NO. 15A_____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF NORTH DAKOTA,

Applicant,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

APPLICATION BY THE STATE OF NORTH DAKOTA FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING APPELLATE REVIEW

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

North Dakota respectfully requests an immediate stay of the final rule of the United States Environmental Protection Agency ("EPA") entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) ("Existing Source Rule" or "Rule"). North Dakota sought a stay of the Rule, also known as EPA's "Clean Power Plan" ("Power Plan"), from the D.C. Circuit, but its motion for a stay was denied on January 21, 2016, together with the stay motions filed by other states and parties.

INTRODUCTION

Like the other states seeking comparable relief, North Dakota requests a stay of the Existing Source Rule in order to preserve the status quo and halt the ongoing irreparable harm the Rule is causing to North Dakota's several sovereign and financial interests. As a major energy producing state (from significant lignite coal, oil, natural gas, and wind resources), North Dakota has an unmistakable sovereign interest in regulating such resources and their use. In fact, the North Dakota legislature has declared it to be an essential government function and public purpose to foster and encourage the wise use and development of North Dakota's vast lignite coal resources to maintain and enhance the economic and general welfare of North Dakota. N.D. CENT. CODE § 54-17.5-01.

The Existing Source Rule, in an affront to North Dakota's sovereign interests, imposes a particularly stringent compliance requirement on the State because of its development and use of its own lignite coal resources. EPA's Rule requires North Dakota to reduce its carbon dioxide (CO_2) emission rate by 44.9%, more than all but two other states and four times more than the emissions reduction EPA originally would have required for North Dakota in its proposed rule. EPA's draconian mandate, specific to North Dakota, requires a dramatic and immediate shift away from lignite coal-powered electric generating plants in favor of gas-powered plants or renewable sources.

EPA's Rule thus usurps the authority and discretion of North Dakota and its respective agencies responsible for implementing environmental and energy policy. The Rule dictates North Dakota's energy policy, and it dictates a policy that is contrary to North Dakota's statutory support for lignite coal-fueled electricity. Indeed, according to EPA's own modeling, the dramatic emissions reductions the Rule requires will lead to the closure in 2016 and 2018 of specific coal-powered electric generating plants in North Dakota, which in turn will require multiple lignite coal mines in the State to close and at least one mine to severely curtail production. The Rule therefore not only denies North Dakota its sovereign authority to administer energy and environmental policies within its borders, but

also deprives North Dakota of very substantial tax and coal royalty payments, which can never be recovered.

The Existing Source Rule's particularly severe impact on North Dakota's sovereign and financial interests is a classic case of irreparable harm requiring a stay of the Rule during the pendency of this litigation. That many other states are also suffering ongoing irreparable harm from the Rule, as set forth in the stay application filed by 29 states on January 26, 2016 ("Joint State Application"), underscores the need to stay the Rule.

Further, the Rule is contrary to the clear text of the applicable Clean Air Act ("CAA") provision, section 111(d), 42 U.S.C. § 7411(d), as it vastly exceeds EPA's limited authority under that provision. As such, the Rule is likely to come before this Court for review. By establishing federal emissions limits for CO_2 and mandating that North Dakota and other states establish plans to meet those limits, the Rule turns on its head the federal-state relationship that Congress carefully built into the CAA, under which "air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*. 42 U.S.C. § 7401(a)(3) (emphasis added). That principle is expressly reflected in Section 111(d), which provides that states – not the federal government – shall establish performance standards for air pollutants like CO_2. *See id.* § 7411(d) ("[EPA] shall prescribe regulations . . . under which *each State shall* submit to the

Administrator a plan *which (A) establishes standards of performance* for any existing source for any air pollutant. . . .") (emphasis added.) The draconian CO_2 emissions limit that EPA's Existing Source Rule mandates for North Dakota (and each other state) is contrary to that statutory directive.

In addition, the Existing Source Rule disregards Section 111(d)'s requirement that EPA regulations under that provision "shall permit" states to take into consideration the remaining useful life of existing sources. The Rule makes no accommodation for the remaining useful life of existing plants, but rather is completely silent on the subject.

The Existing Source Rule is also invalid for several other reasons. Because those other reasons are well explained in the Joint State Application, and in order to avoid undue repetition, North Dakota does not repeat those reasons in this Application but instead adopts the arguments supporting them set forth in the Joint State Application.

