**14-1112 & 14-1151**

In the United States Court of Appeals
for the District of Columbia Circuit

IN RE: MURRAY ENERGY CORPORATION,
*Petitioner*

MURRAY ENERGY CORPORATION,
*Petitioner*,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,
*Respondents.*

# EMERGENCY RENEWED PETITION FOR EXTRAORDINARY WRIT BY INTERVENOR PEABODY ENERGY CORPORATION

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**August 13, 2015**

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

**A. Parties, Intervenors, and *Amici*.** The parties in this case are Murray Energy Corporation (Petitioner); U.S. Environmental Protection Agency (Respondent); and Regina A. McCarthy, Administrator, U.S. Environmental Protection Agency (Respondent); the State of West Virginia (Intervenor); the State of Alabama (Intervenor); the State of Alaska (Intervenor); the State of Arkansas (Intervenor); the State of Indiana (Intervenor); the State of Kansas (Intervenor); the Commonwealth of Kentucky (Intervenor); the State of Louisiana (Intervenor); the State of Nebraska (Intervenor); the State of Ohio (Intervenor); the State of Oklahoma (Intervenor); the State of South Dakota (Intervenor); the State of Wisconsin (Intervenor); the State of Wyoming (Intervenor); National Federation of Independent Business (Intervenor); Utility Air Regulatory Group (Intervenor); Peabody Energy Corporation (Intervenor); the City of New York (Intervenor); the Commonwealth of Massachusetts (Intervenor); the District of Columbia (Intervenor); Environmental Defense Fund (Intervenor); Natural Resources Defense Council (Intervenor); Sierra Club (Intervenor); the State of California (Intervenor); the State of Connecticut (Intervenor); the State of Delaware (Intervenor); the State of Maine (Intervenor); the State of Maryland (Intervenor); the State of New Mexico (Intervenor); the State of New York (Intervenor); the

State of Oregon (Intervenor); the State of Rhode Island (Intervenor); the State of Vermont (Intervenor); and the State of Washington (Intervenor). Amici include the State of South Carolina; National Mining Association; American Coalition for Clean Coal Electricity; American Chemistry Council; American Coatings Association, Inc.; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; the State of New Hampshire; Chamber of Commerce of the United States of America; Clean Wisconsin; Council for Industrial Boiler Owners; Michigan Environmental Council; Independent Petroleum Association of America; Ohio Environmental Council; Metals Service Center Institute; Calpine Corporation; National Association of Manufacturers; Jody Freeman; and Richard J. Lazarus.

**B. Rulings Under Review.** The Petition relates to EPA's final rule styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60).

**C. Related Cases:** This Court has previously issued an opinion in this case, and in *West Virginia v. EPA*, Nos. 14-1112, 14-1146, 14-1151 (D.C. Cir.) *In re: West Virginia, et al.*, No. 15-1277 (filed Aug. 13, 2015) also is related.*

* Petitioner Peabody has filed this submission as a renewed writ, believing that to be the procedurally proper course, but does not oppose having the new writ submitted by the State Attorneys General consolidated with this proceeding and is

authorized to say that the State Attorneys General likewise do not oppose such consolidation. *See* Emergency Motion to Consolidate and For Expedited Treatment, *In re: West Virginia, et al.*, No. 15-1277, ECF 1567767 (filed Aug. 13, 2015).

Dated: August 13 , 2015 /s/ Tristan L. Duncan

## RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Peabody Energy Corporation ("Peabody") provides the following disclosure:

Peabody is a publicly-traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU." Peabody has no parent corporation and no publicly held corporation owns more than 10% of Peabody's outstanding shares.

Dated: August 13, 2015 /s/ Tristan L. Duncan

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## GLOSSARY

| | |
|---|---|
| $CO_2$ | Carbon dioxide |
| EPA | United States Environmental Protection Agency |
| Final Rule | *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, issued Aug. 3, 2015 (to be codified at 40 C.F.R. pt. 60). |
| GHGs | Greenhouse Gases |
| Peabody | Peabody Energy Corporation |
| Section 111 | 42 U.S.C. § 7411 |
| Section 111(b) | 42 U.S.C. § 7411(b) |
| Section 111(d) | 42 U.S.C. § 7411(d) |
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| Waxman-Markey bill | H.R. 2454, 111th Cong. |

**EMERGENCY RENEWED PETITION FOR EXTRAORDINARY WRIT**

## INTRODUCTION

On June 9, 2015, this Court denied a previous writ in this case, explaining that, "[a]fter EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review." *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). On Aug. 3, 2015, EPA issued the Final Rule.[1] Therefore, this Petition is now ripe for review.[2] Peabody has filed this submission as a renewed writ and does not oppose having the new writ filed by State Attorneys General consolidated with this proceeding, as further discussed in the Related Cases section on pages ii-iii above.

On its face, Section 111(d) prohibits exactly what EPA seeks to do in the Final Rule: to regulate coal-fueled power plants *both* under Section 111(d) *and* as a source category under Section 112's Hazardous Air Pollutants (HAP) program. The so-called "Section 112 Exclusion" provides

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[1] Although the Final Rule has not yet been published in the Federal Register, this Petition is still ripe for the reasons discussed herein.

[2] On Aug. 6, 2015, Peabody filed an application with EPA asking for an immediate stay of the Rule, pursuant to EPA's authority under 5 U.S.C. § 705. EPA did not respond to Peabody's request for relief within the timeframe requested by Peabody. Counsel for Peabody contacted EPA by telephone on Aug. 13, 2015 to notify it of this motion in advance of filing.

that Section 111(d) applies only to a pollutant "which is not . . . emitted from a source category which is regulated under section [112] of this title." 42 U.S.C. § 7411(d). Since coal-fueled plants already are regulated under Section 112, Section 111(d) expressly prohibits their double regulation here. Despite EPA's prior representations that it was open to comments on its legal rationale, the Final Rule recites virtually the same arguments that EPA previously raised before this Court. Indeed, EPA effectively concedes that, if Peabody's interpretation of the Section 112 Exclusion is correct, EPA lacks the power to adopt the Final Rule under Section 111(d). (Final Rule 263).

This Court should not wait to address the critical threshold question of EPA's statutory authority, when so much hangs in the balance and irreparable harm is occurring now. To be sure, once the Final Rule is published in the Federal Register, aggrieved parties will file petitions for review, together with stay motions. But this Petition is necessary now because there may well be a substantial delay in publication. News reports indicate that EPA may hold off publication until Dec. 2015.[3] EPA has

[3] *See* InsideEPA, EPA Said To Target Early August for ESPS Release (Jul. 13, 2015) (reporting that the final rules "are unlikely to appear in the Federal Register—which would start the 60-day clock for filing legal

denied those reports. However, as this Court is aware, even in an ordinary case there can be a significant lag between promulgation of a final rule and its publication in the Federal Register. And this is no ordinary case. It is extraordinary by any measure. The Final Rule alone (not counting technical support documents) runs to 1,560 pages. With significant rules like this one, the delay can be much longer. For example, EPA issued a proposed Section 111(b) rule on Sept. 20, 2013, but it was not published in the Federal Register until Jan. 8, 2014. *See* 79 Fed. Reg. 1430 (Jan. 8, 2014). Similarly, the FCC released the 2010 Net Neutrality rule on Dec. 21, 2010, but it was not published in the Federal Register until Sept. 23, 2011.[4] Thus, ordinary course here can easily mean a delay of months.

This Petition is therefore necessary in light of the unmeasurable risk that there will be significant delay in the Final Rule's Federal Register publication. If (on the other hand) EPA promptly publishes the Final Rule, the ensuing petitions for review and motions for stay can simply be

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challenges—until after the United Nations climate talks in Paris in December.").

[4] *See In the Matter of Preserving the Open Internet, Broadband Industry Practices: Report and Order*, No. 09-919, GN Dkt. No. 09-191, WC Dkt. No. 07-52 (Dec. 21, 2010); *Preserving the Open Internet*, 76 Fed. Reg. 59,192 (Sept. 23, 2011).

consolidated into this proceeding, and Petitioners will propose a workable plan for managing and briefing the legal challenges to the Final Rule.

Moreover, no purpose is now served by withholding prompt judicial review. EPA already has had ample opportunity to address the objections to its legal authority during the notice and comment period (and it ignored those objections). No change in the Final Rule will occur between now and publication. Further, the Final Rule directs States to file plans or detailed "initial submittals" by Sept. 6, 2016. That is barely a year away and an eye-blink in the context of the multi-year planning horizon of energy suppliers, utilities, and private industry. Compliance efforts will thus begin while the Rule is being litigated. Moreover, the scale of the required effort ensures that compliance costs will not be the run-of-the-mill expenses typically associated with interstitial rule-making. Quite the reverse. The changes wrought by the Final Rule are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency rules. Ironically, EPA touts the Final Rule as creating cap-and-trade systems, when a bill to do just that was rejected by Congress in 2009-2010.

The Rule has caused and will continue to cause immediate and irreparable harm, which will only intensify in the coming months, while

judicial review is pending. A stay of the Final Rule is warranted now. No purpose would be served by waiting for publication.

## JURISDICTION AND STANDING

This Court has jurisdiction to review nationally applicable EPA final actions under Clean Air Act § 307(b)(1). "A long progression of cases" confirms this Court's authority to stay agency action pending judicial review, where this Court would ultimately have appellate jurisdiction over the agency's rule. *Sampson v. Murray*, 415 U.S. 61, 73 (1974); *see also* 5 U.S.C. § 705; *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966); *In re Tennant*, 359 F.3d 523, 531 (D.C. Cir. 2004) (Roberts, J.). Peabody has standing because the Final Rule will cause it imminent and irreparable injury for the reasons adduced in the accompanying Declaration of Bryan A. Galli ("Galli Decl."), attached as Exhibit A.

## STATEMENT OF RELIEF SOUGHT

Peabody seeks a stay of the Final Rule and a suspension of all deadlines therein pending the completion of judicial review.

## STATEMENT OF ISSUE PRESENTED

Whether the Final Rule should be stayed because it exceeds EPA's legal authority and will cause irreparable injury, and because the public interest and balance of equities also favor a stay.

## STATEMENT OF THE CASE AND FACTS

The Final Rule seeks to restructure the energy industry in the United States and to compel a drastic reduction in the use of coal, traditionally the most reliable and affordable source of electricity. The Final Rule is more draconian than the proposed rule, seeking a 32% (rather than 30%) reduction in power-plant $CO_2$ emissions by 2030. (Tellingly, nine States that filed comments challenging the proposed rule wound up with stricter limits under the Final Rule, compared with only one State supporting the plan – Rhode Island, whose goal changed by only 1%.) The Final Rule directs States by Sept. 6, 2016 to file plans (or detailed "initial submittals") and establishes onerous power-plant $CO_2$ emission rates for States to follow – all of which will result in consumers having to pay substantially more for electricity. The fixed date of Sept. 6 is extremely unusual, if not unprecedented, because it does not depend on when the Final Rule is published in the Federal Register. Judicial review of a fixed compliance deadline barely one year away should not be held hostage by an uncertain publication date.

The Final Rule contains an interim 2022 compliance date, but the far-reaching changes needed to implement the rule must begin immediately. The Final Rule stresses that EPA seeks "to promote early action" (Final Rule 39), based on "EPA's conclusion that it was essential . . . that utilities and

states establish the path towards emissions reductions as early as possible." (*Id.* at 73). "The final guidelines include provisions to encourage early actions." (*Id.* at 42).

