

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

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

Case No. 14-1146

**PETITIONERS' FILING OF THE UNDERLYING AGENCY DECISION  
FROM WHICH THE PETITION ARISES**

Petitioners attach hereto a copy of the Environmental Protection Agency's Settlement Agreement, No. EPA-HQ-OGC-2010-1057-0002, and the Agency's approval of the same, No. EPA-HQ-OGC-2010-1057-0036, which comprises the basis of the Petition.

Dated: September 3, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 3rd day of September, 2014, a copy of the foregoing *Petitioners' Filing of the Underlying Agency Decision From Which the Petition Arises* was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elbert Lin

Elbert Lin

### **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners:

(1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District



of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the

Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1

through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).


8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the

date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

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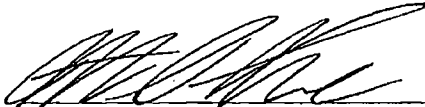
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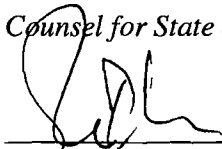
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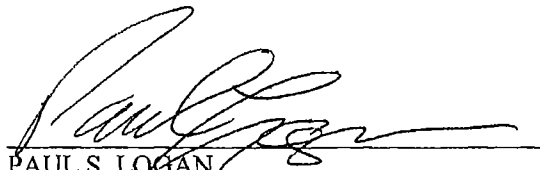
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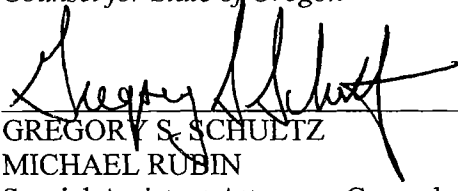
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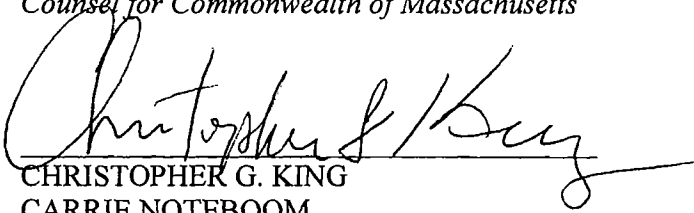
*Counsel for District of Columbia*

DATE: \_\_\_\_\_

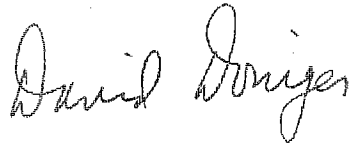
\_\_\_\_\_  
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*Counsel for Environmental Defense Fund*



FEB 28 2011

OFFICE OF  
GENERAL COUNSEL**MEMORANDUM**

**SUBJECT:** Approval of Settlement Agreement Resolving Potential Litigation concerning NSPS Rule regulating Greenhouse Gas Emissions from Electric Generating Units (EGU GHG NSPS Rule)

**FROM:** Scott Jordan, Attorney *SJ*  
Air and Radiation Law Office

**THRU:** Richard B. Ossias, *Ro*  
Associate General Counsel  
Air and Radiation Law Office

**TO:** Scott C. Fulton  
General Counsel

**Background**

On December 30, 2010, EPA published notice of a proposed settlement agreement to resolve threatened litigation over EPA's failure to respond to a remand in State of New York v EPA, No. 06-1322 (D.C.Cir.) which EPA took in 2007 to reexamine the issue of whether the New Source Performance Standard (NSPS) under Clean Air Act (CAA) section 111 for electric utility steam generating units (EGUs) should include standards of performance for greenhouse gases (GHGs). Under the terms of the proposed settlement agreement, EPA is required to sign a proposed rule by July 26, 2011 that includes (A) standards of performance under CAA section 111(b) for GHGs for new and modified EGUs that are subject to 40 CFR part 60, subpart Da, and (B) emissions guidelines under CAA section 111(d) for GHGs from existing EGUs that would have been subject to 40 CFR part 60, subpart Da if they were new sources. EPA is required to sign a final rule by May 26, 2012 that includes final determinations with regard to each of the elements in the proposed rule.

As required by CAA section 113(g), EPA published a notice in the Federal Register to afford persons not named as parties or intervenors in the case an opportunity to comment on the proposed settlement agreement (75 Fed. Reg. 82392 (December 30, 2010)). The Agency

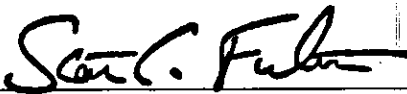
received a total of 28 comments from various regulated entities and industry groups, state environmental agencies, environmental groups and individuals, and the Small Business administration Office of Advocacy (SBA).

Eight of the comments supported the settlement and urged EPA to act promptly to regulate GHGs from EGUs. The remaining comments opposed the settlement. Generally, the adverse comments asserted that the proposed deadlines do not provide sufficient time for EPA to conduct a thorough and reasoned rulemaking and to comply with various requirements for conducting the rulemaking. Under CAA section 113(g), if the comments disclose facts or considerations that indicate that consent to the settlement agreement would be inappropriate, improper, inadequate, or inconsistent with the Act, EPA or the Department of Justice may withdraw or withhold consent to the settlement agreement. We do not believe that the comments received disclose facts or considerations which indicate that consent is inappropriate, improper, inadequate, or inconsistent with the Act. We therefore recommend that you concur with finalizing this settlement.

#### RECOMMENDATION

We recommend that you concur in the Settlement Agreement in this case.

APPROVED:

  
\_\_\_\_\_  
Scott C. Fulton, General Counsel

DISAPPROVED:

\_\_\_\_\_  
Scott C. Fulton, General Counsel

DATE:

3/2/11