

Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule,” 80 Fed. Reg. 64510 (Oct. 23, 2015) (the “111(b) Rule”). The Rule sets carbon dioxide (“CO₂”) emission standards for certain types of new electric generating plants, as well as standards for what are known as “modified” and “reconstructed” electric generating units.

North Dakota is making this separate submission for two reasons: first, North Dakota understands the other State petitioners collectively will be submitting a proposal to file joint opening and reply briefs on their behalf, but those States have asserted to North Dakota that “irreconcilable differences” preclude North Dakota’s participating in those briefs; and second, as a result of North Dakota’s abundant lignite coal reserves and heavy reliance on lignite-fueled electricity generation, North Dakota has a strong interest in the full and fair presentation of particular legal arguments and factual background pertaining to lignite coal and North Dakota’s unique statutory and strong policy support for the current and future lignite industry in the State.

North Dakota’s proposal below is fully consistent with the briefing proposal to be filed today by the non-state petitioners and petitioner-intervenors (“Non-State Proposal”). North Dakota’s proposal also is not inconsistent with our understanding of what the other State petitioners will propose. The primary purpose of this separate submission is to request and explain the basis for a

separate North Dakota opening brief of 6,000 words, and reply brief of 3,000 words, within the overall total of words being requested by all petitioners and petitioner-intervenors. The overall word total is discussed in the Non-State Proposal.

Consistent with this request by North Dakota for separate briefs, North Dakota endorses the following overall proposal for the schedule and format of briefing in this case which is set forth in the Non-State Proposal:

Document	Due Date	Word Limits
24 State Petitioners' Opening Brief	July 15, 2016	12,000 words
State of North Dakota Petitioner's Opening Brief	July 15, 2016	6,000 words
Non-State Petitioners' Opening Brief(s)	July 15, 2016	24,000 words total, not to exceed two briefs
Petitioner-Intervenors' Opening Brief	July 25, 2016	10,000 words
Amici Briefs in Support of Petitioners	July 25, 2016	To be determined by Court
Respondent EPA's Brief	September 28, 2016	To be determined by Court
Joint Brief(s) of Respondent-Intervenors	October 10, 2016	To be determined by Court
Amici Briefs in Support of Respondents	October 10, 2016	To be determined by Court
State Petitioners' Reply Brief(s)	November 9, 2016	One brief of 6,000 words and one brief of 3,000 words
Non-State Petitioners' Reply Brief(s)	November 9, 2016	12,000 words total, not to exceed two briefs

Document	Due Date	Word Limits
Petitioner-Intervenors' Reply Brief	November 9, 2016	5,000 words
Deferred Joint Appendix	November 23, 2016	N/A
Final Briefs	December 5, 2016	N/A

The rationale and justification for this overall briefing schedule and format are set forth in the Non-State Proposal, and that rationale and justification is endorsed by North Dakota.

Set forth below is the justification for North Dakota's request for separate opening and reply briefs of 6,000 and 3,000 words, respectively.

BACKGROUND

1. North Dakota's Interest In Promoting New Coal-Powered Electric Plants.

North Dakota has a compelling, and in some ways unique interest in successfully challenging the 111(b) Rule at issue in this case because of the State's extremely heavy reliance on lignite coal-fueled electricity generation and the State's explicit statutory and strong policy support for the future development and use of the State's substantial lignite resources. In 2013, the last year data is available from the U.S. Energy Information Administration, coal accounted for 99.4% of the fossil-fuel powered electricity generation in North Dakota. *See* www.eia.gov/electricity/state/NorthDakota (Table 5). Substantially all of that coal

is lignite. Estimates for 2014 and 2015 are virtually the same. North Dakota also has more lignite coal reserves than virtually any other State. Importantly, lignite coal has unique characteristics from other types of coal, and few commercial uses other than as fuel for electric generating plants.

Given North Dakota's abundant lignite resources, the State has a vital interest in developing new lignite-fueled electric generating plants in the future. North Dakota has established a specific goal of developing new electric generating plants in North Dakota capable of generating an additional 3000 megawatts, both to make use of the State's lignite resources and to provide electric power to support development of the State's shale oil resources. These plans for the development of new coal-fired electric generating units are also necessary to assure that low-cost and reliable electricity continues to be available for North Dakota's citizens.

Given the importance of lignite coal in the State, the North Dakota Legislature has a long history of supporting the lignite energy industry, and has enacted legislation which specifically:

. . . declares that it is an essential government function and public purpose to assist with the development . . . of North Dakota's vast lignite resources . . . in order to maintain and enhance development of North Dakota lignite and its products; preserve and create jobs involved in the production and utilization of North Dakota's lignite; ensure economic stability, growth and opportunity in the lignite industry; maintain a stable and competitive tax base for our state's lignite industry; and maintain a stable and competitive tax base for our state's lignite industry for the general welfare of North Dakota.