Given long lead times for energy planning, private industry will be forced to begin implementing the Rule *now*. (*See* Galli Decl., ¶¶ 12-21). This accelerated decision-making process will create significant and irreparable injury – not merely when the Rule's compliance deadlines begin, but immediately, during the pendency of judicial review. From the day before the rule was announced to the close of the markets the day after the announcement, Peabody's public shares and bonds lost more than $90 million in value, demonstrating the powerful, immediate and irreparable damage that the Final Rule is now imposing. *Id.* at ¶ 28. And the harm will not be confined to coal producers and utilities; the attached declaration from the head of the National Black Chamber of Commerce shows that the Final Rule will impose enormous costs (on the order of $565 billion), increase consumer retail electric rates by 12-17%, and inflict disproportionate harm on minorities. (*See* Declaration of Harry C. Alford, attached as Exhibit B). The Final Rule will increase black poverty numbers by 23% and Hispanic poverty by 26%; reduce average black annual household income by $455 and Hispanic income by $515; and lead to the loss of 7 million African-

American and 12 million Hispanic jobs. (*See id.*). Senior citizens and those on fixed incomes are also at risk; a senior advocacy group warns that "[m]ore than 70% of the elderly are living on fixed incomes that do not keep pace with inflation, and causing a critical necessity like their electric bill to spike 20% to 30% as CPP will do is flat out unconscionable."[5]

## REASONS FOR GRANTING THE PETITION

This Court outlined the standards for an extraordinary writ in *Murray Energy*, 788 F.3d at 335. The familiar four factors governing requests for stay are: (1) likelihood of success on the merits; (2) irreparable harm; (3) risk of harm to others; and (4) the public interest. *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). "A stay may be granted with either a high probability of success and some injury, or vice versa." *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam).

This Court has previously stayed much less disruptive and less obviously flawed EPA rules, *e.g.*, *EME Homer City Generation, L.P. v. EPA*, Nos. 11-1302, *et al.* (D.C. Cir. Dec. 30, 2011); *Michigan v. EPA*, No.

[5] 60-Plus Ass'n, "Seniors Feel Pain as EPA Finalizes 'Cruel Power Plan'" (visited Aug. 4, 2015), available at http://60plus.org/seniors-feel-pain-as-epa-finalizes-cruel-power-plan/.

98-1497, 1999 U.S. App. LEXIS 38833, at *10 (D.C. Cir. May 25, 1999). A stay is urgently needed here.

## I. The Final Rule Exceeds EPA's Legal Authority.

The Final Rule contains many legal flaws, but the Section 112 Exclusion (which has already been briefed and argued to this Court) provides a clear and ample basis for a stay. EPA's breathtaking exercise of power rests on its novel reinterpretation of a narrow and obscure provision, Section 111(d), whose plain meaning *prohibits* rather than authorizes the Final Rule. EPA has *never before* used its reinterpretation of the Section 112 Exclusion to adopt *any* regulation (let alone one as sweeping as the Final Rule) for a source category it was already regulating under Section 112. Reading Section 111(d) as supporting the Final Rule would render that provision "unrecognizable to the Congress that designed it." *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*").

*Chevron* does not apply, and EPA is not entitled to deference even if its legal authority were ambiguous. "This is hardly an ordinary case." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000). The statutory question is one of "deep 'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, __ U.S. __, No. 14-

114, 2015 WL 2473448, at *8 (Jun. 25, 2015) (quoting *UARG*, 134 S. Ct. at 2444). Indeed, in the one instance in the 1990 Clean Air Act amendments where Congress *did* intend for EPA to address a major question regarding power plant regulation, it *expressly delegated* that authority to EPA. *See* 42 U.S.C. § 7412(n)(1)(A). In addition, it is "especially unlikely" that Congress would have delegated the authority in question to EPA, an agency with "no expertise" in regulating electricity production and transmission. *King*, 2015 WL 2473448, at *8 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006). The Final Rule is literally an impermissible "power" grab. Not even FERC or the Cabinet-level Department of Energy, much less EPA, has been delegated power by Congress to assert authority over intrastate electricity generation and distribution. *See* Federal Power Act, 16 U.S.C § 824(a); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

### A. The Final Rule Flies In The Face Of An Express Statutory Prohibition.

The Supreme Court recognized the plain meaning of the Section 112 Exclusion in *AEP v. Connecticut*, 131 S. Ct. 2527 (2011): "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§

7408–7410, or the 'hazardous air pollutants' program, § 7412. *See* § 7411(d)(1)." *Id.* at 2537 n.7; *see also New Jersey v. EPA*, 517 F. 3d 574, 583 (D.C. Cir. 2008) ("under EPA's own interpretation of the section, it cannot be used to regulate sources listed under section 112"). Because coal-fueled power plants are sources regulated under Section 112, EPA has no authority to regulate them under Section 111(d).

In 1990, EPA officials testified before Congress that imposing double regulation on existing sources, *even for different pollutants*, would be "ridiculous."[6] Since its 1990 amendment, Section 111(d) has been used for only one rule, involving municipal landfills, and there the Clinton Administration EPA noted that Section 111(d) does not permit standards for emissions that are "emitted from a source category that is actually being regulated under section 112"[7] – *i.e.*, precisely the situation here.

EPA's new-found interpretation would trigger a sea change in the way Section 111(d) has always been understood. EPA would turn Section 111(d)

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[6] Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Cmte. on Energy and Natural Res. 101st Cong. 603 (1990).

[7] *See* EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021, at 1-6 (1995) ("1995 EPA Landfill Memo"), available at http://www.epa.gov/ttn/atw/landfill/bidfl.pdf.

into one of the Clean Air Act's most powerful provisions and render most of its other provisions surplusage. EPA's new-found interpretation of Section 111(d) would have rendered the proposed 2009 Waxman-Markey cap-and-trade bill unnecessary as well. The Final Rule describes Section 111(d) as a "gap-filling" provision. (Final Rule 250). It is not. As explained by Sen. David Durenberger, a leading Senate architect of the 1990 Amendments, Section 111(d) was considered to be "some obscure, never-used section of the law."[8] By EPA's own count, it has used Section 111(d) to regulate only four pollutants and five sources[9] — and none remotely on the scale of $CO_2$. All these situations involve unique, localized pollutants, such as sulfuric acid, emitted from distinctive sources, like a sulfuric acid plant. None of them concerned a ubiquitous substance like $CO_2$, benign in itself, emitted from sources across the nation and indeed the globe, rather than from discrete local sources. Further, EPA has never before adopted a Section

[8] Clean Air Act Amendments of 1987: Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcmte. on Envtl. Prot. of the S. Cmte. on Env't and Public Works, 100th Cong. 13 (1987).

[9] 79 Fed. Reg. at 34,844 ("Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories (i.e., sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), Kraft pulp plants (total reduced sulfur), and municipal solid waste landfills (landfill gases)).").

111(d) rule like this one, which holds existing sources to a stricter standard than new sources (Final Rule 638), even though the reverse has been invariably true in the past (because new sources can more readily adopt new technologies without the need for costly retrofits). Section 111(d) authorizes EPA to adopt "standards of performance," but the Final Rule is actually a standard of *nonperformance;* it says that the best system of emissions reduction is simply to use coal generation less, or not at all. Every other Section 111(d) rule has involved a technological means of reducing emissions from a source. The Final Rule is an energy policy – a shift from coal to renewables – masquerading as an emissions limit.

In short, Section 111(d) is far too thin a reed to support the dramatic change that EPA seeks to impose. Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). As the Supreme Court previously admonished EPA, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *UARG*, 134 S. Ct. at 2444.

### B. EPA's "Two Versions of Section 111(d)" Theory Distorts The Legislative Record And Triggers A Separation Of Powers Violation.

In the Final Rule, EPA flip-flops on its theory that Congress enacted two "versions" of Section 111(d) in 1990, one in a substantive House amendment and the other in a conforming Senate amendment. In May 1990, the House adopted a substantive amendment changing Section 111(d) to bar regulation under that provision for any source category (like coal-fueled power plants) already regulated under Section 112. This amendment followed an April 1990 Senate amendment that was simply a clerical or "conforming" one updating a statutory cross-reference in the previous version of Section 111(d) by deleting the text "(1)(A)," to reflect other proposed changes to the statute. The Legal Memo accompanying the proposed rule contended that "[t]he two versions conflict with each other and thus render the Section 112 Exclusion ambiguous."[10] Now, EPA contends that the House amendment is ambiguous, the Senate amendment is clear, but the two do not conflict. (Final Rule 251-70). The agency's latest gymnastics cannot save its legal rationale.

Even under EPA's view that there are two "versions" of Section 111(d), its job would be to reconcile them by applying both prohibitions

[10] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units ("Proposed Rule Legal Memo"), at 23, available at http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum.

simultaneously, *see Brown & Williamson*, 529 U.S. at 133, not by throwing the substantive amendment into the trashcan, as the Final Rule effectively does. It is easy to harmonize the two "versions" by applying both prohibitions simultaneously: EPA should be prohibited from setting a Section 111(d) standard *either* for source categories regulated under Section 112 *or* for pollutants regulated under Section 112. Any other approach would raise grave constitutional difficulties. *Chevron* does not allow an agency to choose which of two competing "versions" of a statute to make legally operative; that is an exercise of lawmaking power. *Whitman*, 531 U.S. at 473 ("The very choice of which portion of the power to exercise . . . would itself be an exercise of the forbidden legislative authority.").

Moreover, EPA's "two versions" theory is wrong. It presupposes that in 1990 the House Office of Law Revision Counsel mistakenly failed to turn the conforming amendment into a second version of Section 111(d) and that the U.S. Code has been wrong ever since. The theory is contrary to the position the Clinton EPA took in 1995, that the substantive amendment was "the correct amendment" to codify and follow because it tracked the "revised section 112 to include regulation of source categories," while the conforming amendment "is a simple substitution of one subsection citation for another." (1995 EPA Landfill Memo at 1-5).

Indeed, the conforming Senate amendment was *not* an independent version of Section 111(d) at all, but simply deleted six characters, four of which were parentheses. It cannot bear the weight of EPA's 1,560-page Final Rule. The conforming amendment was a scrivener's provision, *not a separate "version" of Section 111(d)*, as the legislative record makes clear. Congress placed the substantive amendment in § 108 of Public Law 101-549 (the 1990 amendments), as part of a substantive provision occupying five pages of the Statutes at Large (104 Stat. 2,465-2,469 (1990)), which rewrote Section 111 to mirror the new source-category focus and structure of Section 112. In contrast, Congress placed the conforming amendment some 107 pages later, in § 302 of Public Law 101-549, a short section entitled "Conforming Amendments," which contained a potpourri of eight small clerical changes to six different parts of the Clean Air Act. If there were any ambiguity as to Congress' intent (and there is not) the 1990 Conference Report indicated that the "Senate recedes to the House" in relevant respects.[11] Thus, the amendments do not have equal weight or significance.

[11] 136 Cong. Rec. 36,065 (1990) (Chafee-Baucus Statement of Senate Managers), reprinted in *A Legislative History of the Clean Air Act Amendments of 1990* (1998), Volume I, Book 2 at 885 (emphasis added), excerpts available at

The House amendment was substantive, while the Senate amendment was not, and in conference the Senate receded to the House. The Senate amendment was subordinate in every respect.

