Nos. 15-1277 & 15-1284

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

IN RE: WEST VIRGINIA, et al.,

Petitioners.

IN RE: PEABODY ENERGY CORP.,

Petitioner.

On Petitions For Extraordinary Writ

OPPOSITION OF INTERVENOR-RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, CLEAN AIR COUNCIL, CLEAN WISCONSIN, AND CONSERVATION LAW FOUNDATION TO PETITIONS FOR EXTRAORDINARY WRIT

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue, N.W.,
Suite 950
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

David Doniger
Benjamin Longstreth
David R. Baake
Jared E. Knicley
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 513-6256
ddoninger@nrdc.org
blongstreth@nrdc.org
Counsel for Natural Resources Defense Council

August 31, 2015

Additional Counsel Listed on Following Page

Tomás Carbonell
Vickie Patton
Environmental Defense Fund
1875 Connecticut Ave. NW Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org
vpatton@edf.org
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org
andres.restrepo@sierraclub.org
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont St., Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us
jduffy@catf.us
Counsel for Clean Air Council, Clean Wisconsin, and Conservation Law Foundation

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org
Counsel for Center for Biological Diversity

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenor environmental organizations state as follows:

A. Parties and Amici

All parties and amici are listed in the respective petitions, except for Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club.

B. Rulings Under Review

Petitioners seek review of "Carbon Pollution Emission Guidelines for Stationary Sources: Electric Utility Generating Units," EPA-HQ-OAR-2013-0602, http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf, a rule that was signed on August 3, 2015, but which has not yet been published in the Federal Register.

C. Related Cases

All of the Petitioners here except Florida and Michigan sought an injunction of the proposed version of this rule in *In Re: Murray Energy Corp.*, No. 14-1112, *West Virginia v. EPA*, No. 14-1146, or *Murray Energy Corp. v. EPA*, No. 14-1151. The Court ruled that it lacked authority over those petitions. *See In Re: Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015).

In *Oklahoma v. McCarthy*, Petitioner Oklahoma sought an injunction of the proposed version of this rule. The Northern District of Oklahoma dismissed the suit for lack of jurisdiction. No. 15-cv-0369, 2015 WL 4414384 (N.D. Okla. July 17, 2015). Oklahoma appealed to the Tenth Circuit, and sought an injunction pending appeal. The Tenth Circuit denied Oklahoma's injunction motion on August 24, 2015. *See* Order Denying Injunction Pending Appeal, in No. 15-5066.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and D.C. Circuit Rule 26.1, intervenors Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club state that their organizations are not-for-profit non-governmental organizations whose missions include protection of the environment and conservation of natural resources. None of the organizations has any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

/s/ Benjamin Longstreth

Dated: August 31, 2015

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INTRODUCTION

On August 3, 2015, EPA Administrator McCarthy signed the Clean Power Plan, "Carbon Pollution Emission Guidelines for Stationary Sources: Electric Utility Generating Units" ("Clean Power Plan" or "the Plan"),[2] a rule under section 111(d) of the Clean Air Act (42 U.S.C. § 7411(d)) that establishes a framework for controlling carbon dioxide pollution from fossil fuel-fired power plants, the largest domestic source of this climate-disrupting pollution. In filings styled "Emergency Petition[s] for Extraordinary Writ," Petitioners seek review, and a stay, of this rule. These petitions should be dismissed or denied.

SUMMARY OF ARGUMENT

Earlier this year, in rejecting an effort by most of the current Petitioners[3] to block the proposed version of the Clean Power Plan, this Court held that the All Writs Act (28 U.S.C. § 1651(a)) could not be used to circumvent the Clean Air Act's judicial review regime. *In re: Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). Undeterred, Petitioners once again invoke the All Writs Act, this time attempting to circumvent the Clean Air Act's requirement that

[2] EPA-HQ-OAR-2013-0602, http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf.

[3] Of the parties petitioning in this case, all but Florida and Michigan were parties in *In re: Murray Energy Corp.*

judicial review await publication of EPA's final action in the Federal Register. *See* 42 U.S.C. § 7607(b)(1).

Petitioners fail to identify any emergency that would justify bypassing the statutory procedure for obtaining judicial review. State Petitioners' objection that the Clean Power Plan's "extremely aggressive schedule" will require them to make "massive expenditures of time and resources" in the immediate future (WV. Pet. 7, 13) is simply not credible. *See* Tierney Decl. ¶ 11 (action required of states before September 6, 2016 is "minimal and uncomplicated"). The Plan establishes a three-year timeline for state planning and a seven-year timeline for power companies to prepare for compliance—timeframes that are consistent with, or more generous than, those Congress provided for states to implement other Clean Air Act regulations of comparable size and complexity. Moreover, states are free to opt out of the planning process entirely. In short, the Plan does not require State Petitioners to take any action during the ordinary period for review by this Court (let alone during the much shorter period before Federal Register publication) that would justify an award of extraordinary injunctive relief.

Peabody's allegations of harm are likewise not credible. Whatever economic losses Peabody is now experiencing are attributable to current

market and regulatory conditions, not to the prospect that power plants will be subject to carbon pollution standards in seven years' time.