OPINION BELOW

The D.C. Circuit's January 21, 2016, Order denying North Dakota's motion for a stay of the Existing Source Rule (App. A-1) is unpublished.

JURISDICTION

This Court has jurisdiction over this Application pursuant to 28 U.S.C. § 1254(1), and has authority to grant North Dakota relief under the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651 (a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Set forth below is the text of Section 111(d)(1) of the Clean Air Act, 42 U.S.C. § 7411(d)(1), which is the primary provision involved in this Application. All other pertinent constitutional, statutory, and regulatory provisions are reprinted in the Appendix . (App. A-80).

42 U.S.C. § 7411(d)(1):

> **(d) Standards of performance for existing sources; remaining useful life of source**
>
> **(1)** The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

STATEMENT

1. The Clean Air Act "made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). As to stationary sources of emissions, the CAA contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, that are then implemented and administered by the states through State Implementation Plans ("State Plan") prepared by the states. *See generally* 42 U.S.C. § 7410.

CAA § 111(d) is one program that implements this cooperative approach for setting "standards of performance" for certain existing stationary sources of air pollutants. 42 U.S.C. § 7411(d)(1). But unlike other programs under which EPA sets emissions for air pollutants, CAA 111(d) provides for EPA to prescribe regulations which "establish a procedure" for *states* to submit plans that "establish[] standards of performance for [certain] existing source for any air pollutant[s]". . . . *Id.* A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). EPA's regulations must

also permit a state, "in applying a standard of performance to any particular source under a plan," to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1)(B). Only if a state "fails to submit a satisfactory plan," or fails "to enforce the provisions of such plan," may EPA step in and regulate itself by setting and enforcing standards. 42 U.S.C. § 7411(d)(2).

2. Rather than merely establishing a procedure for states to submit plans that establish "standards of performance" for existing coal-fueled power plants under CAA § 111(d), the Existing Source Rule requires North Dakota (under pain of a federal takeover of significant State authority) to submit a State Plan that fundamentally transforms North Dakota's energy economy, in order to substantially reduce North Dakota's usage of coal-fueled electricity. The Rule's requirements for North Dakota are based on three "building blocks":

(Block 1) increasing efficiency at coal-fueled power plants;

(Block 2) shifting statewide demand for coal-fueled power to natural gas generation; and

(Block 3) shifting statewide demand for coal-fueled power to renewable sources. 80 Fed. Reg. at 64,745.

Only the first building block involves imposing emissions control measures on coal-fueled power plants. The remaining building blocks require broad changes away from coal-fueled electricity. 80 Fed. Reg. at 64,745.

By September 6, 2016, North Dakota must submit an initial State Plan that contains: (1) "an identification of final plan approach or approaches under consideration, including a description of progress made"; (2) an acceptable explanation for why the State requires more time to submit a final plan; and (3) demonstration or description of opportunity for public comment on the initial submittal and meaningful engagement with stakeholders. 80 Fed. Reg. at 64,669. As EPA says, the requirements in the Existing Source Rule are intended "to assure that states begin to address the urgent needs for reductions quickly." 80 Fed. Reg. at 64,675. If North Dakota satisfies these EPA requirements, North Dakota will have until September 6, 2018 to submit a final Plan. 80 Fed. Reg. at 64, 669.

3. The Existing Source Rule requires North Dakota to reduce its carbon dioxide emission rate by 44.9%. Glatt Decl. ¶ 6; *see* Christmann Decl. ¶¶ 7-8.[1] EPA projected the impacts of the Rule on power generation, capacity, emissions, and compliance costs using the Integrated Planning Model ("IPM"). Glatt Decl. ¶ 14; Christmann Decl. ¶ 12.

[1] Fact statements in this Application are supported by 10 declarations from various North Dakota officials and others which are included in the Appendix. (App. A-3).

EPA describes its IPM model analysis of the Final Rule as "illustrative" of the impacts of the Final Rule. USEPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE, Table ES-3 at ES-7, http://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf ("RIA"). In the RIA, EPA presented two scenarios designed to achieve compliance with the Final Rule: the "rate-based" illustrative plan and the "mass-based" illustrative plan. These scenarios are designed for each state to comply with the corresponding state limits (rate-based and mass-based) in the Final Rule. USEPA, *Analysis of the Clean Power Plan*, http://www2.epa.gov/airmarkets/analysis-clean-power-plan.