The Office of Law Revision Counsel properly concluded that, once the substantive amendment in § 108 was executed, the conforming amendment in § 302 was mooted because it referred to language that no longer existed (there was no "112(b)(1)(A)" in the post-1990 version of Section 112). Nor was it necessary to "strik[e] '112(b)(1)(A)'" as the conforming amendment sought to do, in order to conform Section 111 to the revised Section 112. The substantive amendment had already accomplished that. The substantive amendment controls.

The Supreme Court has repeatedly distinguished between substantive and conforming (or "clerical") amendments. *See Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001) (treating "conforming amendment" as nonsubstantive); *CBS, Inc. v. FCC*, 453 U.S. 367, 381–82 (1981) (same). This Court has done the same. *American Petroleum Institute v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013) (disregarding mistake in renumbering statute and correcting cross-reference where it conflicted with

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http://docs.house.gov/meetings/IF/IF03/20140619/102346/HHRG-113-IF03-20140619-SD011.pdf.

substantive provision). In fact, EPA's own Respondents' brief in this case acknowledged that a conforming amendment should be disregarded where it is "obviously in error," citing 2008 amendments to 15 U.S.C. § 2081(b)(1), which involved (as EPA described it) an instance where the "section amended had been repealed." (ECF 1541205, at 48 n.23). That is exactly the situation here.

Substantive amendments routinely moot conforming ones, and EPA's approach has never previously been accepted.[12] The U.S. Code would be turned upside down if moot conforming amendments caused prior versions of substantively amended statutory provisions to spring back to life.

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[12] *See*, *e.g.*, Revisor's Note, 5 U.S.C. app. 3 § 12; Revisor's Note, 8 U.S.C. § 1324b; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1074a; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 1060; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 18 U.S.C. § 1956; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 22 U.S.C. § 2577; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 613A; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 26 U.S.C. § 6427; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 39 U.S.C. § 410; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 49 U.S.C. § 47115.

### C. EPA's Textual Distortions Of Section 111(d) Do Not Withstand Scrutiny.

In its Legal Memorandum accompanying the Proposed Rule, EPA acknowledged that "a literal" application of Section 111(d) would likely preclude its proposal. (Proposed Rule Legal Memo 26). EPA stated: "As presented in the U.S. Code, the Section 112 Exclusion appears by its terms to preclude from Section 111(d) any pollutant if it is emitted from a source category that is regulated under Section 112." (*Id.* at 22).

Undeterred, in the Final Rule, EPA switches gears (as it did before this Court earlier in this case) and now offers a fanciful reinterpretation of Section 111(d) in an attempt to label it "ambiguous." Final Rule 258. This attempt fails. EPA's reinterpretation cannot trigger *Chevron* deference, even if *Chevron* applied here (which it does not).

EPA contends Section 111(d) is "ambiguous" because of the phrases "a source category" and "regulated under Section 112." (*Id.* at 262). EPA acknowledges "one possible reading" of these phrases is "to preclude the regulation of $CO_2$ from power plants under CAA section 111(d) because power plants have been regulated for (HAP) under CAA Section 112." (*Id.* at 262-63). EPA admits that "[t]his is the interpretation that the EPA applied

to the House amendment in connection with the CAMR rule in 2005." (*Id.* at 263). However, EPA now rejects its prior interpretation.

EPA's view of Section 111(d) was correct under the Clinton Administration in 1995, correct in connection with the CAMR rule in 2005, and correct in the 2014 Legal Memorandum as to the plain meaning of the Section 112 Exclusion. And EPA is wrong today. Its suggestion of ambiguity cannot be squared with the text and structure of Section 111(d). The statute refers to "a source category which is regulated under section [112]" – *not* to "a pollutant which is regulated under section [112]." EPA seeks to rewrite the statute to suit its policy preferences.[13]

EPA complains that the plain meaning of the Section 112 Exclusion would bar the agency from regulating non-HAP emissions from source categories regulated under Section 112. But that is virtue, not a vice. That result is a natural consequence of Congress' decision in 1990 to rewrite

[13] The only natural reading is that the clause "which is regulated under section [112]" modifies the phrase "source category" because it immediately follows that phrase in the statute. Moreover, the phrase "any air pollutant" cannot refer solely to HAPs because that same phrase is also modified by the words "for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] of this title." "[A]ny air pollutant" must be broader than "hazardous air pollutants" because it must also include these other two categories, which overlap but are not coextensive.

Section 111(d) to mirror the "source category" structure of the newly amended Section 112. In 1990, Congress fundamentally expanded the scope of what constitutes a HAP (in Section 112(b)) and required regulation under Section 112 by "source category" (in Section 112(c)). The ordinary reading of the Section 112 Exclusion is better (not worse) because it aligns Section 111(d) with the "source category" focus of post-1990 Section 112.

EPA says the plain meaning of Section 111(d) would create a "gap" in the Clean Air Act. (Final Rule 268). But that supposed concern has never previously posed an issue; never before has EPA attempted to adopt a Section 111(d) standard for a source category it was already regulating under Section 112. At stake here is *duplication* (regulation of the same source category under both Section 111(d) and Section 112), not a regulatory "gap." There is no "gap" in EPA's authority; for example, the agency is already regulating greenhouse gas emissions from existing and new major sources, including power plants, under the agency's permitting (or "PSD") program involved in *UARG*. Even if there were a "gap," it would have to be filled by Congress, not by an independent agency that is only a creature of statute and lacks any "implied" or "inherent" authority.

EPA errs in imputing to the 1990 Congress a monolithic intention to ensure that the agency is authorized to regulate every conceivable emission

under whatever section of the Clean Air Act the agency chooses, regardless of statutory overlaps. The Supreme Court has already rejected that very imputation. It made clear in *UARG* that EPA is *not* automatically entitled to regulate *all forms* of greenhouse gas emissions from any source just because the agency has the authority to regulate $CO_2$ from cars and trucks. 134 S. Ct. at 2440-41. EPA construes the 1990 amendments to favor more regulation above all other concerns. That construction ignores the necessary policy trade-offs that inevitably accompany legislation. As the Supreme Court has instructed, "no legislation pursues its purposes at all costs."[14] "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."[15] EPA therefore lacks legal authority to adopt the Final Rule.

## II. The Final Rule Threatens Irreparable Injury.

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[14] *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (internal quotation marks and citation omitted).

[15] *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

Absent a stay, Petitioner faces irreparable harm.[16] The Final Rule is aimed squarely at coal. Press reports have stated that "[t]he U.S.' largest coal producer, Peabody Energy Corporation stands to lose the most as the newly-proposed rules will harm local consumption of coal."[17] (*See also* Galli Decl., ¶28 (noting $90 million decline in value)).

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[16] An "enduring restraint on the manner in which a business is conducted" constitutes irreparable harm. *Chamber of Commerce v. Reich*, 897 F. Supp. 570, 584 (D.D.C. 2005), *rev'd on other grounds*, 74 F.3d 1322 (D.C. Cir. 1996). "[L]oss of profits which could never be recaptured" is irreparable harm. *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J. concurring) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs") (emphasis in original); *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (financial loss was irreparable harm); *Brendsel v. Office of Federal Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (argument that economic losses are not irreparable harm "is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]"). Forcing a facility to retire before the end of its useful life also constitutes irreparable harm. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[17] "How Peabody Energy Corporation Has Responded To EPA's New Carbon Rules," Bidness Etc., Aug. 4, 2015 (available at http://www.bidnessetc.com/49291-how-peabody-energy-corporation-has-responded-to-epas-new-carbon-rules/); *see also* "Only One Loser In Obama's Clean Power Plan," Forbes, Aug. 4, 2015 (available at http://www.forbes.com/sites/jamesconca/2015/08/04/only-one-loser-in-obamas-clean-power-plan/) ("The only big loser in the U.S. from these rules will be coal *producers*.") (emphasis in original).

The Final Rule will force coal-fueled power plants to close (or to lock in the closure process) before judicial review is complete. EPA expects that the Final Rule will cause 15GW to 17GW of electricity generation to retire in 2016. (*Id.* at ¶ 17). For example, EPA expects its plan will cause the 2016 closure of the Big Brown plant in Fairfield, Texas and the 2016 partial closure of two units at the Monticello plant in Mount Pleasant, Texas, to which Peabody supplies coal. (*Id.* at ¶¶ 18-19). On July 9, 2015, Minnesota Power announced it will indefinitely suspend its Taconite Harbor Energy Center plant in third quarter 2016, to which Peabody also supplies coal. (*Id.* at ¶¶ 14-15). Because Peabody and its utility customers must make future planning and investment decisions for existing plants and resources on a multi-year time horizon, irreversible closure decisions will be made years before actual closure and before judicial review is complete. (*Id.* at ¶¶ 12-13). In fact, the proposed rule (let alone the Final) caused Sunflower Electric Power Corp. and Mid-Kansas Electric Co. to take costly steps to comply. (*Id.* at ¶ 13). These illustrative impacts are likely an underestimate based on experience. (*Id.* at ¶ 22). The New York Times reported that "[t]he rule will probably lead to the closing of hundreds of coal-fired power

plants."[18] These decisions will harm employees, consumers, and entire communities. (*Id.* at ¶ 20). Even EPA admits its "analysis indicates that there may be some additional job losses in sectors related to coal extraction and generation that are attributable to implementation of this rule." (Final Rule 1140).[19]

The Mercury and Air Toxics ("MATS") rule illustrates the irreparable harm that will occur absent a stay. Although *Michigan v. EPA*, 135 S. Ct. 2699 (2015), rejected EPA's refusal to consider costs before deciding to impose the MATS rule, EPA subsequently announced the decision was not important because the majority of plants had already complied or were locked into decisions to comply. (Galli Decl., ¶¶ 24-25).

In this case, power plants that begin to shut down and States that begin to implement the Final Rule will essentially lock in EPA's policy

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[18] "5 Questions About Obama's Climate Change Plan," N.Y. TIMES, Aug. 3, 2015 (available at http://www.nytimes.com/2015/08/04/us/politics/5-questions-about-obamas-climate-change-plan.html).

[19] The Final Rule's Regulatory Impact Analysis ("RIA") acknowledges that retail electricity rates will rise (at 3-35), the electrical sector will lose tens of thousands of full-time job-years (at 6-24 to 6-25 (Tables 6-4 & 6-5)), and there will be ripple effects in other sectors of the economy (at 5-3). EPA, RIA for the Clean Power Plan Final Rule (Aug. 2015), available at http://www.epa.gov/airquality/cpp/cpp-final-rule-ria.pdf.

preferences, even if the Rule is ultimately invalidated. In this instance, "[t]he injury against which a court would protect is not merely the expense to the plaintiff,…but…the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.).

### III. The Remaining Factors Favor a Stay.

A stay will merely preserve the status quo while this Court considers the lawfulness of the Final Rule. Electric power markets will continue business as usual, with no injury as a result of the Court's stay order. EPA can hardly claim there is any particular urgency to its regulatory actions during the period necessary for judicial review. EPA has not quantified *any* environmental benefit from the Final Rule, let alone one that would occur while judicial review is pending. In fact, EPA has waited years to regulate power plant $CO_2$ emissions and has already allowed its deadlines to slip numerous times.[20]

Also relevant to the stay calculus is the unprecedented nature of EPA's action. Its legal theory is completely novel and represents a stark

[20] *See* Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to adopt Section 111(d) standards by May 26, 2012).

change in the agency's interpretation of the Section 112 Exclusion. And the Final Rule is strikingly different from traditional pollution regulations:

- $CO_2$ is unlike familiar pollutants with localized impacts and documented human health effects. We are all $CO_2$ emitters, and atmospheric $CO_2$ is the intermingled result of all human activity and Mother Nature. Although EPA tries to cast this regulation in traditional air emissions terms, it is anything but. $CO_2$ is different in kind from traditional air emissions because *it is not unique to the regulated source*. Congress rejected cap-and-trade legislation partly out of concern for disproportionate adverse impacts on coal-reliant States. Now, EPA is forcing coal-reliant consumers, communities, regions, businesses and utilities to bear the burden for a stated objective that is global in nature.