ARGUMENT

A. The All Writs Act is Not a Means to Circumvent the Clean Air Act's Judicial Review Requirements.

Congress has the authority to "prescribe the procedures and conditions under which . . . judicial review of administrative orders may be had." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). The Clean Air Act establishes a detailed, comprehensive, and exclusive regime for judicial review of regulations promulgated under the Act. *See* 42 U.S.C. § 7607(b)(1), (d), (e). This regime specifically applies to the type of regulations at issue here (i.e., rules promulgated under 42 U.S.C. § 7411), and requires petitioners to seek judicial review of such rules "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." *Id.* § 7607(b)(1). Petitioners acknowledge that the Clean Power Plan is "not yet reviewable" under the Act because it has not yet been published in the Federal Register. *See* WV Pet. at 10. *See also Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1092–93 (D.C. Cir. 1997).

Petitioners invoke the All Writs Act in an attempt to bypass the Clean Air Act's procedure for obtaining judicial review. But this Court has already held that the All Writs Act cannot be used to "circumvent" the Clean Air Act's

judicial review requirements. *In re: Murray Energy Corp.*, 788 F.3d at 335 (All Writs Act does not authorize "'ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.'") (quoting *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985)). Petitioners' latest efforts at circumvention are equally groundless, and would, if accepted, upend the orderly process that Congress established, and that this Court has always followed, for judicial review of Clean Air Act regulations.

B. State Petitioners Have Not Identified Any Emergency That Would Justify a Departure From the Statutory Procedure For Judicial Review.

Section 111(d) of the Clean Air Act authorizes EPA "to regulate carbon-dioxide emissions from power plants." *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011); *see id.* at 2537 (section 111(d) "'speaks directly' to emissions of carbon dioxide from [existing power] plants"). The statute contemplates that states will have the first opportunity to regulate these emissions, "in compliance with [federal] guidelines and subject to federal oversight." *Id.* at 2537–38.

Consistent with this cooperative federalism framework, the Clean Power Plan invites states to cooperate with EPA to reduce carbon dioxide pollution from power plants, or not, as they wish. The Plan establishes carbon pollution limits for existing fossil fuel-fired power plants, gives states the opportunity to develop plans to apply the limits to those plants, and provides for direct federal

regulation of those sources if a state declines to submit an approvable plan. *See generally* Clean Power Plan at 9–11, 856–57. A state that chooses to submit an implementation plan has up to three years to do so, *id.* at 1475 (to be codified at 40 C.F.R. § 60.5760(b))—the same amount of time Congress provided for states to develop plans for controlling emissions of new "criteria" air pollutants from *all* sectors of the economy, and eighteen months *more* than Congress provided for states to prepare detailed "non-attainment" plans.[4]

State Petitioners focus on the only Plan deadline that occurs in the next year, namely the requirement that states prepare an "initial submittal" by September 6, 2016 if they intend to submit a final plan by September 6, 2018. State Petitioners' claim that this requirement will cause them irreparable harm (WV Pet. 7) is utterly unconvincing. An initial submittal need include only three elements: (1) "[a]n identification of final plan approach or approaches under consideration, including a description of progress made"; (2) "[a]n appropriate explanation of why the State requires additional time to submit a final plan by September 6, 2018"; and (3) a "[d]emonstration or description of

[4] *See* 42 U.S.C. § 7410(a)(1) (requiring states to adopt implementation plans for new criteria pollutants "within 3 years (or such shorter period as the Administrator may prescribe)"); *id.* § 7513a(a)(2)(B) (requiring states to submit non-attainment plans for particulate matter within 18 months); *id.* § 7514(a) (requiring states to submit non-attainment plans for sulfur oxides, nitrogen dioxide, and lead within 18 months).

opportunity for public comment on the initial submittal and meaningful engagement with stakeholders . . . .” Clean Power Plan at 1476 (to be codified at 40 C.F.R. § 60.5765(a)). An initial submittal does not bind the state to adopt any particular approach in its final plan, and need not contain any proposed regulations or legislation. *Id.* at 1010–11. A state’s initial submittal will be automatically approved, unless EPA notifies the state that it failed to include one of the required elements. *Id.* at 1022.

State Petitioners grossly overstate the cost and difficulty of complying with this requirement. Any state can prepare an adequate submittal within a matter of months—certainly by September of next year. *See* Tierney Decl. ¶ 11. If a state considers even this task too burdensome, it can forgo the initial submittal entirely without forfeiting the right to submit an approvable plan at a later date. *See* Clean Power Plan at 1451 (to be codified at 40 C.F.R. § 60.5720(b)) (“After a Federal plan has been implemented in your State, it will be withdrawn when your State submits, and the EPA approves, a final plan.”).