EPA did not run the IPM model for each year, but rather uses individual years to reflect the impacts on individual states in multi-year periods, as stated by EPA in the model documentation:

> Although IPM is capable of representing every individual year in an analysis time horizon, individual years are typically grouped into model run years to increase the speed of modeling. While the model makes decisions only for run years, information on non-run years can be captured by mapping run years to the individual years they represent.[2]

Although not displayed in the RIA, the IPM model also calculated impacts for years prior to 2020 and after 2030. As noted, while EPA only presented the

[2] USEPA, *Documentation for EPA Base Case v.5.13 Using the Integrated Planning Model*, 7-1 (November 2013), http://www.epa.gov/sites/production/files/2015-08/documents/chapter_7_set-up_parameters_and_rules.pdf.

results for the model years 2020, 2025 and 2030 in the RIA, the supporting files available on EPA's website all contain the IPM model results for other model years, including 2016 and 2018.

This analysis by EPA of the impact of the Existing Source Rule shows that several coal-fueled power plants in North Dakota will close immediately in 2016 and 2018 due to the Rule.[3] While EPA did not reveal these immediate impacts in the RIA, EPA's IPM modeling results confirm that the North Dakota's lignite coal-fueled power plant capacity will be lower in 2016 due to the Rule. EPA's results are publicly available and can be found in tables provided on EPA's website.[4] In addition, further information on the specific coal-fueled power plants which EPA projects will close early due to the Rule can be determined from additional IPM model documentation files, which are also available on EPA's website. *See* note 4,*supra; see also* Christmann Decl. ¶ 12.

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[3] The IPM model was run for years 2016 and 2018, but not 2017. The run year 2016 is intended to be representative of 2017 also. EPA, IPM model run files, "Base Case DAT Replacement File.xlx", "Rate-Based DAT.xlsx", and "Mass-Based DAT.xlsx", available at http://www2.epa.gov/airmarkets/analysis-clean-power-plan (follow "IPM Run Name" hyperlinks in chart at the end of the page). *See* note 4, *infra*; *see also* Gaebe Decl. ¶12.

[4] EPA, IPM model documentation and run files, system support resources, "Base Case SSR.xls", "Rate-Based SSR.xls", and "Mass-Based SSR.xls", Summary and Tables 1-16 tabs, available at USEPA, *Analysis of the Clean Power Plan*, http://www2.epa.gov/airmarkets/analysis-clean-power-plan. The Addendum to this Application explains how to access these files to ascertain the plant shutdown dates that EPA has projected.

Although EPA's expectations regarding the closure of coal-fuel power plants in North Dakota are buried deeply in complex "zip" files accessible on EPA's website, *see* note 4, supra; Addendum to this Application, EPA's analysis unmistakably projects the closure in 2016 and 2018 of six coal-fuel power in North Dakota, as discussed further below. Despite this lack of transparency, there is little doubt that EPA will expect North Dakota to comply with the Existing Source Rule by closing coal-fueled plants in the manner EPA has projected.

4. In North Dakota, EPA projects the 427 MW Coyote Station to close in 2016 in its rate-based case. *See* note 4, *supra;* Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. The Coyote Station is the primary customer for the Beulah lignite mine owned by Westmoreland Coal and that mine will also have to close if the Coyote Station is closed in 2016. Binder Decl. ¶ 6. The Beulah mine produced a total of 2,763,576 tons in 2014, Christmann Decl. ¶ 12; Glatt Decl. ¶ 14, of which 2,248,483 tons (81%) were consumed at the Coyote Station. North Dakota Department of Health Air Quality, *2014 Annual Emissions Inventory Report for the Coyote Station*, http://www.ndhealth.gov/AQ/EmissionInventory/AEIR2014/OtterTail-CoyoteStationT5F84011AEIR2014.pdf. The closure of Coyote Station will force the layoff of all of the 80 employees at the mine. *See* Binder Decl. ¶ 6(A);

Christmann Decl. ¶ 12; Glatt Decl. ¶ 14.[5] The EPA scenario also includes the shutdown of Unit 1 at the R.M. Heskett Station in 2016. *See* note 4, *supra;* Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. This unit also consumed 120,991 tons of lignite from the Beulah Mine in 2014. North Dakota Department of Health Air Quality, *2014 Annual Emissions Inventory Report for the R.M. Heskett Station*, http://www.ndhealth.gov/AQ/EmissionInventory/AEIR2014/MDU-Heskett-T5F76001AEIR2014.pdf.