- The Final Rule's impact is far more severe and discriminatory than that of ordinary regulation. As Secretary of State John Kerry described U.S. policy regarding coal-fueled power plants: "We're going to take a bunch of them out of commission."[21] This deliberate targeting is qualitatively different from other programs. The transportation sector accounts for 27%

[21] Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. TIMES (Dec. 11, 2014), available at http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=3.

of total GHG emissions, barely less than 31% from the entire electric power industry,[22] and yet transportation does not face the same treatment. Although the government regulates cars, it does not embark on a "war" against the automobile. Never before has a regulation been accompanied with a governmental pronouncement that it intends to extinguish an entire industry *for conduct in which we all engage*. EPA has arbitrarily singled out coal-fueled plants for shutdown and extinction, for emissions produced by Mother Nature and virtually every human activity on the planet.

- Worse, EPA does not even claim that the Final Rule will have any measureable impact on climate. In fact, the EPA Administrator testified before the Senate Environment and Public Works Committee on July 23, 2014: "The great thing about this [EPA Power Plan] proposal is that it really is an investment opportunity. *This is not about pollution control*."[23]

- State participation in federal programs is "in the nature of a contract," with the key question being "whether the State voluntarily and

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[22] RIA for the Clean Power Plan Final Rule, p. 2-25, Table 2-15.

[23] U.S. House Energy Commerce Comm. Press Release, Pollution vs. Energy: Lacking Proper Authority, EPA Can't Get Carbon Message Straight (Jul. 23, 2014), *available at* http://energycommerce.house.gov/press-release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight (emphasis added).

knowingly accepts the terms of the 'contract.'" *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (internal quotation marks and citations omitted). The Final Rule improperly remakes the agreement between States and the Federal Government that has existed since the Clean Air Act was enacted in 1970. States could not have expected, when they adopted costly implementation plans to regulate power plants' conventional pollutants like $NO_2$, $SO_2$, and particulates, that EPA would do an about-face and seek to phase out those power plants altogether.

These features of the Final Rule are not merely striking; they in fact raise serious constitutional questions,[24] which provides yet another reason

[24] Under our Federalism, the federal government may not compel the States to implement federal regulatory programs, making "a 'balancing' analysis" "inappropriate." *Printz v. United States*, 521 U.S. 898, 932 (1997). Even when some States agree to expand federal power, structural principles of federalism prevent such collusion. *New York v. United States*, 505 U.S. 144, 181-82 (1992). Whether coercive or collusive, federal commandeering blurs the lines of political accountability by making it appear as though the harmful effects of federal policies are attributable to state choices. *Printz*, 521 U.S. at 930. That is exactly what will occur here: the Final Rule will force States to adopt policies that will raise energy costs and prove deeply unpopular, while cloaking those policies in the Emperor's garb of state "choice" – even though in fact the polices are compelled by EPA. In addition, regulations that single out a few to bear a burden that ought to be borne by all, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion), or that impose targeted burdens that simply go "too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), trigger just compensation obligations. Courts avoid statutory constructions triggering

that EPA is not entitled to *Chevron* deference. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'r*, 531 U.S. 159, 174 (2001).

The public has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible," rather than through administrative fiat. *WMATA*, 559 F.2d at 843. Absent a stay, the Final Rule will trigger costly and irreversible decisions by States and private industry. EPA should not be permitted to circumvent timely judicial review in imposing such vast burdens. Indeed, the possibility that fundamentally important agency action might permanently evade judicial review that is meaningful enough to make a difference would risk impairment of the judicial function and raise separation of powers concerns.

## CONCLUSION

The Petition should be granted, the Final Rule should be stayed, and all deadlines in it suspended pending the completion of judicial review. To ensure the least amount of harm while permitting this Court sufficient time to consider this request, Peabody seeks a stay by Tuesday, September 8, 2015, approximately one year before state plans must be submitted.

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potential duties to compensate, especially when Congress has not authorized such a result. *Bell Atl. Tel. Cos. v FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

August 13, 2015

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared with 14-point Times Roman type and contains 6,827 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), on the basis of a count made by the word processing system used to prepare the brief.

/s/ Tristan L. Duncan

## CERTIFICATE OF SERVICE

I hereby certify that on this day, August 13, 2015, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/Tristan L. Duncan

# EXHIBIT A

# DECLARATION OF BRYAN A. GALLI

I, Bryan A. Galli, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge and belief:

## Title and Background

1. I am Group Executive Marketing & Trading of Peabody Energy Corporation ("Peabody"). I have been employed by Peabody, or one of its subsidiaries, for more than 13 years. Peabody is incorporated under the laws of the State of Delaware, and its principal place of business is in St. Louis, Missouri.

2. I provide this declaration in support of Peabody's emergency petition for an extraordinary writ, which seeks to stay the final rule issued by the United States Environmental Protection Agency ("EPA"), "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (the "Final Rule"). This declaration is based on my personal knowledge of facts and analysis conducted by my staff and me.

## Peabody's Business

3. Peabody is the world's largest private-sector coal company, the largest producer of coal in the United States, and is a publicly-traded company.

4. Peabody has an estimated 6.6 billion tons of proven and probable coal reserves in the United States. Peabody's annual United States coal production was approximately 185 million tons in 2013 and 190 million tons in 2014.

5. Peabody's products fuel nearly 10% of America's electricity. In 2014, Peabody's total U.S. coal sales (by volume) of about 200 million tons went to more than 150 U.S. electricity generators and industrial sites in approximately 30 states.

6. Peabody owns interests in 16 active coal mining operations in the United States. These mines are located in Arizona (Kayenta), Colorado (Twentymile), Illinois (Cottage Grove, Gateway, Wildcat Hills), Indiana (Bear Run, Francisco, Somerville Central, Somerville North, Somerville South, Wild Boar), New Mexico (El Segundo, Lee Ranch), and Wyoming (Caballo, North Antelope Rochelle, Rawhide).

7. In addition to Peabody's mining operations, Peabody markets coal from its operations, other coal producers, and traders through its trading and business offices in the United States and abroad. Peabody also owns an interest in a 1,600 megawatt coal-fueled electricity generation plant in the United States.

8. Peabody has made substantial investments in its business of providing coal as a reliable and low-cost fuel source to power plants throughout the country.

**Summary of Harms from the Final Rule**

9. As discussed in more detail below, the Final Rule will result in irreparable and immediate harm by forcing coal-fueled power plants to close (or lock in the closure process) before judicial review of the rule is complete. Based upon EPA's modeling from its Technical Support Documents, EPA expects that its plan will force the full or partial closure of many coal-fueled power plants, with closures beginning as early as 2016. Peabody supplies coal to some of these plants. Because Peabody and its utility customers must make future planning and investment decisions for existing plants and resources on a multi-year time horizon, irreversible closure decisions must be made years before actual closure and before judicial review is complete. As described more fully below, Peabody's customers already have begun making plant closure and curtailment decisions in anticipation of the Final Rule. The pace of those closure and curtailment decisions will pick up now that the Final Rule has been announced. Therefore, the harm from the plant closure and curtailment decisions required by the Final Rule already is occurring and will only become cumulative and ongoing in the immediate

future. Plant closure and curtailment will irreparably and immediately harm Peabody as well as its workers, suppliers, and customers, and our and their communities.

## EPA's Final Rule

10. On August 3, 2015, EPA announced and released the text of the Final Rule, which sets carbon dioxide emissions rates from existing fossil-fueled Electric Generating Units ("EGUs") by state. Through these emissions rates, the Final Rule primarily targets coal-fueled power plants.

11. In approximately one year, by September 6, 2016, states must submit their plans to EPA describing how they will meet the strict carbon dioxide emissions rates placed on them by EPA. Because of the time-intensive planning necessary to implement changes that will be required by the plans, which is described in more detail below, utilities will need to begin making irreversible decisions before and after they submit their plans to EPA.

## Irreversible Utility Planning Decisions Are Being Made Now Because of the Final Rule

12. The Final Rule ignores the capital and time-intensive nature of the power generation and transmission industry, in which it takes a decade or more to make major shifts in generation mix and to upgrade the transmission system to support these shifts. Accordingly, the generators and transmission

providers must begin planning now to comply with the 2016 and subsequent deadlines.

13. This time-intensive process is confirmed by a declaration already submitted in this case. Within months of EPA issuing its proposed rule in June 2014, and long before EPA issued the Final Rule, Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC (collectively, "Sunflower") already were taking steps to comply with the proposed rule. According to Sunflower:

a) Improvement planning done up to four years in advance – "Sunflower is undergoing all of this analysis now, even though the Proposed Rule is not final because the project design, engineering, permitting, vendor selection, manufacture and delivery, and installation of projects to reduce CO2 emissions through the heat rate improvements contemplated by Building Block 1 of the Proposed Rule generally take anywhere from 18 to 48 months to complete." ECF 1529709, ¶ 7.

b) Outage and maintenance planning done at least three years in advance – "The nature of utility management for production resources, especially for small utilities, necessarily requires much advance outage and general maintenance planning. Sunflower plans such activities at least three years into the future. For example, we anticipate a major turbine outage for 2017 and are planning for it now." *Id*. ¶ 8.

c) Major outage planning done 8-10 years in advance – "We are also currently evaluating how the Proposed Rule affects our current planning cycle. If we ignore the Proposed Rule, we might find ourselves in a situation necessitating an additional unplanned major turbine outage project 8 to 10

years in advance of the next turbine outage cycle. These are the types of decisions that are having to be made right now in light of the Proposed Rule. These kinds of decisions have immediate influence on our long-range plans." *Id*.

d) Transmission changes require "major" advance planning – The utility "is also having to begin planning now for the major re-dispatch of generating resources to address the Proposed Rule's Building Block 2 and Building Block 3 assumptions regarding re-dispatch to gas-fired EGUs and increased renewable energy generation. . . . The current transmission system was developed over decades to move central station energy to current load centers. Those same transmission resources will NOT, without major revisions, be able to move large quantities of energy from these re-dispatched sources to load centers without major pre-planned improvements to the transmission system." *Id*. ¶ 9.

14. Utilities are *already* making irreversible and significant decisions to comply with the Final Rule. For example, on July 9, 2015, Minnesota Power announced it will indefinitely suspend its Taconite Harbor Energy Center plant in third quarter 2016, and completely retire it in 2020.[1]

a) EPA's anticipated Final Rule responsible for the closure – Minnesota Power blamed the closure on the anticipated finalization of EPA's proposal: "Minnesota Power, a subsidiary of Allete, says its move is part of an economic and regulatory shift to less carbon-intensive resources, *particularly as result of the US Environmental Protection Agency's proposed Clean Power Plan to regulate CO2 from existing power plants*, due to be finalized next month."[2]

[1] Brady Slater, *Coal-Fired Operations to End at Taconite Harbor Energy Center; Plant Will Be Idled in 2016*, DULUTH NEWS TRIBUNE, July 9, 2015, available at http://www.duluthnewstribune.com/news/3782973-coal-fired-operations-end-taconite-harbor-energy-center-plant-will-be-idled-2016.