State Petitioners’ objection to these minimal planning requirements appears to rest on the premise that any version of cooperative federalism is inherently harmful to the states. *See* WV Pet. 12 (option to prepare an initial submittal threatens “permanent disruption to sovereign priorities”). But, as the Supreme Court observed in *American Electric Power*, section 111(d) reflects

Congress' determination that states should have the option to regulate pollution from existing industrial sources "in compliance with [federal] guidelines and subject to federal oversight." 131 S. Ct. at 2537–38. Regulating air pollution that affects the whole nation (and other countries) lies and that is emitted from large facilities affecting interstate electricity markets lies at the heart of Congress' regulatory powers, and cooperative federalism arrangements addressing such matters are familiar and constitutionally unproblematic. *See, e.g.*, *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) (upholding provision of the Clean Air Act against Tenth Amendment challenge); *see also New York v. United States*, 505 U.S. 144, 167–68, 173–74 (1992) (affirming that cooperative federalism arrangements do not violate states' sovereign rights). If State Petitioners object to the Clean Power Plan, they can decline to participate and leave regulation of power plants' carbon pollution to EPA. But they cannot leverage their option to participate into a basis for thwarting Congress' command that EPA regulate dangerous emissions from power plants.

C. Peabody's Claims of Harm are Patently Inadequate.

Peabody fails to show that the Clean Power Plan is causing it *any* concrete harm, let alone the type of immediate, extraordinary, and grievous injury that would justify bypassing the statutory review process. Peabody offers

a hodge-podge of allegations that the current market and regulatory conditions affecting the coal industry are somehow attributable to regulatory requirements under the Clean Power Plan that do not take effect until 2022. Nothing Peabody puts forward remotely supports this thesis.[5]

There is no basis for Peabody's assertion (Pet. 24) that the Clean Power Plan will result in the 2016 closure of three units in Texas (the Big Brown plant and two units at the Monticello plant). Peabody's claim is based solely on out-of-date modeling of the *proposed* Clean Power Plan. *See* Tierney Decl. ¶ 24.

Peabody's assertion that the Clean Power Plan is responsible for the closure of Taconite Harbor Energy Center is similarly baseless. Minnesota Power announced its plan to close the Taconite plant before the Clean Power Plan was finalized, and publicly available documents filed with the Minnesota Public Utility Commission indicate that the company's decision was driven by a broad set of considerations. *See* Tierney Decl. ¶ 25. Moreover, the Taconite plant has been a candidate for retirement since well before the Clean Power Plan was proposed, with the company deciding to retire one unit at the plant in 2013 as part of a baseload diversification strategy. *See id.*

[5] Because Peabody fails to identify any concrete, particularized injury that is fairly traceable to the Clean Power Plan, it lacks Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Nor is there any basis for Peabody's assertion (Pet. 24) that the Plan "will force coal-fueled power plants to close (or lock in the closure process) before judicial review is complete." *See* Tierney Decl. ¶ 22 (explaining that "power plant owners need not make final commitments in 2015 and 2016 about how their individual power plants will comply with the Clean Power Plan in 2022").

Neither is there any basis for Peabody's claim (Galli Decl. ¶28) that EPA's unveiling of the Plan damaged the company by causing a $90 million decline in Peabody's stock value on August 3, 2015. *See* Tierney Decl. ¶ 26 (noting that the stock market as a whole lost value that day, that "coal stocks in particular might have been affected by the entirely coincidental bankruptcy declaration of Alpha Resources on the same day," and that Peabody's stock recovered after August 4, 2015).

CONCLUSION

As with any other Clean Air Act rulemaking, interested parties can petition for judicial review of the Clean Power Plan within sixty days from the date it is published in the Federal Register. If a party believes it has grounds for a stay of the rule, notwithstanding the Plan's flexible implementation framework and protracted timeframes for state planning and private-sector compliance, the party will be able to move for a stay at that time. But granting

review of this important rule on the basis of these extraordinary, inaptly-named "emergency" filings would bypass the orderly process Congress established and on which many stakeholders are relying.

Therefore, these petitions should be dismissed or denied.

Respectfully submitted,

/s/ Benjamin Longstreth

Dated: August 31, 2015

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue, N.W.,
Suite 950
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

Tomás Carbonell
Vickie Patton
Environmental Defense Fund
1875 Connecticut Ave. NW,
Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org
vpatton@edf.org
Counsel for Environmental Defense Fund

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont St., Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us
jduffy@catf.us
Counsel for Clean Air Council, Clean Wisconsin, and Conservation Law Foundation

David Doniger
Benjamin Longstreth
David R. Baake
Jared E. Knicley
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 513-6256
ddoninger@nrdc.org
blongstreth@nrdc.org
Counsel for Natural Resources Defense Council

Joanne Spalding
Andres Restrepo
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org
andres.restrepo@sierraclub.org
Counsel for Sierra Club

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org
Counsel for Center for Biological Diversity

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point font and, according to the word-count function in Microsoft Office 2010, is 2,103 words in length.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, the foregoing brief was served upon all registered counsel via the Court's ECF system.

/s/ Benjamin Longstreth

Dated: August 31, 2015

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

IN RE WEST VIRGINIA, et. al.	)	
	)	
Petitioners	)	
	)	Case No. 15-1277, et al.
	)	

On Petition for Extraordinary Writ to the United States Environmental Protection Agency

DECLARATION OF SUSAN F. TIERNEY, Ph.D.