In addition, EPA projects the 250 MW Milton R. Young Station (MRYS) Unit 1 will close in EPA's 2016 base and rate-based cases. *See* note 4, *supra;* Christmann Decl. ¶ 12, Glatt Decl. ¶ 14. MRYS Unit 1 is supplied by the adjacent lignite mine in Center, North Dakota. Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. MRYS Units 1 and 2 are the only customers for the Center mine and the mine will have to cut production significantly if Unit 1 is closed in 2016. Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. The Center mine produced a total of 3,975,634 tons of lignite coalin 2014,[6] of which 1,545,190 tons (39%) were used to fuel the MRYS Unit 1.

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[5] NACCO Industries has won a coal supply contract to replace Beulah mine at Coyote, so one could argue that Beulah will have to forgo that production anyway. However, then the impact of the closure of Coyote plant will fall on the new Coyote Creek mine, which is under construction and already has 52 employees building the mine, so the impact is similar. *See* Neumann Decl. ¶¶ 6-8; Binder Decl. ¶ 6(A).

[6] Mine Yearly Production Information, U.S. DEPT. OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, http://www.msha.gov/drs/drshome.htm (search MSHA

North Dakota Department of Health Air Quality, *2014 Annual Emissions Inventory Report for M.R. Young Station,* http://www.ndhealth.gov/AQ/EmissionInventory/AEIR2014/Minnkota-M.R.YoungStationT5F76009AEIR2014.pdf. The EPA-projected closure of MRYS Unit 1 will force the layoff of approximately 63 of Center Mine's 162 employees.[7]

EPA also projects the closure of the Spiritwood Station in 2016. *See* note 4, *supra;* Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. In 2014, this plant combusted 91,017 tons of lignite from the Falkirk Mine. North Dakota Department of Health Air Quality, *2014 Annual Emissions Inventory Report for the Spiritwood Station*, http://www.ndhealth.gov/Aq/EmissionInventory/AEIR2014/GRE-SpiritwoodStation-PTC07026AEIR2014.pdf.

EPA further projects the 558 MW Coal Creek Station (CCS) Unit 1 in North Dakota will close in 2018 in EPA's rate-based case. *See* note 4, *supra;* Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. CCS is supplied by the adjacent Falkirk lignite mine. Erickson Decl. ¶ 4. CCS Units 1 and 2 and the Spiritwood Station, which as noted above EPA also specifically projects will close, are the only customers for the

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Mine ID for "3200218", then select "Get Report" in Employment/Production Reports for this Mine at end of webpage).

[7] Mine Yearly Production Information, U.S. DEPT. OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, http://www.msha.gov/drs/drshome.htm (search MSHA Mine ID for "3200218", then select "Get Report" in Employment/Production Reports for this Mine at end of webpage).

Falkirk lignite mine, which will have to cut production if Unit 1 is closed in 2018. Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. The Falkirk mine produced a total of 7,985,648 tons in 2014,[8] of which 3,407,090 tons (43%) were combusted at CCS Unit 1. Neumann Decl. ¶ 13. North Dakota Department of Health Air Quality, *2014 Annual Emissions Inventory Report for the Coal Creek Station*, http://www.ndhealth.gov/Aq/EmissionInventory/AEIR2014/GRE-CoalCreekStation-T5F82006AEIR2014.pdf. The closure of CCS Unit 1 will necessarily force the layoff of 207 of its 482 employees. Neumann Decl. ¶ 14.

EPA also projects the closure of Unit 2 at North Dakota's R.M. Heskett Station in 2018. *See* note 4, *supra;* Christmann Decl. ¶ 12; Glatt Decl. ¶ 14. This unit combusted 396,712 tons of lignite from the Beulah Mine in 2014. North Dakota Department of Health Air Quality, *2014 Annual Emissions Inventory Report for the R.M. Heskett Station,* http://www.ndhealth.gov/AQ/EmissionInventory/AEIR2014/MDU-Heskett-T5F76001AEIR2014.pdf.

