NO. 15A793

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF NORTH DAKOTA,

Applicant,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

REPLY BY THE STATE OF NORTH DAKOTA IN SUPPORT OF APPLICATION FOR IMMEDIATE STAY

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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February 8, 2016.

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:

The State of North Dakota respectfully submits this reply in support of its application for 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").

INTRODUCTION

The replies filed by the other stay applicants amply refute most of EPA's arguments attempting to deny that 1) the Existing Source Rule is causing irreparable harm now, and 2) the Rule is legally invalid for multiple reasons. North Dakota endorses and adopts the arguments made in those other replies.

North Dakota submits this reply to address EPA's responses to arguments made particularly by North Dakota in its stay application which the replies of other stay applicants do not address. Specifically, this reply addresses EPA's response concerning: 1) the distinct and particularly severe sovereign and economic harm that the Rule is imposing on North Dakota, and 2) North Dakota's showing that the Existing Source Rule is contrary to Section 111(d) of the Clean Air Act ("CAA") because i) the Rule establishes performance standards for carbon dioxide ("CO_2") emissions, which under the statute only States, not EPA may do, and ii) the Rule

contains no provision allowing States to consider the remaining useful life of existing sources.

I. The Existing Source Rule Is Irreparably Harming North Dakota Now.

The reply filed by other States ("Joint State Reply") explains why the Court should reject EPA's arguments denying that the Existing Source Rule is causing irreparable harm by coercing State sovereign functions and imposing undue and unrecoverable compliance costs. *See* Joint State Reply at 18-27. However, the Joint State Reply does not address EPA's responsive arguments as they apply to the specific and particularly severe sovereign and economic harm that the Rule is imposing on North Dakota, as set forth in its application. *See* ND App. at 15-22.

EPA does not and could not deny that in practical terms, compliance with the Existing Source Rule requires "generation-shifting" – and especially a shift away from coal-fueled electricity generation. That is particularly true in North Dakota, because of the draconian 44.9% emissions reduction requirement the Rule imposes on the State and the fact that North Dakota residents currently obtain the vast majority of their electricity from power plants fueled by lignite coal. *See id.* at 8, 11-14. The Rule strongly pressures North Dakota to "shift" from higher CO_2 emitting coal-fueled plants to lower emitting sources in order to meet the 44.9% reduction requirement – *without regard to any other factor*. That strong pressure precludes the North Dakota's energy policy agencies from making decisions about

the types of electric generating plants that are best for North Dakotans based on *all* relevant factors, not just on what will best achieve the CO_2 emissions reductions mandated by the Rule.

As North Dakota explained, *see* ND App. at 17, under North Dakota law its Department of Health ("NDDH") is responsible for implementing the Clean Air Act. But because the Existing Source Rule mandates specific CO_2 emissions limits, NDDH is deprived of authority to do so. Similarly, North Dakota law assigns responsibility for planning and implementing new electricity-generating and transmission facilities to the North Dakota Public Service Commission ("Commission") and the North Dakota Transmission Authority ("NDTA"). Absent the Rule, these state agencies have plenary authority over electricity generation and transmission policy and facilities in North Dakota. *Id.* at 18-19. Under Rule, however, the authority of these North Dakota energy policy agencies is significantly constrained by the requirement that any implementation plan North Dakota develops *mus*t reduce its CO_2 emissions rate by 44.9%. *See* 80 Fed. Reg. at 64, 953 ("You must require, in your plan, emission standards on affected EGUs to meet the CO_2 emission performance rates listed in Table . . . .").

With respect to North Dakota specifically, EPA's suggestion that the Existing Source Rule has no immediate impact, *see* EPA Opp. at 4-5, 58-59, defies logic and directly contradicts EPA's own projections of the Rule's impact. As

North Dakota explained, *see* ND App. at 10-14, EPA's analysis using its Integrated Planning Model ("IPM") concluded that the Rule will lead to closure in 2016 and 2018 of no fewer than six specific coal-fueled electricity generating plants in North Dakota, which in turn will lead to closure of several lignite mines in the State and reduced production at others. Those closures will impose distinct sovereign harm on North Dakota by coercing the State's energy policy agencies to develop replacement sources of electricity to meet the Rule's mandatory 44.9% emissions reduction requirement. *See id.* at 16-19. The specific coal plant and mine closures identified by EPA's IPM also will cause irreparable harm to North Dakota's economic interests in the form of substantially decreased revenues – beginning in 2016 – from taxes and royalty and lease payments from coal on state lands. *See id.* at 19-22.

EPA's opposition brief does not address the fact that its IPM Model projects the Existing Source Rule will lead to closure in 2016 and 2018 of six specifically-named coal-powered generating plants in North Dakota. However, in addressing claims by other stay applicants that the Rule will cause plant closures, EPA contends that its IPM cannot be relied on to support such claims. *See* EPA Opp. at 65-68. In particular, EPA states that "simplifications and constraints built into the Model mean that it is not designed to reliably forecast the Rule's impact on

specific plants." *Id.* 66; *see id.* at 59 n. 15 ("no evidence" lost tax revenue from plant closures will occur in the short run).

