enhanced oil recovery") is occurring....Three solid-fuel fired EGU projects incorporating CCS – Kemper, TCEP, and HECA – all include utilization of captured CO₂ for EOR.") (parenthetical supplied).

19. The Proposed Rule does not attempt to resolve the inconsistency with the Act's prohibition against premature regulatory mandates based on the consideration of technology deployment at facilities receiving assistance under the Act. Rather, the Proposed Rule seeks to circumvent the Act's prohibition by arguing that "many types of electricity generation receive government subsidies." 79 Fed. Reg. at 1478. Indeed the Proposed Rule acknowledges that "[i]t is true that each of these projects has received DOE grants to encourage the development of CCS technology, but we do not consider such government subsidies to mean that the costs of CCS would otherwise be unreasonable." 79 Fed. Reg. at 1478.

FACTUAL BACKGROUND

I. The Kemper Facility

20. The Kemper facility currently under construction is a 582-megawatt power plant that will utilize CCS technology. Kemper is located approximately 30 miles north of Meridian, Mississippi. It will be owned and operated by Mississippi Power. By design, Kemper will have an advanced gasification plant and a combined cycle plant working together. This process sends coal through a device called a gasifier. By being subjected to high

temperatures and high pressure, the coal undergoes a chemical reaction that creates a synthesis gas. The cleaned “syngas” is then used in a gas turbine to generate power. Up to 65 percent of the CO₂ from the Kemper Facility will be captured and sold for enhanced oil recovery (“EOR”). CO₂ injection is a common method of EOR, in which the CO₂ is injected into abandoned oil wells to force oil out of the ground.

21. Kemper has received grants totaling some \$270 million from the DOE and more than \$400 million in investment tax credits approved by the United States Internal Revenue Service (“IRS”) through the Energy Policy Act of 2005.

II. The TCEP Facility

22. The planned TCEP facility is a 400-megawatt power plant that will utilize CCS technology. TCEP will be located approximately 15 miles west of Odessa, Texas. The project is being developed by Summit Power Group, Inc. TCEP is designed to have a carbon capture rate of 90 percent, with the captured CO₂ being used for EOR in the West Texas Permian Basin.

23. TCEP has received grants totaling some \$450 million from DOE and over \$600 million in investment tax credits approved by the IRS through the Energy Policy Act of 2005.

III. The HECA Facility

24. The planned HECA facility is a 300-megawatt power plant that will utilize CCS technology. HECA will be located approximately 21 miles west of Bakersfield, California. The project is being developed by SCS Energy. HECA will convert coal, petroleum coke and brackish water into liquefied hydrogen and CO₂. HECA is designed to have a carbon capture rate of 90 percent, with the captured CO₂ being used for EOR in the Elk Hills oil field.

25. HECA has received grants totaling some \$400 million from DOE and over \$400 million in investment tax credits approved by the IRS through the Energy Policy Act of 2005.

26. To date, the facilities considered by the Proposed Rule – Kemper, TCEP, and HECA – have received a combined \$2,520,000,000.00 in federal subsidies.

CLAIM FOR RELIEF

27. The State incorporates all allegations set forth above by reference.

28. The State is entitled to judicial review under the APA. See, 5 U.S.C. §§ 702, 704 (providing judicial review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action,” where such action is “final” and for which there is “no other adequate remedy in a court.”).

29. Pursuant to the APA the Court “shall . . . hold unlawful and set aside agency action, findings, and conclusions . . . not in accordance with law” or “in excess of statutory . . . authority.” 5 U.S.C. § 706(2)(A), (C).

30. The Proposed Rule’s consideration of the use of CCS technology at such facilities as the Kemper, TCEP, and HECA facilities, is “not in accordance with law” and is “in excess of statutory . . . authority,” as the Agency’s consideration of those facilities violates section 402(i) of the Energy Policy Act. 42 U.S.C. § 15962(i).

PRAYER FOR RELIEF

The State respectfully requests that the Court enter judgment:

1. Declaring that the Proposed Rule violates the Energy Policy Act of 2005 by considering the use of CCS technology at the Kemper, TCEP, and HECA facilities and basing its finding that CCS is the “best system of emission reduction” that is “adequately demonstrated” for purposes of 42 U.S.C. § 7411 on such considerations;

2. Ordering Defendants to withdraw the Proposed Rule;
3. Enjoining EPA from future consideration the use of CCS technology at the Kemper, TCEP, and HECA facilities as a basis for finding that CCS is the “best system of emission reduction” that is “adequately demonstrated” for purposes of 42 U.S.C. §7411 on such considerations; and
4. Granting the State such additional relief as the Court deems appropriate.

Respectfully submitted this 15th day of January 2014.

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