REASONS FOR GRANTING THE APPLICATION

The Court should stay the Existing Source Rule because it is an unprecedented power grab by EPA that unlawfully impairs North Dakota's several sovereign and financial interests. Under 5 U.S.C. § 705, this Court "may issue all

[8] Mine Yearly Production Information, U.S. DEPT. OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, http://www.msha.gov/drs/drshome.htm (search MSHA Mine ID for "3200491", then select "Get Report" in Employment/Production Reports for this Mine at end of webpage).

necessary and appropriate process to postpone the effective date of an agency action." The Court also has the authority to issue a stay under the All Writs Act. 28 U.S.C. § 1651. And under "well settled" principles, such equitable relief is appropriate here. *See Lucas v. Townsend,* 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). There is "a reasonable probability" that four Justices will eventually vote to review the validity of the Existing Source Rule, a "fair prospect" that a majority of the Court will decide the Rule is invalid and "a likelihood" that irreparable harm will result from denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see Phillip Morris USA Inc. v. Scott,* 131 S.Ct. 1, 2 (2010) (Scalia, J., in Chambers); *Lucas,* 486 U.S. at 1304-05. A stay of the Existing Source Rule, and its overreaching expansion of federal regulatory authority, will "preserve the relative position of the parties" until this litigation is finally resolved. *See Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981).

I. NORTH DAKOTA WILL CONTINUE TO SUFFER IRREPARABLE HARM IF THE EXISTING SOURCE RULE IS NOT STAYED.

The ongoing irreparable harm to North Dakota caused by the Existing Source Rule rests on two independent bases: (1) the Rule deprives North Dakota of its sovereign authority, interests, and policies, and deprivation of these interests during the pendency of this action is irreparable; (2) the Rule is causing economic loss to North Dakota's budget in current and future budget years, and even if it is

successful on the merits of its challenge to the Rule, North Dakota will not be able to recover economic damages from the federal government.

First, the Existing Source Rule runs roughshod over North Dakota's sovereign interests in administering its own comprehensive regulatory programs governing air quality, public utility regulation and energy generation and use within its borders. When a federal agency "use[s] the States as implements of regulation," it infringes upon state sovereignty, *New York v. United States,* 505 U.S. 144, 161 (1992), which constitutes irreparable harm. *See Maryland v. King,* 133 S. Ct. 1, 3 (2012) (Roberts, J, in chambers); *New Motor Vehicle Bd. Of Cal. v. Orrin W. Fox Co.* 434 U.S. 1345, 1352 (1977) (Rehnquist, J., in chambers). That is particularly true here, because the Existing Source Rule intrudes on North Dakota's "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pac. Gas & Elec. Co. v., State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 212 (1983); *see Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (when a federal agency's action places a state's "sovereign interests and public policies at stake, . . . the harm the State stands to suffer is irreparable if [it is] deprived of those interests without first having a full and fair opportunity to be heard on the merits.").

The North Dakota Department of Health (NDDH) is the agency charged with implementing and enforcing North Dakota's laws and regulations implementing North Dakota's Air Quality Control Act and the federal CAA. Glatt Decl. ¶ 3. Specifically, the NDDH oversees programs to implement New Source Performance Standards (NSPS) and the State's permitting programs for stationary sources under Titles I and V of the CAA. *Id*. at ¶ 3; s*ee also United States v. Minnkota Power Coop., Inc.*, 831 F. Supp. 2d 1109 (D. N.D. 2011).

Even if EPA has authority to issue CAA § 111(d) regulations pertaining to CO_2 emissions from coal-fueled electric generating units, the Existing Source Rule impermissibly intrudes on North Dakota's express authority under CAA § 111(d) to "establish" standards of performance. Under CAA § 111(d), EPA's authority is limited to adopting a "procedure" under which "each State shall submit to the Administrator a plan which (A) establishes standards of performance. . . ." The Rule usurps North Dakota's authority to "establish" performance standards by dictating what the standards must be. Glatt Decl. ¶¶ 6-9. Additionally, the Rule prevents North Dakota from, as provided in CAA § 111(d)(1)(B), considering "the remaining useful life of the existing source" to which a performance standard applies, standards which EPA has set specifically for North Dakota. Glatt Decl. ¶ 9. Remaining useful plant life is irrelevant under the Rule if closing a particular plant is necessary to meet EPA's prescribed emissions standard. The Rule will

also interfere with North Dakota's significant and ongoing air quality improvement efforts. Helms Decl. ¶¶ 11-14.