[2] *Minnesota Power Plans to Idle Taconite Coal Plant*, ARGUS, July 10, 2015, available at http://www.argusmedia.com/pages/NewsBody.aspx?id=1069256&menu=yes (emphasis added).

b) Jobs have been affected – The plant's employees must begin making plans now to change jobs.[3] The announced closure likely will cause employees to change jobs and cities in the upcoming months. The current jobs are considered to be well paying and for which adequate replacements do not exist in the community. Upsetting the status quo risks displacing this work force now, which cannot be undone later once this work force is displaced. Foisting higher living expenses on this work force now also is irreversible harm, which invalidation of the Final Rule a year to three years from now will not be able to undo.

c) The community has been affected – The mayor of the nearby community described the repercussions caused by the closure: "Silver Bay Mayor Scott Johnson weighed in on the human toll of the announcement, lamenting potential transfers that will affect North Shore communities. He said he knows a number of the people who work at the plant and called their jobs well-paying. 'I can picture the faces of the people I know that work there,' Johnson said. 'There's a lot of them — guys I coached in hockey — that now have families, and their participation in our community involvement will be a loss.'"[4]

15. Peabody supplies coal to the Taconite Harbor Energy Center.

16. Like Minnesota Power's decision to suspend and retire its Taconite Harbor plant, other utilities undoubtedly will announce and begin the closure process for other coal-fueled power plants before judicial review is complete.

[3] David Shaffer, *Minnesota Power to Idle Coal-Burning Power Plant in Schroeder, Minn., in 2016*, MINNEAPOLIS STAR TRIBUNE, July 9, 2015, available at http://www.startribune.com/minnesota-power-to-idle-coal-burning-power-plant-in-schroeder-minn-in-2016/313006971/.

[4] Duluth News Tribune, *supra* note 1.

17. EPA expects the Final Rule will cause 15GW to 17GW of electricity generation to retire in 2016.[5] The closure process would need to begin immediately for affected plants. Indeed, absent a stay, these plants will be closed by the time full appellate review (including possible Supreme Court review) is complete for this case.

18. For example, EPA expects its plan will cause the 2016 closure of the Big Brown plant in Fairfield, Texas. EPA further expects its plan will cause the 2016 partial closure of two EGUs at the Monticello plant in Mount Pleasant, Texas.[6]

19. Peabody supplies coal to Luminant's Big Brown and Monticello plants.

20. In declarations submitted in support of a motion to stay the Cross-State Air Pollution Rule (a motion this Court granted, *EME Homer City Generation, L.P. v. EPA*, Nos. 11-1302, et al. (D.C. Cir. Dec. 30, 2011)), officials described the severe impact that millions of dollars in tax revenue lost by closure of the Monticello plant and the mine that supports

[5] Based on a comparison of the Integrated Planning Model run files EPA released with the Final Rule. *See* http://www.epa.gov/airmarkets/programs/ipm/cleanpowerplan.html. The retirements identified by the Base Case for the Final Rule were compared against the retirements projected in the Rate-Based Illustrative CPP compliance scenario and the Mass-Based Illustrative CPP compliance scenario.

[6] *See* EPA Projected Texas Coal-Fueled Unit Capacity Retirements in the Proposed Clean Power Plan, Comments of Luminant Generation Company LLC to EPA, Dec. 1, 2014, Appendix D, available at http://pov.energyfutureholdings.com/wp-content/uploads/2014/12/Luminants%20Comments%20on%20EPA%20Proposed%20Carbon%20Emission%20Guidelines%20Docket%20EPA....pdf.

the Big Brown plant would have on county employees and services, local teachers and students, hospital services, and community college staff and programs.[7]

21. Peabody stands to lose coal supplies to plants that will be closed.

**Experience from the MATS Rule Indicates Irreversible Harm Will Occur Before Judicial Review Is Complete**

22. Experience from the Mercury and Air Toxics Standard Rule ("MATS Rule") indicates that, without a stay, (1) more plants will close than EPA projects, (2) plants will close before judicial review is complete, and (3) EPA will achieve its intended outcome before judicial review is complete.

23. In its Regulatory Impact Analysis, EPA estimated the MATS Rule would close 4.7 gigawatts ("GW") in coal-fueled power by 2015.[8] However, in early 2014, the U.S. Energy Information Administration

[7] Declaration of Judge Brian P. Lee, County Judge, Titus County, Texas, attached as Ex. A; Declaration of Dr. Lynn Dehart, Superintendent of Schools, Mount Pleasant Independent School District, attached as Ex. B; Declaration of Dr. Bradley Johnson, President, Northeast Texas Community College, Titus County, Texas, attached as Ex. C; Declaration of Judge Linda K. Grant, County Judge, Freestone County, Texas, attached as Ex. D; Declaration of Roy W. Hill, Mayor, City of Fairfield, Texas, attached as Ex. E; Declaration of George M. Robinson, President, Fairfield Hospital District, attached as Ex. F; Declaration of David E. Zuber, P.E., President, Fairfield Industrial Development Corporation, Freestone County, Texas, attached as Ex. G.

[8] U.S. EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, Dec. 2011, at ES-14, available at http://www.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf ("A small amount of coal-fired capacity, about 4.7 GW (less than 2 percent of all coal-fired capacity in 2015), is projected to become uneconomic to maintain by 2015.").

("EIA") projected that 54 GW of coal-fueled power – more than 10 times EPA's original projections – would be retired between 2012 and 2016, the first year of MATS Rule enforcement.[9] Moreover, more coal-fueled power plant closures were announced in the four months between November 2013 and March 2014 – 5.4 GW – than the total projection in EPA's Regulatory Impact Analysis.[10]

24. Judicial review of the MATS Rule is on-going. In June 2015, the United States Supreme Court remanded the MATS Rule to the United States Court of Appeals for the District of Columbia Circuit. In holding that EPA acted unreasonably "when it deemed cost irrelevant to the decision to regulate power plants," the Supreme Court ruled that EPA "must consider cost – including, most importantly, cost of compliance – before deciding whether regulation is appropriate and necessary." *Michigan v. EPA*, No. 14-46, 576 U.S. ___ (June 29, 2015), slip op. at 14-15.

25. EPA discounted its defeat at the Supreme Court because of the compliance that had occurred while judicial review was pending:

a) Gina McCarthy, EPA Administrator: "The majority of power plants have already decided and invested in a path to

[9] U.S.EIA, AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 Than Have Been Scheduled, Feb. 14, 2014, available at http://www.eia.gov/todayinenergy/detail.cfm?id=15031.

[10] U.S. EIA, Planned Coal-Fired Power Plant Retirements Continue to Increase, Mar. 20, 2014, available at http://www.eia.gov/todayinenergy/detail.cfm?id=15491.

achieve compliance with the Mercury Air Toxics Standards."[11]

b) Janet McCabe, EPA Acting Assistant Administrator for the Office of Air and Radiation: "In fact, the majority of power plants are already in compliance or well on their way to compliance."[12]

c) Melissa Harrison, EPA Spokeswoman: "EPA is disappointed that the Court did not uphold the rule, but this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance."[13]

26. Because of the advance planning that must begin immediately for power plants to comply with the Final Rule, a future ruling that the Final Rule is illegal may only exacerbate the irreparable harm. For example, a utility in Montana and the Dakotas already has spent approximately $350 million on upgrades to comply with the MATS Rule. However, in light of the Supreme Court's decision that EPA did not properly consider cost before deciding that regulation was appropriate and necessary, the Montana Public Service Commission has not decided whether to approve a rate increase

[11] Alan Neuhauser, *McCarthy: Clean Power Plan Unaffected by Supreme Court*, U.S. NEWS, July 7, 2015, available at http://www.usnews.com/news/articles/2015/07/07/mccarthy-clean-power-plan-unaffected-by-supreme-courts-mercury-rule-rebuke.

[12] EPA Connect, Official Blog of the EPA Leadership (June 30, 2015), https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/.

[13] Timothy Cama and Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, THE HILL, June 29, 2015, available at http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule.

needed for the utility to pay for the upgrades.[14] Therefore, the utility is now facing being stuck with the compliance costs it already incurred with no practical way to recoup those costs. If judicial review strikes down the MATS Rule in whole or in part, these massive upgrades will have been an unnecessary expenditure for the utility or the customers forced to pay for them. So here too, the Final Rule predictably will force costly changes by many power plants.

**Other Irreparable Harm Caused by the Final Rule Before Judicial Review Is Complete**

27. Peabody's status as a publicly traded company means that it is affected immediately by investors' perceptions of the Final Rule's impacts, both near-term and beyond, on Peabody's business.

28. From the day before the Final Rule was announced to the close of the markets the day after the announcement, Peabody's public shares and bonds lost more than $90 million in value, demonstrating the powerful, immediate and irreparable damage that discussion of such a plan can have regardless of its ultimate disposition years later.

[14] Tom Lutey, *Montana Utility Rate Increase Based on Disputed Pollution Terms*, BILLINGS GAZETTE, July 22, 2015, available at http://billingsgazette.com/news/government-and-politics/montana-utility-rate-increase-based-on-disputed-pollution-terms/article_9141011d-3ee1-5656-bdaf-509f9e6f74e1.html.

29. A 2014 study analyzed the potential impacts of the EPA power plant rules on the electricity sector and the economy as a whole.[15] The study found that the rules would cause lower GDP – on average $51 billion every year, accompanied by higher rates to consumers and losses in employment. Slower economic growth, job losses, and higher energy costs mean that annual real disposable household income would decline an average of more than $200, with a peak loss of $367 in 2025. In fact, the typical household could lose a total of $3,400 in real disposable income during the years 2014 through 2030. On average, from 2014 to 2030, the U.S. economy would have 224,000 fewer jobs.

30. Two 2014 studies by Energy Ventures Analysis[16] estimated that EPA's plan would substantially raise retail consumer rates. The studies projected that under the plan average annual electricity bills per household would increase approximately $340 or 27 percent until 2020, and then even more (over $350 per household) between 2020 and 2030. The end result

[15] IHS, Assessing the Impact of Potential New Carbon Regulations in the United States, 2014, *available at* http://www.energyxxi.org/epa-regs-report.

[16] Energy Ventures Analysis, Energy Market Impacts of Recent Federal Regulations on the Electric Power Sector, Nov. 2014, available at http://evainc.com/wp-content/uploads/2014/10/Nov-2014.-EVA-Energy-Market-Impacts-of-Recent-Federal-Regulations-on-the-Electric-Power-Sector.pdf; Energy Ventures Analysis, EPA Clean Power Plan: Costs and Impacts on U.S. Energy Markets, Oct. 2014, available at http://www.countoncoal.org/assets/Executive-Summary-EPA-Clean-Power-Plan-Costs-Impacts.pdf.

would be that average family would pay over $1,225 more for power and gas in 2030 than it did in 2012.

Executed this 13th day of August, 2015.