I, Susan F. Tierney, declare as follows:

1. I am a Senior Advisor at Analysis Group Inc., 111 Huntington Avenue, 10th Floor, Boston, Massachusetts, 02199, where I provide policy, economic and strategy consulting in the electric industry. I hold a Ph.D. in Regional Planning (1980) and Masters in Regional Planning (1976) from Cornell University.

2. I have worked for more than thirty years in areas relevant to the agency rulemaking at issue, including as a federal and state official with regulatory and policymaking responsibilities, and as a university professor and consultant. My work has involved implementation of utility and environmental statutes and regulations by state governments; economic

analysis of issues affecting electric utilities, wholesale power markets and consumers' utility rates; reliability of the electric industry; the design of environmental policies to control emissions of air pollutants from the power sector; and the implications of different kinds of regulation for costs to power producers and to consumers.[1]

3. Portions of my declaration are based on my direct experience as a former state cabinet officer responsible for air pollution control and as a former state utility regulator responsible for implementing state and federal statutes and regulations relating to electric utilities and power plants. Among many other things, my state service included: responsibility for development and submission of Massachusetts' State Implementation Plan for ozone, a process which involved working with other state agencies responsible for different elements of the ultimate state plan; working with other states to develop designs for certain air pollution control programs whose impacts affected other states (and vice versa); and reviewing and approving proposals to site utility and non-utility energy infrastructure projects and contracts for power supply.

4. Other portions of my statement are based on my extensive experience as an advisor to a wide variety of parties (including owners of power plants, state

[1] My experience is further discussed in an appendix to this declaration.

government agencies, non-governmental organizations, grid operators, transmission companies, local distribution utilities, and others) on matters relating to utility and air regulation, power plant projects, and the costs, environmental impacts, and reliability of the electric power system.

5. I am supplying this declaration at the request of movant-intervenors Natural Resources Defense Council, Clean Air Council, Center for Biological Diversity, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, and Sierra Club.

6. The purpose of my declaration is to provide information to the court relating to the question of whether states or other parties will suffer irreparable harm absent an emergency stay of the U.S. Environmental Protection Agency's ("EPA") Emission Guideline for carbon-dioxide pollution from existing power plants (known as the Clean Power Plan).[2]

7. In preparation for this declaration, I have reviewed: (a) the Clean Power Plan; (b) the States' Emergency Petition for Extraordinary Writ and the declarations of state officials attached to that petition (the "State Declarants"); and (c) the Emergency Renewed Petition for Extraordinary Writ by Peabody Energy Corporation, along with the declarations attached to

[2] EPA, Clean Power Plan, available at http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf.

it ("Peabody Declarants"). In addition, I have reviewed other documents cited in this declaration.

8. The Clean Power Plan provides each state the opportunity to develop a state plan to implement carbon dioxide emission limits for fossil fuel-fired electric generating units. States are not required to develop state plans. If a state elects not to do so, then Section 111(d) provides for the EPA to regulate fossil-fueled power plants' carbon dioxide emissions in that state directly through a federal plan. At any point, a state can avoid or supplant a federal plan by submitting an approvable state plan. This structure, known as "cooperative federalism," has been a prominent architectural feature of the Clean Air Act since 1970. In most instances, states have elected to develop their own plans. In some situations, EPA has been required to implement a federal plan directly regulating pollutant-emitting sources. Federal plans are superseded when states adopt and submit approvable state plans and EPA approves them, although some states have opted to leave federal plans in place for long periods.

9. For states that elect to develop and submit their own state plans, the Clean Power Plan provides three years to do. Such a state must make an initial submittal by September 6, 2016. I anticipate that some states may submit complete plans by that date. But any state may instead request a two-year

extension, until September 6, 2018, to submit a complete plan. The criteria for an extension are very modest. To request an extension, a state's initial September 2016 submission must include three elements: "[a] An identification of final plan approach or approaches under consideration, including a description of progress made to date. [b] An appropriate explanation for why the state requires additional time to submit a final plan by September 6, 2018. [c] Demonstration or description of opportunity for public comment on the initial submittal and meaningful engagement with stakeholders, including vulnerable communities, during the time in preparation of the initial submittal and plans for engagement during development of the final plan."[3] The Clean Power Plan specifically states: "EPA is not requiring the adoption of any enforceable measures or final decisions in order for the state to address any of the initial submittal components by September 6, 2016."[4] EPA states that it will grant extension requests if these three elements are included. EPA further indicates that states may obtain an extension based on "other appropriate explanations."[5] If EPA does not inform the state within 90 days that it cannot grant the

[3] EPA, Clean Power Plan, page 1009 (footnote omitted).
[4] EPA, Clean Power Plan, page 1011.
[5] EPA, Clean Power Plan, page 1012.

extension, the extension will be deemed automatically approved.[6] As EPA states, the task of providing "an appropriate explanation for an extension is easily achievable by 2016."[7] It is plain that this regime is designed to ensure that any state that desires more time to develop its state plan will be able to secure a two-year extension.

10. The States' Declarations largely overlook that EPA has made it very clear that no state is required to submit anything in September 2016. Nor do they acknowledge that no state must make binding commitments or adopt regulations or legislation in its September 2016 initial submission, if the state chooses to submit one.