Further, the Existing Source Rule infringes upon North Dakota's sovereign authority over intrastate energy production and consumption. Christmann Decl. ¶¶ 16-17; Hamman Decl. ¶¶ 13-14. The North Dakota Public Service Commission (Commission) is a state agency created by the North Dakota Constitution to regulate and oversee intrastate energy production and consumption. N.D. Const. art. 5, § 2. The specific authority of the Commission is set forth in the North Dakota Century Code § 49-01, *et seq*. The North Dakota Transmission Authority was created by the North Dakota legislature and its purpose and authority are set forth in North Dakota Century Code § 17-05 *et seq*. Hamman Decl. ¶¶ 4-6 North Dakota's authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 377 (1983). Congress recognized State authority over these "important functions" in the Federal Power Act ("FPA"), which confines federal authority over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a); *see also id.* § 824(b)(1). The FPA and other federal energy statutes respect the States' "traditional responsibility in the field of

regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co.*, 461 U.S. at 205 ; *cf.* 16 U.S.C. § 808(d)(2)(A).

Absent a stay, North Dakota will be irreparably injured by EPA's abrogation of North Dakota's cooperative-federalism rights under both the CAA and the FPA. *See New Motor Vehicle Bd.,* 434 U.S. at1351 (a State's interest "is infringed by the very fact that the state is prevented from engaging in" its regulatory process); *see California State Bd. of Optometry v. FTC,* No. 89-1190, 1989 U.S. App. LEXIS 16067, at *1 (D.C. Cir. Aug. 15, 2009) ("'[A]ny time a state is enjoined from effectuating statutes enacted by representatives of the people, it suffers … irreparable injury.'").

Second, the Existing Source Rule has irreparable and far-reaching consequences on North Dakota's economic interests in the form of substantially decreased revenues. Schmidt Decl. ¶¶ 13-14; Rauschenberger Decl. ¶ 11-12; Gaebe Decl. ¶ 13. While economic loss—on its own—does not ordinarily constitute irreparable harm, "that is because money can usually be recovered. . . . [But if] expenditures cannot be recouped, the resulting loss may be irreparable." *Phillip Morris,* 131 S.Ct. at 2 (Scalia, J., in chambers); *see Mori v. Int'l Bhd. Of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers). In the same vein, lower courts have held that when a state alleges economic harm

occasioned from the loss of tax income, the appropriate test is "whether the financial loss is temporary or not." *See Oklahoma ex rel. Oklahoma Tax Com'n v. Int'l Registration Plan, Inc.*, 264 F. Supp. 2d 990, 996 (W.D. Okla. 2003).

North Dakota generates significant revenue from taxes on coal conversion and coal severance. Rauschenberger Decl. ¶ 9. North Dakota also generates significant revenue from royalty and lease payments from coal on state lands. Gaebe Decl. ¶¶ 6-9. Over the last ten years, North Dakota has received more than $250 million under the coal conversion tax and $110 million under the coal severance tax. Rauschenberger Decl. ¶ 9. North Dakota also collects substantial royalties from coal extracted from state lands. Gaebe Decl. ¶ 9. Because of the coal-fueled power plant closures and reduced lignite coal mining in North Dakota caused by the Existing Source Rule, the State will be deprived of these substantial revenue sources.

In addition, North Dakota also will needlessly expend substantial taxpayers' dollars to analyze and attempt to implement the complex and onerous Existing Source Rule, which is likely to be overturned by the courts. Substantial economic and human resources would be required to develop a State Plan in an effort to implement the Rule. Glatt Decl.¶¶ 13, 16-17; Christmann Decl. ¶¶ 18-19. *See Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 220-21 (1994) (Scalia, J., in chambers) ("[A] regulation later held invalid almost always produces the

irreparable harm of nonrecoverable compliance costs."). The Rule will also cause severe adverse economic and social impacts. Erickson Decl. ¶ 6; Binder Decl. ¶ 10; Neumann Decl. ¶¶ 11-19.

North Dakota's economic harm is irreparable because its significant ongoing expenditures to comply with the Rule and its reduced tax and royalty revenue cannot be recovered from EPA. Neither the CAA or APA (nor any other statute) affords North Dakota a mechanism for recovering economic damages caused by the Rule following a successful adjudication of the merits of North Dakota's claims. Those damages therefore are considered to be "irreparable." *Toomer v. Witsell*, 334 U.S. 385, 391-92 (1948) ("[W]e conclude that appellants sufficiently showed the imminence of irreparable injury for which there was no plain, adequate and complete remedy at law."); *accord Phillip Morris*, 131 S.Ct. at 2 (Scalia, J. in chambers); *Mori,* 454 U.S. at 1303 (Rehnquist, J., in chambers).