Bryan A. Galli

# EXHIBIT A

# Declaration of Judge Brian P. Lee

## County Judge, Titus County, Texas

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

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|---|---|
| Luminant Generation Company LLC, et al.<br><br>Petitioners,<br><br>v.<br><br>Environmental Protection Agency, et al.<br><br>Respondents. | Case No. 11-1315 |

Declaration of Judge Brian P. Lee

1. I am the County Judge for Titus County, Texas and was elected to the position in November, 2010. In addition to certain judicial responsibilities, a County Judge in Texas serves in an important administrative role for the County. I am responsible for drafting the County budget, and I preside over the Commissioners Court, which oversees the budget and the business of the County. Thus, I am very familiar with the County's budget, services, and revenue.

2. I am providing this declaration to support Luminant's motion to stay the Environmental Protection Agency's (EPA's) Cross-State Air Pollution Rule (CSAPR) by describing the harm that rule will cause Titus County unless the Court acts to stay the rule. The information included in this declaration is based on my personal knowledge and my years of experience as a businessman and civic leader in the County.

3. I have lived in Titus County since 1983, working first for a local businessman and then owning and operating several of my own businesses. In 1987, my wife and I built the El Chico Restaurant and operated it for 20 years. Since 2003, I have owned and operated The Space Place, a five location self storage facility. I am also part owner of LMP Concrete, a locally owned ready mix plant.

4. I have previously been elected to the Mount Pleasant City Council and the Titus Regional Medical Center Board of Managers. I have served as a volunteer with The Chamber of Commerce (Board), Titus Regional Medical Foundation (Vice President), Habitat for Humanity (Treasurer), Industrial Foundation (President), and the Industrial Development Corporation (nominated by City Council).

5. I attended Baylor University where I earned my Bachelor of Business Administration in Accounting in 1980. I received my license as a Certified Public Accountant while working for Ernst & Young in Dallas immediately after college.

6. Titus County's largest taxpayer is Luminant, which runs the Monticello power plant and associated mines. Luminant announced on September 12, 2011 that it will stop running two of the three power generation units at the Monticello plant and will also close the Thermo and Winfield lignite mines, because it cannot comply with CSAPR and still operate those facilities.

7. If Luminant is forced to close those operations, it would be devastating to Titus County. It would be the perfect storm of higher taxes, higher unemployment, and higher utility rates. In the three decades that I have lived here, we have never had to suffer through something like that.

Higher taxes or fewer services (or both)

8. Titus County raises most of the funds for its services through an ad valorem tax on property and equipment. In 2010, Luminant paid $3.3 million out of the approximately $9.5 million collected countywide pursuant to the ad valorem tax.

9. Unfortunately our County is already having to significantly increase taxes because of a number of factors, including the 2010 decision by Pilgrim's Pride to move its executive offices to Colorado. The tax implications of that are still working their way through the system, but they are already reducing our tax revenue.

10. If CSAPR forces Luminant to shut down facilities, we are going to face unprecedented reductions in property values and, therefore, tax revenues. That will drive the need to raise taxes even higher, in a time when the county is already struggling to recover from the nationwide economic recession and the loss of a major employer in the area.

11. However, we may have to cut services as well if the tax increases cannot keep pace with the property value reductions driven by CSAPR. The ad valorem tax provides 67% of the money used to fund County services. The majority of the County's budget is devoted to law enforcement through the sheriff's department and County jail. Additional services include, but are certainly not limited to, providing maintenance to roads and bridges, the County Clerk, automobile registration, and the County Court. I am not sure what services we would need to cut first or which employees we would need to lay off, but the cuts will not be easy and they will certainly harm the County residents who rely on the services.

12. We're currently at the end of our budget cycle, and due to property devaluation that has already occurred, we are postponing plans to expand the county offices, which have not been remodeled or updated since the early 1990s. Expansion is needed because of the growth in population we have experienced during that time. These offices house voter registration, auto registration, tax collection, the district court, and child and adult probation. Due to the uncertainty caused by the EPA rule, projects like these will have to be shelved indefinitely.

Higher unemployment

13. The closures at Luminant will significantly impact jobs in the area. Luminant is a major employer that provides some of the community's best, highest-paying jobs. There are no employers in the area that are positioned to be able to provide replacement jobs for those Luminant employees.

14. The loss of those jobs will have a "ripple" effect that is hard to calculate, but that is very real. We are in the midst of a similar event because of the Pilgrim's Pride relocation mentioned above. When we lost all of the company's executive officers, the businesses in the area saw significant reductions in sales. In addition, the housing market suffered reduced prices and there is a glut of houses for sale. These reduced housing prices will continue for several years. That also means that new houses are no longer being built by our tradesmen.

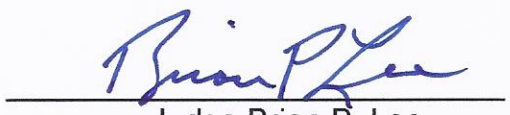
Higher utility rates

15. As a businessman, it is obvious to me that we are going to end up paying more for our electricity if Luminant is forced to cut back the supply of energy. If the supply goes down and the demand stays the same (or increases), the law of supply and demand dictates that we are going to be seeing higher energy prices.

16. In addition, I am concerned that we are going to experience more power reliability problems. This summer's heat wave resulted in repeated warnings from the State that we need to conserve energy so that we do not lose power. If there is less generating capacity available because Luminant is not operating some of its generating units, those problems are likely going to be worse.

17. This is a tough time for our community. Just a few years ago, we thought that Luminant was going to be significantly expanding its power plant. Now we are looking at just the opposite, unless this Court stays CSAPR.

I, Brian P. Lee, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 13 day of September 2011.



Judge Brian P. Lee

# EXHIBIT B

# Declaration of Dr. Lynn Dehart

## Superintendant of Schools, Mount Pleasant Independent School District

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

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|---|---|---|
| Luminant Generation Company LLC, et al. | ) | |
| Petitioners, | ) | |
| v. | ) | Case No. 11-1315 |
| Environmental Protection Agency, et al. | ) | |
| Respondents. | ) | |

**Declaration of Dr. Lynn Dehart**

1. I am the Superintendent of Schools for the Mount Pleasant Independent School District (Mount Pleasant ISD or the District), a position I have held since January 31, 2011. I am providing the court with this declaration in support of Luminant's motion to stay the Cross-State Air Pollution Rule (CSAPR), in order to demonstrate the impact that rule will have on my community and school district.

2. I have spent over 25 years in public education, as a teacher, an assistant principal, a program director in one of the largest bilingual programs in America, principal of the First International School of Texas and America, and finally Superintendent of Schools of the Maypearl Independent School District, which I held for seven years immediately prior to coming to Mount Pleasant. Prior to that, I spent over fifteen years in Christian Ministry in Texas and Michigan.

3. I earned a B.A. in religion and philosophy from Dallas Baptist University in 1975, an M.A. in English and ESOL from the University of North Texas in 1989, an M.Ed. in Education Administration from the University of North Texas in 1995, and a Ph.D. in Public and Urban Administration from the University of Texas at Arlington in 2011.

4. There are nine schools in the Mount Pleasant ISD, and we serve approximately 5500 students. We employ 550 certified educators and a total of 930 employees. For the past three years, Education Resources Group has ranked Mount Pleasant ISD in the top 5 among

1,035 school districts in Texas with respect to student achievement relative to fiscal responsibility. While Mount Pleasant may be considered rural, its demographics are more similar to those seen in large urban areas such as Dallas. We have a higher percentage of economically disadvantaged students and students for whom English is a second language than is common for rural Texas school districts. For example, approximately 80 percent of our students are eligible for free lunch due to their economically disadvantaged status. Ensuring that such students finish school as successful graduates requires a greater amount of teacher time and involvement. This, in turn, requires a greater financial investment in school teachers and other staff. To date, thanks to Luminant and other major industries located here, we have had a stable and relatively high tax base that has allowed us to invest those resources. Thus, we have been able to provide a small school education to an urban population.

5. However, on September 12, 2011, Luminant announced that it will be shutting down two electric generating units at its Monticello power plant in the Mount Pleasant area, as well as closing its Thermo and Winfield lignite coal mines, all in order to comply with CSAPR.

6. Luminant's planned reduction in operations is going to make it difficult for Mount Pleasant ISD to continue to be able to provide the high quality small school education that we have been providing. Mount Pleasant ISD funds the majority of its operations from the ad valorem tax on property and equipment. To date, Luminant has been the largest single taxpayer funding Mount Pleasant ISD. In 2010, for example, Luminant paid over $11.2 million in taxes to the District, approximately 45% of total tax collections and 25% of the district's operating budget. That compares to the school's total 2010 budget of $42 million (which was comprised of $39 million for payroll, materials, maintenance and operation and $3 million in bond repayments).

7. If Luminant is forced by CSAPR to reduce its operations, then Luminant will likely seek to significantly reduce its property tax assessment, cutting significantly into Mount Pleasant ISD's revenue and, ultimately, budget. A significant change in revenue from a taxpayer that contributes 45% of our tax collections will result in severe impacts to the District. In addition, since Luminant would also be reducing its workforce, I expect that would result in fewer students in our District to the extent any of those workers move out of town. Our state

funding is directly tied to the number of students we have, so we would also lose funding because of the reduction in our student population.

8. Further cuts in revenue could not come at a worse time. The State of Texas is significantly reducing its payment to districts across the state, including Mount Pleasant ISD. We expect to lose approximately $4.5 million in state funding in school years 2011-12 and 2012-13. In addition, the corporate offices of a major poultry company, Pilgrim's Pride, just moved out of the area. Finally, another power plant that is also a major taxpayer is planning to shut down significant portions of its operations, which may further reduce our student population.

9. With the cuts in revenue that result from Luminant's actions will likely come cuts in our educational programs. In addition, eighty percent of our spending goes to pay salaries, so we are likely going to have to cut staff. This is particularly difficult, as we need a large staff to work with bilingual and special needs students in this district. It costs us approximately $50,000 for the salary and benefits of one teacher, so a loss of $400,000 in revenue, for example, would cost us eight teachers. We would have to have a district-wide vote to approve any increase in taxes (which would be limited to a maximum levy of $.13 on $100 dollars of taxable value), making that an uncertain option for covering budget deficits.

10. Mount Pleasant ISD will also be harmed in non-financial ways if Luminant is forced to reduce its operations here. First, Mount Pleasant ISD is a well run school district that gets exceptional student achievement results, and the potential reduction in Luminant's tax payments will make it harder for us to sustain that level of academic achievement. Second, Luminant has always been a friend of the school district, regularly providing volunteers, offering scholarships and partnering with the District on projects such as job training. Given the scale of the potential reduction of Luminant's operations, I expect that these benefits to the District will also be dramatically reduced. Finally, our students aspire to work at Luminant and the prospect of available jobs at Luminant helps motivate our students to graduate. That source of motivation to graduate will be essentially eliminated if the Court does not stay CSAPR and Luminant is forced to cut most jobs here.

I, Lynn Dehart, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 12th day of September, 2011.

Dr. Lynn Dehart

# EXHIBIT C

# Declaration of Dr. Bradley Johnson

# President, Northeast Texas Community College, Titus County, Texas

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

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| Luminant Generation Company LLC, et al.<br><br>Petitioners,<br><br>v.<br><br>Environmental Protection Agency, et al.<br><br>Respondents. | Case No. 11-1315 |

**DECLARATION OF DR. BRADLEY JOHNSON**

1. I am President of Northeast Texas Community College (NTCC) in Titus County Texas and have been for the past three years. The purpose of my declaration is to support Luminant's request to stay the Environmental Protection Agency's Cross-State Air Pollution Rule (CSAPR), and it is based on my personal knowledge gained largely during my time at NTCC.