11. The actions required by September 2016 to secure the full three-year period to prepare a state plan are minimal and uncomplicated. Principally, the state need only write a description of the process it is undertaking and the options it is considering after seeking stakeholder and public input. A state may indicate that it is considering more than one implementation approach. The state may cite a wide variety of reasons for requesting the extension, including the very factors cited now by State Declarants, such as the need to

[6] EPA, Clean Power Plan, page 1022.
[7] EPA, Clean Power Plan, page 1012.

perform analyses, conduct further stakeholder discussions, or design and draft needed regulations or legislation.

12. From my experience as a senior environmental and energy official in both state and federal government agencies, I observe that every state has extensive experience conducting public processes and seeking public comment on proposed actions, including sponsoring formal stakeholder meetings, holding public hearings, and soliciting written comments. Given that experience, the requirement to engage the public as states begin to evaluate their options will not be burdensome.

13. In short, the contents of a state's request by September 2016 for a two-year extension are quite minimal. And EPA's approval process for such extensions is expressly designed to be efficient and rapid. As noted, if a state has not heard otherwise within 90 days, its filing will be deemed approved.

14. Furthermore, a state is free to decide to do nothing – not even to ask for a two-year extension – and to make no filing at all by September 2016. In such a case, the responsibility for limiting the carbon dioxide emissions of power plants in that state will rest with the EPA under a federal plan. The Clean Power Plan indicates that a federal plan will be issued within twelve months after a state fails to make a required submission. As noted, any state that

does not submit a plan or extension request may at any later point submit an approvable plan, which would supersede the federal plan once approved.

15. The State Declarants generally overstate the complexity entailed in developing final state plans by 2018. First, the State Declarants appear to base their comments principally on EPA's June 2014 proposed rule, not the final Clean Power Plan. The final Clean Power Plan clarifies and simplifies the options available to the states, and provides detailed guidance to assist the states in crafting approvable plans. Among other things, the analytic and regulatory steps associated with developing state plans are much more straightforward and less complex under the final Clean Power Plan than as portrayed by many of the State Declarants. For instance the final Clean Power Plan makes it much easier for states to adopt cost-reducing approaches, such as emissions-trading among power plants in different states with compatible plans, without the need for states to negotiate any interstate agreements. In addition, EPA has proposed detailed draft model state plans along with the Clean Power Plan, which – once finalized – will greatly assist the states in crafting approvable plans. Such clarifications are directly responsive to concerns similar to those in the State Declarations that were expressed by states and others during the comment period on EPA's proposed rule.

16. Contrary to assertions by the State Declarants, the option of using emissions-trading mechanisms for power plants to comply with their emission limits is hardly unorthodox or unfamiliar to state officials. Since 1990, Title IV of the Clean Air Act has required power plants that emit sulfur dioxide (i.e., coal-fired power plants and oil-fired power plants) to comply with a national emissions-trading programs to control this pollutant in a cost-efficient, market-based manner that allows some power plants to emit above their nominal emission limits by buying credits from companies that emit below those limits. Under EPA's Cross-State Air Pollution Rule, twenty-seven states in the Eastern United States are using similar emissions trading programs to limit sulfur dioxide and nitrogen oxide emissions from fossil fuel-fired power plants. Existing emissions-trading programs include mechanisms to credit a variety of activities that reduce emissions from fossil fuel-fired power plants, such as end-use energy efficiency measures. Such approaches operate seamlessly in the daily operations of power plants and power markets and do not raise operational or reliability issues. All states have the ability under the Clean Power Plan to adopt an approach that allows power plants to engage in emissions trading with power plants in other states.

17. Contrary to suggestions by some of the State Declarants, the final Clean Power Plan provides mechanisms that support reliable electric operations

through, among other things, its inclusion of a "reliability safety valve," which EPA believes will only be needed in extraordinary circumstances – a conclusion with which I concur, after performing various studies on these reliability issues.[8]

18. The State Declarants acknowledge, indirectly, that states are not starting from scratch. For one thing, EPA's original June 2014 proposal served to alert the states of the upcoming final rule. The states' extensive comments provided insights that EPA has said were helpful and were taken into consideration as EPA revised the proposed rule and issued the final one. I have personally participated in and am aware of substantial conversations, meetings, analyses, studies, and stakeholder meetings in various parts of the country and in national meetings and industry forums about the Clean Power Plan during the past year. Many states with power plants that participate in regional, multi-state markets (e.g., Indiana, West Virginia, Wisconsin, Ohio, Kentucky) have existing organizations (e.g., the Organization of PJM States;

[8] Susan Tierney, Paul Hibbard and Craig Aubuchon, " Electric System Reliability and EPA's Clean Power Plan: Tools and Practices," February, 2015; Susan Tierney, Paul Hibbard and Craig Aubuchon, "Electric System Reliability and EPA's Clean Power Plan: The Case of PJM," March 16, 2015; Susan Tierney, Eric Svenson, and Brian Parsons, " Ensuring Electric Grid Reliability Under the Clean Power Plan: Addressing Key Themes from the FERC Technical Conferences," April 2015; Susan Tierney, Paul Hibbard and Craig Aubuchon, "Electric System Reliability and EPA's Clean Power Plan: The Case of MISO," June 8, 2015.

the Organization of MISO States) which facilitate interstate collaboration, discussions, education, advocacy, and so forth. Other states (e.g., Western states; the Midwest States Energy and Environmental Regulators group) have begun to confer in ad-hoc meeting groups to understand the options available to them. In short, the states are well positioned to file a simple extension request, if needed, by September 2016 and to develop final plans by 2018.