In addition, as in *Oklahoma Tax Commission*, these irreparable economic losses will directly impact funding for the provision of "critical state services." 264 F. Supp. 2d at 997. The funds that North Dakota collects from taxes and royalties are distributed into funds which make financial distributions to school districts and townships, and for public facilities and services and infrastructure construction. Schmidt Decl. ¶ 8. These funds finance health districts, emergency management, human services, infrastructure construction, schools, and law

enforcement. Gaebe Decl. ¶ 10; Schmidt Decl. ¶ 8; Binder Decl. ¶ 10. That those essential North Dakota services are being deprived of funding underscores the Rule's irreparable impact on North Dakota's financial and sovereign interests.

II. NORTH DAKOTA IS LIKELY TO PREVAIL IN ESTABLISHING THAT THE EXISTING SOURCE RULE IS UNLAWFUL.

Turning to the legal issues, as an initial matter there is a "reasonable probability" this Court will eventually review the validity of the Existing Source Rule, regardless of how the court of appeals decides that question. *See. e,g, Hollingsworth,* 558 U.S. at 190. "The substantiality of the federal questions presented by the case cannot be doubted." *Lucas*, 486 U.S. at 1304 (Kennedy, J. in chambers). The Rule is one of the most, if not the most, far-reaching attempts to regulate air emissions ever attempted by EPA. Just as this Court has reviewed a number of EPA's major CAA rules in recent years, *see, e.g., Michigan v. EPA,* 135 S.Ct. 2699 (2015); *Utility Air Regulatory Group v. EPA,*134 S.Ct. 2427 (2014), there is a good probability at least four Justices will vote to review the Existing Source Rule.

It is also likely that North Dakota and the other states and parties challenging the Existing Source Rule will succeed on the merits of their claims. Certainly there is a "fair prospect" of success, which is all this Court requires to support a stay. *See, e,g, Hollingsworth,* 558 U.S. at 190. North Dakota emphasizes below two important reasons for its likely success in establishing the Existing Source

Rule is unlawful. With respect to the several other substantial reasons the Rule is contrary to Section §111(d) and otherwise invalid, as noted previously, to avoid undue repetition North Dakota endorses those reasons and adopts the arguments supporting them that are set forth in the Joint State Application.

A. EPA Does Not Have Authority To Impose Binding CO_2 Emission Reduction Requirements In North Dakota.

Under the plain text of CAA §111(d), North Dakota, not EPA, has the authority to "establish" standards of performance. The Existing Source Rule nevertheless establishes performance standards for CO_2 emissions, and is therefore contrary to EPA's statutory authority.

CAA § 111(d) provides that EPA "shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant…." Under this clear statutory text, EPA may not set emission reduction requirements for states. EPA instead is only authorized to "establish a procedure" for states to submit plans containing state-established standards, and EPA may review those plans to determine if they are "satisfactory." But EPA's power to disapprove a State Plan is limited and cannot be used, as it is in the Existing Source Rule, to dictate a minimum required level of emissions reduction for North Dakota.

Under the Rule, whatever State Plan North Dakota submits must ensure that emissions from the regulated source category must decline to the level of EPA's specific and stringent requirements for North Dakota. 80 Fed. Reg. at 64,953. Thus, directly or indirectly, EPA is dictating the level of emission reduction that power plants in North Dakota must make, and it has determined that level by applying EPA's "best system of emission reduction" factors. 80 Fed. Reg. at 64,717. As a result, EPA has promulgated performance standards within the meaning of CAA § 111(a). Under CAA § 111(d), however, Congress gave states, not EPA, authority to establish those standards.

In the court of appeals, EPA argued that the emissions targets in the Existing Source Rule are merely "substantive guidelines," EPA Opp'n. 50, but that severely mischaracterizes the Rule. The Rule prescribes hard emissions limits, *see* 80 Fed. Reg. at 64,961-64, that North Dakota's and other states' plans must achieve in a legally-enforceable way. 80 Fed. Reg. at 64,832 n. 781. EPA also asserted below that the argument that the Rule unlawfully prescribes performance standards is actually an untimely challenge to two 1975 regulations, EPA Opp'n 50 (citing 40 C.F.R. §§ 60.21(e), 60.22(a)). But those regulations refer only to "guideline[s]" and "guideline documents;" they do not allow EPA to dictate, contrary to Section 111(d)'s plain text, specific emissions limits that regulated sources in a state *must* meet.