2. I have served in higher education for the last 17 years, working in various roles from educator to administrator and development officer. Immediately before being named President of NTCC, I served as Vice President and Dean of Development for Amarillo College in Amarillo, Texas and had held a number of other positions over thirteen years at Amarillo College.

3. Prior to my work in community colleges, I owned businesses in construction and advertising, as well as a 13-year private practice in mental health counseling. My research on management and leadership issues in the community college system has been published and I have lectured on these subjects at both the state and national levels.

4. I have a doctorate in Educational Studies (2004), a master's degree in Higher Education (1999), and a master's degree in Counseling (1984) from the University of Nebraska – Lincoln, Texas Tech University, and West Texas A&M University, respectively.

5. NTCC is a public community college located two hours east of Dallas, Texas. The main campus is located just outside of Mount Pleasant and it is the only college within at least an hour's drive of Mount Pleasant. The college serves part or all of eight counties covering a population of 100,000, is 27 years old, and has more than 4,400 credit students annually. NTCC has a locally-elected governing board, local taxing authority that covers Titus, Camp, and Morris Counties, and serves as a principal economic development engine for the region, providing education in a variety of industrial, law enforcement/fire fighting,

agricultural and health care professions, as well as the first two years of baccalaureate coursework. Students can complete their bachelor's degrees on the college campus because of a "university center" provided by NTCC. Presently, students can complete a bachelor's in business, education and social work and a master's in social work on our campus.

6. The majority of the students at NTCC come from a 50-mile radius of the college. In addition, more than 200 students live on campus. The college has educational centers in two area cities and a regional training academy in Mount Pleasant.

7. One fifth of the college's operating and non-operating budget is provided by an ad valorem tax on property and equipment. The college tax rate is currently 10 cents per $100 valuation and it is capped at that rate.

8. Luminant's importance to the college's tax base cannot be overstated, as Luminant is the largest taxpayer in the college district and provides more than 20% of the local tax revenue to the college. Even the second largest taxpayer pays just a fraction of Luminant's taxes. In 2009, Luminant paid close to a million dollars in taxes to the college while the second largest taxpayer paid roughly $260,000.

9. This week, Luminant announced that in order to comply with CSAPR, it will stop operating two of the three units at the Monticello power plant and will stop mining lignite at the Thermo and Winfield lignite mines, which are all located in the Titus County area. Luminant has estimated that these steps and others it is taking will result in approximately 500 job losses.

10. I expect that the actions described in paragraph 9 will result in a significant reduction in the taxable value of Luminant's facilities. These potential reductions in taxes come at a particularly difficult time for NTCC. Out of a roughly $14 million operating budget, we just lost $325,000 this year from the State of Texas and are anticipating another 5% cut in state funding in the next year. At the local level, we have also seen a tax revenue reduction of more than $400,000 this year. In addition, the second largest tax payer in our area, another power plant owned by SWEPCO, has announced that it will be closing one of three operating units at its plant as a result of EPA rules. This all comes on the heels of the recent departure from our area of the corporate offices of Pilgrim's Pride. We still have not seen the full financial impact of that departure, but we will be seeing further reductions in our revenue as a result.

11. To absorb such significant revenue losses, the college was forced to close our radiologic sciences program at the college, which impacts our hospital's ability to find the trained personnel they need. The college also implemented a reduction in force, layoffs, and contract modifications that affected approximately 35 employees. In addition, we slashed our maintenance budget by 50%.

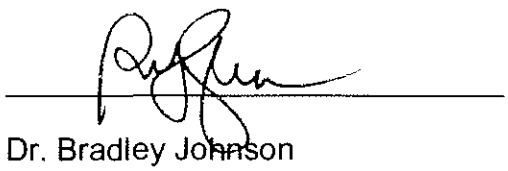
12. There are few options left to address further inevitable cuts in revenue resulting from the EPA's actions. For example, we cannot raise taxes to cover any shortfall, as our tax rate is capped. Thus, we are going to need to further postpone maintenance needs, resulting in decaying facilities. We are also going to have to seriously consider laying off additional employees and cutting more training programs. The impact of these additional cuts will exceed the impacts described in paragraph 11 because all non-essential operational adjustments have already been made.

13. One example of a program that could be in jeopardy is an industrial technology program we started specifically to help our area employers—Luminant, SWEPCO, and US Steel—create the skilled workforce that they need as a generation of workers retires. This program has been one of our top priorities, but if SWEPCO and Luminant cut their workforces, this program might be scaled back or even eliminated. According to our current federal and state administrations, this kind of training program is "mission-critical" because our country needs to rebuild a skilled labor workforce and manufacturing capability. We created this program largely with local funding, and it could be a model for other similar programs. However, this program is in jeopardy, if the EPA timetable is followed.

14. Fewer instructional programs mean fewer educational options for area residents. The next closest alternatives to NTCC are all located an hour or more away. Even if local residents would be willing to make the drive to study at those other colleges – which is unlikely – they will need to pay 60% higher tuition since they are not residents of those areas. In addition, online classes are not a viable alternative in this area, as many residents have very limited access to broadband and must rely on dial-up Internet service. Online offerings are also not an option for many technical classes that need to be taught in a "hands on" environment.

15. In addition to the direct impacts to the college, I am also concerned about the long-term impacts to my community as a result of Luminant's closures. If Luminant is forced to lay off workers, we will lose middle class jobs and the community will face greater poverty and a continuation of the rural "brain drain," which is jeopardizing many communities across our country. I am confident a more rational rule can be implemented that will strike a proper balance between our environmental needs and the economic stability of our community and our nation.

I, Dr. Bradley Johnson, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 13th day of September 2011.



Dr. Bradley Johnson

# EXHIBIT D

# Declaration of Judge Linda K. Grant

## County Judge, Freestone County, Texas

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

| | | |
|---|---|---|
| Luminant Generation Company LLC, et al. | ) | |
| Petitioners, | ) | |
| v. | ) | No. 11-1315 |
| Environmental Protection Agency, et al. | ) | |
| Respondents. | ) | |

**Declaration of Judge Linda K. Grant**

1. I am the County Judge for Freestone County, Texas. I have been the County Judge for almost 13 years. In Texas, the position of County Judge entails both judicial and administrative responsibilities. I have judicial responsibility for certain probate, civil, and criminal matters. In addition to other administrative matters, I preside over a five-member Commissioners Court which has budgetary and administrative authority over County government operations. The Commissioners Court manages the business of the County. This declaration is based on my personal knowledge and opinions which I believe I am qualified to offer based on my almost 13 years of experience as County Judge.

2. I have lived in this area of Texas all my life and in Freestone County in particular for over 27 years. I am also a Certified Public Accountant and worked in that area prior to obtaining my law degree and, ultimately, being elected as County Judge in 1999. I received my undergraduate degree in 1972 and my J.D. in 1997, both from Baylor University.

3. One of my primary responsibilities is preparing the County budget. Working with the other members of the Commissioners Court, we decide on expenditures and set the tax rate based on those expenditures and expected revenue, including from the ad valorem tax. The County has an ad valorem tax applicable to property and equipment that is currently set at $0.25 per $100.00 of valuation. The ad valorem tax is our primary source of revenue, accounting for approximately 75% of all revenue.

4. Luminant's Big Brown power plant and the associated lignite mining operations at the Turlington/Big Brown mine are a cornerstone of our community. Luminant is the largest private employer, provides some of the highest paying jobs, and is the second largest taxpayer, accounting in 2010 for approximately $1.2 million dollars of the County's revenue.

5. Unfortunately, Luminant announced on September 12, 2011 that it intends to cease mining operations at its Turlington/Big Brown Mine as a direct result of the EPA's Cross-State Air Pollution Rule (CSAPR), unless that rule is suspended by the court.

6. If Luminant is forced to cease mining operations, the impact to the County, including its employees and the services it provides, will be significant. Luminant contributes almost a tenth of the County's revenues. If Luminant idles facilities and moves equipment out of the county, that will likely result in a significant reduction of the ad valorem tax paid by the company and will impact the County's budget.

7. The County would be faced with a choice between decreasing the County's services, raising our tax rate, or cutting into reserves. We try to keep the tax rate as low as possible, particularly as many of our citizens are on fixed income and an increase in the tax rate results in a decrease in funds available for living expenses. It would not be fiscally responsible to use our reserves on a prolonged basis. So, our only viable choice would be to cut or reduce the services we are able to provide.

8. In the last several years, the County has already had to go through the process of significantly trimming its budget as a result of reductions in tax revenue from the oil and gas industry. Thus, there is little opportunity for further "belt tightening," without actually cutting services and staff. This will result in more jobs lost in our County.

9. The services that the County provides to its residents—and that are threatened by CSAPR's impact on Luminant—include sheriffs' services, garbage collection, animal control, financial support for volunteer fire departments, emergency management services, ambulance services, and maintenance of roads and bridges, among others.

10. In addition to impacting County services, the cessation of these mining operations as a result of CSAPR would have a "ripple" effect, harming people throughout the county. For example:

    a. Luminant is among the largest employers in the county. It provides some of the highest paying jobs. If people lost their jobs at Luminant, I do not believe it would be possible for them to find comparable new jobs in this area, particularly at their prior salaries. Thus, they would need to move or would have significantly lower disposable income.

    b. Departures will further depress the real estate market.

    c. Departures and the loss of revenue from Luminant will harm retail sales and our local businesses that rely on those sales.

d. Subcontractors that service Luminant's mining operations will likely need to reduce or shutdown operations and reduce their workforce, exacerbating the impacts.

e. The volunteer positions at the fire department and in other places that Luminant's mining employees fill will go empty, as will other assistance Luminant provides the community through donations and volunteerism.

11. Fundamentally, the cessation of mining operations by Luminant will substantially harm the County and its residents. That harm would begin to happen virtually immediately after any workers are laid off and would continue as long as Luminant's facilities remain closed.

12. EPA should consider the impact that CSAPR is having on our small community and our lives. Respectfully, EPA should provide companies like Luminant with a reasonable period of time to implement new government rules and make the adjustments required under CSAPR, and avoid the substantial harms that otherwise will occur.

I, Linda K. Grant, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 14th day of September, 2011.

Linda K. Grant

# EXHIBIT E

# Declaration of Roy W. Hill

# Mayor, City of Fairfield, Texas

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

| | | |
|---|---|---|
| Luminant Generation Company LLC, et al. | ) | |
| Petitioners, | ) | |
| v. | ) | Case No. 11-1315 |
| Environmental Protection Agency, et al. | ) | |
| Respondents. | ) | |

Declaration of Roy W. Hill

1. It is in my capacity as Mayor of Fairfield that I have been asked to provide the court with this declaration. However, it is my position as a 5th generation resident that truly qualifies me to make this statement.

2. Born and raised here, my family has lived in Freestone County and the Fairfield community since the 1830s. We have been land owners, cattle ranchers, business owners, public servants, and citizens of this community. We have seen the area through both tough and prosperous times. My love for this community runs very deep. The future of our City, our County, our State and our Nation are of paramount importance to me.

3. In 1972, after college and law school, I decided to return to Fairfield and set up a law firm which specializes in oil and gas exploration, start-up corporations, mergers, acquisitions, permitting, real estate, banking, and environmental matters for the energy sector. Also during that time, I decided to start giving back to my community. Since returning to the community I have served in several volunteer capacities, including City Attorney from 1973-

1979. In 2003, I was elected to the City Council of Fairfield and became its Mayor Pro Tempore that same year. I was elected Mayor the following year (2004) and have served in that capacity ever since.