N.D.C.C. § 54-17.5-01. North Dakota's substantial lignite reserves are also a source of significant State revenue from taxes and lignite mining royalties on State land.

2. EPA's 111(b) Rule Effectively Bans New Coal-Fueled Electric Plants.

Section 111 of the Clean Air Act is designed to be a "technology forcing" provision. Its primary purpose is to encourage the use of the best emissions control technology for new sources. The CO₂ performance rates for new coal-fired electric generating plants which are established by the 111(b) Rule being challenged in this case can only be met, if at all, using carbon dioxide sequestration. However, the feasibility, reliability and safety of that technology has not been established – particularly with respect to lignite coal -- and its cost is exorbitant.

The 111(b) Rule therefore effectively bans the development of new coal-fired electric generating units. That result is both unlawful, because Clean Air Act Section 111(b) does not authorize EPA to ban one category of electric generating plants, and contrary to North Dakota's strong interest in the continued use of its lignite coal resources to fuel new generating plants to provide electricity to its citizens. The effective ban on new lignite-fueled electric generating plants also jeopardizes the significant revenue North Dakota currently receives from lignite mining and related taxes.

There is no question, therefore, that North Dakota has a compelling interest in participating effectively in this case to challenge the 111(b) Rule and its effective ban on new coal-fueled electric generating plants. North Dakota also has a particular interest in participating in the presentation of legal and record-based arguments pertaining to lignite coal – for example, that section 111(b) required EPA to address, through the subcategorization of different coal types, technical matters pertaining specifically to new lignite-fueled plants, like the feasibility of using carbon dioxide sequestration at such plants. *See* Clean Air Act 111(b)(2) (EPA “may distinguish among classes, types and sizes within categories”). EPA did establish a lignite subcategory in its Mercury and Air Toxics Standards Rule under section 112 of the Clean Air Act, *see* 77 Fed. Reg. 9,304, 9,379 (Feb. 16, 2012), but did not do so in the 111(b) Rule challenged here.

DISCUSSION

North Dakota seeks to file separate opening and reply briefs, of 6,000 and 3,000 words respectively, because absent permission to do so North Dakota will be unable to participate meaningfully in this case or to present the Court with significant legal and record-based arguments pertaining to lignite coal and North Dakota’s strong interest in the future development of new lignite coal-fueled plants.

North Dakota Cannot Join Any Other Brief

Despite extensive and diligent discussions with the other State petitioners, those State petitioners have asserted “irreconcilable conflicts” with North Dakota that preclude North Dakota from participating meaningfully in the separate briefing that those States collectively are requesting to file. North Dakota is notably excluded from the separate briefing proposal being filed today by those other States, and has no expectation that that it can participate in the development of, or join, the briefs to be filed by those other States. Nor is there any realistic possibility that North Dakota can join a brief filed by any other (non-state) petitioner, given the distinctions between North Dakota’s sovereign interests and the issues those petitioners intend to focus on as discussed in the Non-State Proposal.

Accordingly, absent the separate briefs that North Dakota is requesting here, North Dakota will be unable to participate at all in the briefing of this case. That clearly is both unreasonable and unfair, particularly given that North Dakota is the lead named petitioner in this case.

North Dakota’s Separate Briefs Will Present Distinctive And Unique Arguments Pertaining to Lignite Coal-Fueled Electric Generating Plants

Because of the importance of lignite coal to North Dakota, and the importance to the State of developing new lignite-fueled electric generating plants, allowing North Dakota to submit the separate briefs it is requesting will provide a

vehicle for presentation to the Court of important arguments pertaining to lignite coal that may not be presented, or not be as fully developed, in briefs submitted by other parties. Where coal-fuel electric power is concerned, North Dakota has no significant interest *other than* its interest in lignite and the future development and use of the State's lignite resources, including in new coal-fueled electric generating plants. North Dakota's separate briefing can therefore be counted on to present lignite-specific arguments with particular force and clarity.

Finally, while the special characteristics of lignite coal give rise to some purely legal arguments, many of the lignite-based arguments that North Dakota will make are record-intensive and will depend upon the detailed technical record developed in the rulemaking. North Dakota believes that 6,000 words is the minimum number necessary to address the issues of importance to North Dakota and allow the State to have a meaningful role in the briefing of this case.

CONCLUSION

For the foregoing reasons, North Dakota respectfully requests that the Court 1) allow North Dakota to submit a separate opening brief of 6,000 words and brief of 3,000 words, and 2) otherwise adopt the briefing schedule and format proposal set forth in the Non-State Proposal being filed today.

Respectfully submitted,

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February 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioner's Proposed Briefing Format and Schedule have been served through the Court's CM/ECF system on all registered counsel this 22nd day of February 2016.

/s/ Paul M. Seby

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