19. Several State Declarants make assertions about various aspects of the power system that they believe renders the Clean Power Plan harmful. These concerns relate to the period well beyond 2018, and are not grounded in facts. For example, the Kansas declaration states that there are a "limited number of viable sites for wind energy development in Kansas."[9] This assertion is inconsistent with the wind resource data from the U.S. Department of Energy's National Renewable Energy Laboratory ("NREL"), which indicates substantial wind resources exist across nearly the entire state of Kansas, even taking many land use restrictions into account.[10] The

[9] Declaration of Thomas Gross, Chief of the Monitoring and Planning Section, Kansas Department of Health and Environment Bureau of Air Quality, pages 3-4.
[10] U.S. Department of Energy, WINDExchange: Kansas Wind Resources Map and Potential Wind Capacity, http://apps2.eere.energy.gov/wind/windexchange/wind_resource_maps.asp?stateab=ks; U.S. Department of Energy, National Renewable Energy Laboratory, Estimates of Land Area and Wind Energy Potential, by State (Feb. 2015),

Wisconsin declaration asserts that the Clean Power Plan will introduce electric-system reliability challenges associated with integrating renewable energy facilities.[11] This statement is inconsistent with the literature as well as the empirical experience of the many states and regional grid operators (including in the mid-continent portion of the U.S.) that have already introduced significant wind generating capacity.[12] The Indiana declaration states that the timeline for bringing renewable resources on line is too long to meet the Clean Power Plan requirements.[13] This assertion is inconsistent with actual project experience around the country in which wind and solar projects have come on line in time periods as short as two to three years and well shorter than many large-scale fossil energy projects.[14]

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http://apps2.eere.energy.gov/wind/windexchange/docs/wind_potential_80m_110m_140m_35percent.xlsx.

[11] Declaration of Ellen Nowak, Chair, Public Service Commission of Wisconsin, pages 7-10.

[12] Nivad Navid, Midwest ISO, Multi-faceted Solution for Managing Flexibility with High Penetration of Renewable Resources, available at http://www.ferc.gov/CalendarFiles/20140411130433-T1-A%20-%20Navid.pdf.

[13] Declaration of Thomas W. Easterly, Commissioner, Indiana Department of Environmental Management, page 6-7.

[14] See, e.g., Iowa Energy Center, MidAmerican Energy announces 5 new Iowa wind farms (Aug. 13, 2013), http://www.iowaenergycenter.org/2013/08/midamerican-energy-announces-5-new-iowa-wind-farms/; U.S. Energy Information Administration, *Renewable Electricity Production Grows in Texas*, Today in Energy (Dec. 2, 2013), http://www.eia.gov/todayinenergy/detail.cfm?id=13991.

20. The Peabody Declarants fail to show that the Clean Power Plan is currently causing or about to cause the irreparable harms they claim. To illustrate the weakness of these claims, I respond below to several of the statements in the declaration by Peabody executive Mr. Galli.[15] As a general matter, it is important to emphasize that the Clean Power Plan does not go into effect for seven years, in 2022. No existing coal-fired power plants will be required to meet carbon pollution emission standards until that time. Mr. Galli greatly overstates the effect of the 2022 standards on near-term demand for coal.

21. Mr. Galli implies that the Clean Power Plan will require a new and unprecedented resource planning process.[16] Mr. Galli fails to acknowledge that utilities and other grid operators undertake continuous planning activities to ensure grid reliability. This is true under many states' own resource-planning processes for electric utilities as well as regulatory policies of the Federal Energy Regulatory Commission (e.g., FERC Order 1000, which requires transmission planning by all transmission owners and with stakeholders on their system (e.g., utility and non-utility owners of power plants)). Owners of power plants do not need to start from scratch to plan for changes in the electricity system. Various parties (including grid operators,

[15] Declaration of Mr. Bryan A. Galli, Group Executive Marketing & Trading of Peabody Energy Corporation (hereafter "Galli Declaration (Peabody)").
[16] Galli Declaration (Peabody), page 3.

utility companies, project developers, others) are constantly looking forward and undertaking planning and other actions, in light of changing economic conditions (e.g., fuel costs). Even if some infrastructure (e.g., some wholly new transmission lines) requires multiple years to construct, there are numerous options to reduce pollution at high-emitting power plants (e.g., through increasing output at under-utilized generating capacity at existing power plants, developing new peaking power plants, adding 'demand-response' resources, installing solar panels) that do not require long lead times. Many options (e.g., emission trading) might not necessitate construction of any new infrastructure, at all. A state's planning process and the industry's own planning will not be harmed if the rule is not stayed. Those can continue.