B. The Final Rule Deprives North Dakota Of Authority To Consider The Remaining Useful Lives Of Regulated Sources.

Under CAA § 111(d)(1)(B), "[r]egulations . . . under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." EPA previously complied with this requirement in its general CAA § 111(d) regulations, by providing that states may deviate from EPA-mandated guidelines for a specific facility based on, among other factors, "[u]nreasonable cost of control resulting from plant age." *See* 40 C.F.R. § 60.24(f). The Existing Source Rule, by contrast, fails to provide North Dakota and other states with the authority and discretion the statute requires to accommodate the remaining useful lives of existing sources. This is a serious deficiency with particularly severe impact on North Dakota, because of the number of existing coal-powered plants in the State that have to be retired prematurely under the Rule.

In the court of appeals, EPA responded to this point in one cursory paragraph that asserted the Existing Source Rule does permit states to take account of the remaining useful lives of regulated sources because states have "flexibilities" in developing implementation plans. EPA Opp'n 50. By that logic, any statutory directive requiring an agency to promulgate regulations that permit a

party to "take into consideration" a specific factor would be satisfied anytime the regulated parties have flexibility in responding. But the plain import of CAA § 111(d)'s directive that EPA's regulations must allow states to take account of remaining useful lives is that the regulations must contain a specific provision addressing the accommodation of remaining useful life. EPA recognized that in its general regulations under § 111(d), which contain such a specific provision. *See* 40 C.F.R. § 60.24(f). The Existing Source Rule contains no such specific provision, and therefor contravenes the statute.

III. THE EQUITIES AND BALANCE OF HARMS REQUIRE A STAY OF THE EXISTING SOURCE RULE.

When this Court considers a stay application, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth,* 558 U.S. at 189 (citing *Lucas,* 486 U.S. at 1304). This is not a close case, however, because for reasons set forth above, the basic and "well settled" requirements for a stay, *see Lucas,* 486 U.S. at 1304 (Kennedy, J., in chambers), are met: there is "a reasonable probability" that four Justices will eventually vote to review the validity of the Existing Source Rule, a "fair prospect" that a majority of the Court will decide the Rule is invalid and "a likelihood" that irreparable harm will result from denial of a stay. *See, e.g., Hollingsworth,* 558 U.S. at 190.

Nonetheless, here the equities and relative harms to the parties also strongly support issuing a stay of the Existing Source Rule. Granting a stay will freeze the status quo, and halt the significant ongoing irreparable harm that the Rule is causing. If the Rule is not stayed, North Dakota and its citizens will continue to suffer that irreparable harm. North Dakota will be forced to expend significant State resources to comply with the Rule even though it is likely to be invalidated. North Dakota will also lose significant State revenues from taxes and royalties associated with the use of coal for electric generation. Moreover, ratepayers in North Dakota will see their electricity bills increase as a result of the Rule.

Conversely, staying the Existing Source Rule during the pendency of this litigation will cause EPA no harm. And the public interest also favors granting a stay of the Rule. There is no public interest in subjecting North Dakota – or the other stay applicants – to the irreparable harms being caused by the Rule.

CONCLUSION

For the foregoing reasons, the State of North Dakota respectfully requests that this Court enter an order staying the Existing Source Rule.

Respectfully submitted,

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ADDENDUM

EPA's plant shutdown projections can be found in the following files available at USEPA, *Analysis of the Clean Power Plan*, http://www.epa.gov/airmarkets/analysis-clean-power-plan: EPA, IPM model run files, *EPA Base Case for the Clean Power Plan (ZIP)*, *Rate Based Analysis of the CPP* (zipped file), and *Mass Based Analysis of the CPP* (zipped file). The units can be identified by: 1) go to the base case, rate based and mass based *RPT Files.zip* within the zipped files listed above, 2) go to the *CapacityRetrofits.xlsx* file within base case, rate based and mass based *RPT Files.zip files*, determine the megawatts per year projected to retire, the year of retirement and the unique identifying number associated with the unit, 3) for the identifying number in the *CapacityRetrofits.xlsx file*, go to *DAT File.xlsx* and determine the date the unit came on line, and 4) match the state, capacity and year on-line data to the data in the *NEEDS_v515.xlsx* file, which will provide the name of the unit. The unit name can then be matched to the year of retirement determined in step 2 above.

CERTIFICATE OF SERVICE

I certify that on this 29th day of January, 2016, I caused to be served the above document on the following by overnight commercial carrier and electronic mail where available:

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