Presumably EPA would similarly attempt todisavow the projections made by its own Model of coal plant closures in North Dakota. However, in the D.C. Circuit EPA asserted that "such assumptions do not undermine the Model's usefulness for its intended purposes in this rulemaking." Respondent EPA's Opposition to Motions to Stay Final Rule at 64-65, State of West Virginia v. USEPA, No. 15-1380 (D.C. Cir. Dec. 3, 2015), ECF No. 1586661. EPA should not be allowed to pick and choose the manner in which its IPM Model is used. Either the Model is reliable for analytic purposes or it is not. No Model is perfect, but it is a different matter to say that the *same* projections from a Model are reliable for one purpose but not for another. Moreover, it would be untenable for EPA to contend that its IPM Model is wrong concerning *all six* of the plant closures it projects in North Dakota. In any event, North Dakota does not rely only on EPA's Model to show that the Existing Source Rule will require closure in 2016 and 2018 of coal-fire power plants in the State. North Dakota officials independently substantiate that fact. *See, e.g.,* Gaebe Decl. ¶ 12 ("[I]f North Dakota does not commit to implementing the EPA's specific assumptions, then North Dakota will simply have to make functionally equivalent CO_2 emission

reductions from some other North Dakota lignite-fueled power plants."); *see also* Glatt Decl. ¶¶ 14-15 (to same effect); Christman Decl. ¶¶ 12-15 (same) .

Accordingly, EPA has no real answer to the irreparable harm to North Dakota's sovereign and financial interests that is being caused by the Rule's requirement that the State immediately plan for and implement "generation-shifting" – which means coal plant closures. The Rule requires North Dakota coal plants to close beginning this year, and the generation -shifting that the Rule requires must continue until State meets the 44.9% emission reduction mandate imposed by the Rule.

II. The Existing Source Rule Unlawfully Establishes Performance Standards And Fails To Provide For Consideration Of The Remaining Useful Life Of Regulated Sources.

Replies by the other stay applicants demonstrate that the Court should reject EPA's attempt to defend the legality of the Existing Source Rule. The Rule does not satisfy the "clear statement" requirement of *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427 (2014) ("*UARG*"), and as the Joint State Reply points out, EPA does not even claim the Rule satisfies the *UARG* standard. Joint State Reply at 3-5. That reply also demonstrates that EPA has no persuasive response to several other ways the Rule contravenes the clear terms of Section 111(d). *See id.* at 5-8, 12-18.

EPA's responses to two additional statutory arguments made in North Dakota's stay application, *see* ND App. at 23-26, also lack merit.

1. EPA wrongly asserts that North Dakota contends EPA "lacks authority to set substantive emissions *guidelines* for States." EPA Opp. at 46 (emphasis added). The issue is not emissions guidelines, but whether EPA may establish enforceable performance standards for emissions from existing sources. Under the plain terms of Section 111(d), EPA only has authority to issue "regulations which shall establish a *procedure* . . . under which each State shall submit to [EPA] a plan which (A) establishes standards of performance for any existing source. . ." (emphasis added). The statute provides that States, not EPA, "establish" performance standards in the plans they submit, in contrast to Section 111(b) (b)(1)(B), which provides with equal clarity that EPA "shall publish proposed regulations, establishing Federal standards of performance for new sources. . . ."

Although Section 111(d) limits EPA's existing source authority to establishing procedures for State plan submittal, the Existing Source Rule establishes emissions reduction targets for each State and also requires States to develop and implement plans that will meet those targets in a legally enforceable way. *See, e.g.,* 80 Fed. Reg. at 64, 953 ("You must require, in your plan, emission standards on affected EGUs to meet the CO_2 emission performance rates listed in

Table 1. . . ."). Thus, directly or indirectly the Rule establishes standards of performance, contrary to EPA's statutory authority. EPA's assertion that "the Rule provides considerable flexibility to States," EPA Opp. at 47, does not negate the fact that the Rule requires that State plans must meet performance standards prescribed by EPA.

EPA claims this argument is an untimely challenge to its longstanding Section 111(d) implementing regulations, EPA Opp. at 47 n. 12, but those regulations refer only to "guideline[s]" and "guideline documents," *see* 40 CFR 60.22; they do not allow EPA to dictate, contrary to Section 111(d)'s clear text, specific emissions limits that regulated sources *must* meet.[1]

2. EPA also has no answer to North Dakota's argument that, contrary to the text of Section 111(d), the Existing Source Rule does not appropriately allow States to take account of the remaining useful lives of existing sources. EPA merely asserts in one conclusory sentence that the Rule does allow States to do so. EPA Opp. at 47-48. But the plain import of the statutory directive is that any Section 111(d) rule must contain a specific provision that addresses, and permits

[1] EPA's resort to the Federal Register preamble accompanying those regulations, EPA Opp. at 46-47, is unavailing. *See* 40 Fed. Reg. at 53,343 ("EPA's emissions guidelines will not have the purpose or effect of national emissions standards. . . [T]hey will not be requirements enforceable against any source."). EPA's reference to *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011), *see* EPA Opp. at 47, is also inapposite; the cited passage refers primarily to EPA's authority under Section 111(b), not Section 111(d).

accommodation of, the remaining useful life of existing sources. EPA's general Section 111(d) regulations contain such a provision, under which, based on plant age," States "may provide for the application of less stringent emissions standards . . . ." *See* 40 CFR 60.24(f). The Existing Source Rule contains no such provision. This is of particular concern where taxes have already been approved to pay to retrofit state utilities under other EPA rules – tax dollars that will be wasted under the Rule. *E.g.,* McClanahan Decl. ¶ 10.

CONCLUSION

For all the reasons that North Dakota has stated in its stay application and this reply, and adopted from submissions by other stay applicants, North Dakota respectfully requests that the Court grant an immediate stay of EPA's Existing Source Rule.

Respectfully submitted,

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February 8, 2016

CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 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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