22. Furthermore, contrary to Mr. Galli's assertions, power plant owners need not make final commitments in 2015 and 2016 about how their individual power plants will comply with the Clean Power Plan in 2022.[17] The Clean Power Plan provides states with flexibility to choose among multiple approaches to structuring state plans. The owner of a power plant (or multiple power plants) can participate in its state's (or states') stakeholder processes, weigh in on its preferred approach(es), monitor the discussions, and begin to

[17] Galli Declaration (Peabody), pages 3-4.

understand its options. Mr. Galli and some State Declarants express a misplaced concern that the lead time required for some compliance pathways, such as the construction of wholly new plants, could force them to make irrevocable commitments in 2016. Their concern is misplaced: first, because they are overstating the reasonable lead times and understating the amount of flexibility that is available; and second, because the Clean Power Plan allows power plant owners many other compliance options with even shorter lead times. These include, but are not limited to, complying by accessing markets for emissions credits or allowances. In short, there is ample time for state plan development through 2018, and no one will be forced to make decisions in 2016 that amount to irreparable harm from the Clean Power Plan. Indeed, many power plant owners will find it advantageous to wait until states have determined the architecture of their plans before making compliance decisions. They will have ample time after that to make and implement those compliance decisions given the 2022 start date, the possibility to allow averaging of emissions across years, and the gradual nature of the required emissions reductions.

23. Mr. Galli's statements that the Clean Power Plan is already causing retirements of coal-fired power plants have no factual basis.[18] His declaration does not acknowledge the well-documented conditions that have existed in the electric industry since 2007-2008 as a result of fundamental changes in energy markets and the electric sector. The "shale gas revolution" has resulted in low natural gas prices, providing significant cost advantages for power plants that operate on natural gas relative to many coal-fired power plants. This has caused power companies and grid operators to dispatch gas-fired power plants ahead of coal-fired power plants.[19] Further, relatively flat electricity demand and the introduction of increasing amounts of renewable energy over the last decade (in part driven by state policies) have also led to decreased coal generation. Many of the coal plants that have retired in recent years are very old and relatively inefficient. These factors are substantially responsible for the reduced utilization and retirement of coal-fired power plants that has occurred over this period and that is projected to continue over the next year (the period of this litigation). These recent and current events

[18] Galli Declaration (Peabody), page 3 and generally.

[19] See, e.g., U.S. Energy Information Administration, *Scheduled 2015 Capacity Additions Mostly Wind and Natural Gas; Retirements Mostly Coal*, Today in Energy (Mar. 10, 2015), http://www.eia.gov/todayinenergy/detail.cfm?id=20292&src=email; Susan Tierney, "Why Coal Plants Retire: Power Market Fundamentals as of 2012," February 16, 2012.

cannot be causally linked to the Clean Power Plan, given that its first compliance deadline does not come until 2022, and plant-specific emission limits have not even been set yet in state or federal plans.

24. For example, Mr. Galli errs in stating that "EPA expects its plan will cause the 2016 closure of the Big Brown Plant in Fairfield Texas" and "the 2016 partial closure of two [electric generating units] at the Monticello plant in Mount Pleasant, Texas."[20] Mr. Galli fails to mention that these power plants have been at risk of retirement for several years. Mr. Galli cites EPA modeling results pertaining to the *proposed* Clean Power Plan released in June 2014 and ignores the fact that the final Clean Power Plan made significant changes including moving the first compliance deadline to 2022 (as compared with 2020 in the proposal) and phasing in emission limitations more gradually in the subsequent years, compared to the proposal. EPA explicitly states that modeling relating to the final rule should not be used to identify plant-specific impacts because that modeling is only illustrative.[21] Actual impacts on specific plants cannot be known until final plans are submitted and after the affected power plant owners and other market

[20] Galli Declaration (Peabody), page 8.
[21] EPA, Clean Power Plan, pages 91-98, 1379-80.

participants respond to those plans in light of the then-current outlook for energy prices, technology costs and other market-driven factors.

25. Mr. Galli also incorrectly asserts that utilities are already making irreversible and significant decisions to comply with the Final Rule and cites the July 2015 announcement by Minnesota Power to indefinitely suspend its Taconite Harbor Energy Center plant in third quarter 2016 and retire it in 2020.[22] Other documents, however, filed before the Minnesota Public Utility Commission by the utility itself and by state agencies from as early as 2010 indicate that the company's decision was the result of a much broader set of considerations, that the Taconite power plant has been a potential candidate for retirement long before the Clean Power Plan was even proposed (with one unit at that facility having already retired), and that the company's decision is part of a larger company strategy to reduce its reliance on coal-fired generation.[23]

26. Additionally, Mr. Galli errs in assigning the Clean Power Plan responsibility for the changes in Peabody's stock prices and market capitalization from the day before August 3rd (the day the Clean Power Plan became public) to

[22] Galli Declaration (Peabody), pages 6-7.
[23] See: Minnesota Power, *EnergyForward*, http://www.mnpower.com/EnergyForward.

August 4th.[24] He neglects to note that there had been a relatively steady decline in Peabody's stock price for quite some time, or that the overall stock market dropped on that day, or that Peabody's stock price increased after August 4th, or that coal stocks might have been affected by the entirely coincidental bankruptcy declaration of Alpha Natural Resources, Inc. (a major coal producer), on August 3rd.[25] Without a specific event study or other analysis to understand these and other factors, there is no basis to claim a causal relationship between the Clean Power Plan and the transitory change in Peabody stock price between August 3rd and August 4th 2015.

27. The economic studies described by Mr. Galli[26] also provide no valid basis for conclusions about the impacts of the Clean Power Plan, especially regarding whether there will be impacts (positive or negative) in the upcoming three years. Neither the IHS study nor the EVA studies – the studies Mr. Galli cites – address costs incurred in the years between the finalization of the Clean Power Plan and the date when it requires emission reductions at fossil-fueled power plants. The IHS study was prepared before the *proposed* Clean

[24] Galli Declaration (Peabody), page 12.
[25] Matt Jarzemsky & Joseph Checkler, *Alpha Natural Resources Files for Chapter 11*, Wall Street Journal, Aug. 3, 2015, available at http://www.wsj.com/articles/alpha-natural-resources-to-seek-chapter-11-1438557901.
[26] Galli Declaration (Peabody), pages 13-14.

Power Plan was even released, and its modeling assumed an emission-reduction program substantially more stringent than the final Clean Power Plan that would have taken effect four years earlier. The EVA studies are based on the proposed Clean Power Plan, and do not take account of the multiple changes that EPA made in the final rule in response to comments. Further, both the IHS and EVA studies base their analyses on a narrow set of technologies and options that states and the industry might rely upon, and misstate costs as a result. The EVA study does not even focus only on the incremental impacts of the proposed rule, but rather includes other programs as well (e.g., other environmental regulations that are separate from the Clean Power Plan and that do not incorporate the flexibility that it allows for cost-effective compliance by states and power plants). Finally, the studies' methodologies focus only on potential costs of the proposed rule over its entire life, and do not address the potential benefits of implementing the Clean Power Plan. Over the life of the Clean Power Plan, such impacts could include: significant public health benefits related to lower ground level air pollution from reduced power production at certain power plants; and positive job impacts resulting from changes in fuel production and new power plant construction. EPA's economic analysis of the final rule concluded that as the Clean Power Plan goes into effect, it will have net

positive benefits amounting to billions of dollars per year, taking the quantifiable public health and climate protection benefits into account.[27]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 31st day of August, 2015, in Boston, Massachusetts.

Susan F. Tierney

[27] EPA, Clean Power Plan, pages 92-99.

Appendix

Bio of Susan F. Tierney, Ph.D.

Susan Tierney is a Senior Consultant at Analysis Group, an economic, financial, and business strategy consulting firm with more than 600 professionals, with offices in Boston and 10 other cities in the U.S., Canada and China. She is the lead consultant for many of Analysis Group's engagements relating to the electric and natural gas industries.

Over her 30+-year career as a regulator, policymaker, university professor, consultant, and expert witness, she has been directly involved in issues relevant to this matter; implementing utility and environmental statutes and regulation; economic analysis of issues affecting electric utilities, wholesale power markets and consumers' utility rates; the design of environmental policies to control emissions of air pollutants from the power sector and the implications of different policy designs for costs to power producers and to consumers.

She previously served as the Assistant Secretary for Policy at the U.S. Department of Energy, a Presidential appointment subject to Senate confirmation. Before that, she held senior positions in the Massachusetts state government as: Secretary of Environmental Affairs (a cabinet officer reporting to the Governor); Commissioner of the Department of Public Utilities; Executive Director of the Energy Facilities Siting Council; and Senior Economist for the Executive Office of Energy Resources. When she was in state government, she was a member of the EPA Clean Air Act Advisory Committee and a founding member of the Ozone Transport Commission. In those positions she has had direct experience in planning for, designing and implementing state and federal energy, utility-regulatory and air, water and waste-management statutes and regulations. She was appointed to those positions by elected officials from both political parties.

Prior to her work in state and federal government, she was an assistant professor for 3.5 years at the University of California at Irvine. Five years ago, she taught a course at the Massachusetts Institute of Technology. Over the past two decades, she has lectured at the law schools and graduate schools of numerous universities, including Harvard University, Yale University, MIT, New York University, Tufts University, Northwestern University, and University of Michigan.

She holds a Ph.D. in regional planning (1980) and a Masters in Regional Planning (1976), both from Cornell University. She has authored numerous articles, reports and analyses; spoken frequently at industry conferences; and served on a number of boards of directors of private corporations and non-governmental organizations. She currently chairs the External Advisory Council of the National Renewable Energy Laboratory. She was a member of the Secretary of Energy's Advisory Board, and has recently been appointed to serve on another Department of Energy federal advisory committee (the Electricity Advisory Board). She has served on several National Academy of Sciences expert panels relating to energy industries; and was the co-lead author of the energy chapter of the National Climate Assessment. She has previously testified before utility regulatory agencies in many states, the Federal Energy Regulatory Commission, the U.S. Congress, state legislatures, arbitration panels, and federal and state courts.