3. Luminant has been a vital part of the Fairfield community since the Big Brown Plant and the original Big Brown Mine opened. My family was instrumental in bringing Big Brown to Freestone County—we owned the land on which most of the Big Brown Power Plant and Lake currently sit and much of the land that Luminant has mined and reclaimed. I have watched Luminant grow over the years and have lent a hand whenever it was needed to assure their success because, ultimately, their success is good for our community.

4. Unfortunately, on September 12, 2011, Luminant announced that, on January 1, 2012, it will be forced to cease mining operations at its Turlington/Big Brown Mine in order to comply with the U.S. Environmental Protection Agency's (EPA) Cross State Air Pollution Rule (CSAPR). The closure of these mining facilities will cause irreparable harm to the citizens, the local economy and the services provided by Fairfield and Freestone County.

5. The Turlington/Big Brown Mine currently employs approximately 225 men and women (roughly 2% of the workforce of Fairfield), most of whom live in and around Fairfield. A loss of that many local jobs would cause our unemployment rate to rise significantly and materially. In addition, Luminant is not only the largest private employer in the area, it also provides some of the highest paying jobs. The median salary for Luminant employees is close to $60,000, considerably higher than the community average of just over $40,000.

6. A review of local statistics shows that every job at Big Brown, supports or creates two and one-half jobs in Freestone County. These jobs include contractors directly affiliated with

the mining operations, but also our local merchants, banks, grocery stores, restaurants, schools, hospital and City and County government staff supported by the property taxes paid by Luminant and the sales taxes paid by Luminant employees who shop in our community.

7. Affected citizens will be forced to look outside our area for employment, perhaps even relocating outside our area to support their families. To lose such an important employer in our community would also mean a significant loss of tax revenue — both sales and property. Approximately 65% of the City of Fairfield budget comes from the local sales tax. The loss of these jobs will directly impact that revenue stream and multiply as owners of other businesses will also have less money to spend locally. The housing market will also be affected which will directly affect property taxes and the portion of property taxes the City receives. This closure will force the City to reduce or eliminate City services that its citizens rely on — services like police, fire, road maintenance and construction, parks and recreation, water and sewer, economic development, and garbage disposal.

8. The impacts of CSAPR are far reaching and have affected several local projects. The City has applied for and received approval on the construction of a new airport which would service this area. However, after the July 7 announcement by EPA and the subsequent announcement by Luminant, the City Council will, if this time line is not vacated, be forced to put this project on hold because of concern that it would not have sufficient revenue in the future to support such an endeavor. In addition, plans for a new community center will also have to be put on hold because of concerns about the financial impacts of CSAPR on our community.

9. My concern is that this potential shut down of any "base load" plants in this State will also cause our area and State to not have enough electricity to meet our growing demands. This creates an additional Health and Safety issue for our citizens.

10. In light of Luminant's announcement and the repercussions to follow, the future for the citizens of Fairfield and Freestone County is not good. It grieves me to see the loss on the faces of our citizens, all caused by the EPA, unless they are stopped from enforcement of the time lines set out by this rule.

I, Roy W. Hill, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 14th day of September, 2011.

Roy W. Hill

Roy W. Hill

# EXHIBIT F

# Declaration of George M. Robinson

# President, Fairfield Hospital District

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

| | | |
|---|---|---|
| Luminant Generation Company LLC, et al. | ) | |
| Petitioners, | ) | |
| v. | ) | Case No. 11-1315 |
| Environmental Protection Agency, et al. | ) | |
| Respondents. | ) | |

**Declaration of George M. Robinson**

1. I am the President of the Fairfield Hospital District in Fairfield, Texas. The Hospital District is a legal entity with taxing authority that supports our local hospital, East Texas Medical Center Fairfield (ETMC-Fairfield), that is operated by a private health care provider. The purpose of this declaration is to describe the harm that I believe the Hospital District, the hospital, and my community will suffer if a recent rule issued by the U.S. EPA is not stayed by the court.

2. I am also a lawyer in private practice here in Fairfield. My practice includes a broad range of areas, including criminal, family, oil and gas, real estate, wills, trusts and probate. I also serve on the Board of Directors for the Fairfield Industrial Development Corporation.

3. My family has been actively involved in the ranching industry within a few miles from the Big Brown plant for many, many decades. Despite the negative allegations regarding Big Brown, on a regular basis, our cattle are fat, our grasses our good and our water is healthy and plentiful. This year, due to the drought, that is not necessarily the case.

4. I received my bachelors degree in business administration from Sam Houston State University in 1992 and my J.D. from South Texas College of Law in 1992.

5. I was raised in this community and grew up right around the corner from Luminant's Big Brown power plant. My family has lived here since the 1850s—before the City of Fairfield even existed.

6. Luminant is an integral part of the Fairfield community. I estimate that, since the plant and mines opened, the economic base of the community has tripled because of the taxes paid by Luminant, the home purchases by Luminant employees, the money spent by Luminant employees in the community, and other benefits brought by Luminant.

7. If we lost a significant portion of Luminant's local operations, it would be similar to what happened to Detroit (and other industry-dependent cities) with the shut down of the auto manufacturing in that city. Luminant supports our local businesses and has been the primary employer here since the late 1960s. The jobs at Luminant are the steadiest and best paying jobs in town.

8. However, Luminant just announced that it will need to cease mining operations at the Turlington/Big Brown mine in order to comply with the "Cross State Air Pollution Rule." This will result in the loss of 110 jobs in 2012 and the balance of the approximately 225 jobs at the mine in the next few years, as well as a reduction in the taxes paid by Luminant due to changes in the valuation of Luminant's property and equipment.

9. In addition to harming many other parts of our community, the cessation of mining operations at Luminant will harm the Hospital District. Our funding comes, in significant part, from revenue from the ad valorem tax on property and equipment. In other words, the Hospital District's revenue is derived from a portion of the ad valorem tax on the property, buildings and equipment owned by companies such as Luminant and located in the county. If the value of Luminant's operations in the county is reduced due to cessation of mining operations, taxes will also be reduced.

10. The mine closure that Luminant will need to undertake because of CSAPR will reduce the County's tax base and the taxes that the District receives. The indigent care program, which provides no-cost medical care for the indigent, in particular, is funded by that tax, along with matching federal funds. The amount of indigent care that we need to provide will not decrease if Luminant closes its mining operations, and could even increase. Further, the hospital cannot deny care to those people who are unable to pay for the services they receive. Thus, any money that the Hospital District loses from a decrease in taxes, and the accompanying loss of federal matching funds, will need to be made up by the hospital, making it less economical for the company that runs it (East Texas Medical Center Regional Healthcare System).

11. The hospital will also be harmed by a reduction in population. It is unlikely that the mining employees who lose their jobs at Luminant will be able to find local jobs that can match their current ones. Thus, these two and three children families are going to be forced to leave town, reducing the local population using the hospital's services. This will further cut into the hospital's finances.

12. As it stands right now, the hospital is operating on a very tight budget. The financial viability of the hospital will be seriously threatened by the types of financial stress that Luminant's closure of the Turlington/Big Brown mine will cause.

I, George M. Robinson, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 13th day of September, 2011.

George M. Robinson

# EXHIBIT G

# Declaration of David E. Zuber, P.E.

# President, Fairfield Industrial Development Corporation, Freestone County, Texas

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

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|---|---|
| Luminant Generation Company LLC, et al.<br><br>Petitioners,<br><br>v.<br><br>Environmental Protection Agency, et al.<br><br>Respondents. | Case No. 11-1315 |

DECLARATION OF DAVID E. ZUBER, P.E.

1. I am the President of the Fairfield Industrial Development Corporation (FIDC) in Fairfield, Freestone County, Texas and have spent the last three and a half years in that role promoting economic development in and around the City of Fairfield. I am providing this declaration to support Luminant's request to stay the Environmental Protection Agency's Cross-State Air Pollution Rule (CSAPR), which will otherwise seriously affect the Freestone area, as discussed below. This declaration is based on my personal knowledge, largely gained through my position with the FIDC, but also as a member of the community.

2. FIDC is a non-profit industrial development corporation established under the Development Corporation Act of 1979, as amended. It is a legal entity with the statutory authority to spend economic development sales tax dollars for economic development purposes. I am responsible for the day-to-day operations of FIDC, reporting directly to a seven-person Board of Directors. I develop incentive packages for companies that desire to locate in Fairfield and the surrounding areas. The incentives are based on the number of jobs to be created and the capital investment to be made by the company. FIDC's major investment is in its 400 acre industrial park, which includes development of the land, roads and utilities. The industrial park is adjacent to a major interstate highway and provides an excellent location for manufacturing and industrial companies.

3. I also serve on the Board of Directors for the Heart of Texas Economic Development District. The development district is a six-county regional economic development and planning organization that coordinates economic development throughout its region and assists local economic development organizations with training and specific needs in all areas of economic development as required.

4. Prior to my role at FIDC, I spent 27 years in the manufacturing industry. I held various management positions with companies in the manufacturing, packaging,

assembly and testing of semiconductor products and the manufacturing of semiconductor production equipment. This included management of production and engineering operations for the wafer fabrication of semiconductor devices and microelectromechanical systems. Prior to that, I spent nine years in the Civil Engineer Corp., United States Navy, and rose to the rank of Lieutenant Commander. My duties included management of construction and maintenance of U.S. Military bases throughout the Pacific and Indian Oceans.

5. I have a B.S. in Civil Engineering from the University of New Mexico and an M.S. in Civil Engineering from the University of Colorado--Boulder. I am a Licensed Professional Engineer in the State of Texas.

6. My highest priority work at FIDC is to help businesses to create industrial jobs in Fairfield. That work is focused on the industrial park that FDIC created and supports. It has been a struggle and has taken a long time, but over the last eleven years, we have been able to generate about 100 jobs. Our budget for these activities is derived almost exclusively from sales tax revenue. We collect a ½ percent sales tax, which is the maximum allowed by statute.

7. On September 12, 2011, Luminant announced that it must cease mining operations at its Turlington/Big Brown mining facilities located in Freestone County as a result of the CSAPR, unless the Court grants a stay. Luminant explained that, with these and other East Texas mining and plant facilities idled, it will be forced to reduce its workforce by more than 500 jobs.

8. The Luminant jobs are some of the best jobs in the area. They are stable, industrial jobs that pay high salaries and come with good benefits. They are the type of jobs that we are striving to create with our work at FIDC. Unfortunately, in a single stroke, CSAPR has eliminated more jobs in our community than FIDC has been able to create over eleven years.

9. The work force in this area is fairly stable. There are not that many jobs that are being created in this area and there is no way that the area could provide comparable jobs for as many skilled people as are going to be looking for jobs if Luminant must idle facilities. The Turlington/Big Brown mining facilities employ approximately 225 people. Although not all of these jobs will be immediately lost given the need for reclamation activities to continue, Luminant has stated that 110 positions will be lost in 2012, with more reductions thereafter. Given that the size of the city is roughly 3,000 people, with approximately 7,000 people living close-by and 20,000 people in the entire county, a loss of that many jobs would mean a significant boost in the area's unemployment.

10. With an approximate labor force of 10,000 people in Freestone County and using July 2011 data, releasing a Luminant permanent workforce of 110 employees into the job market would impact the Freestone County unemployment rate by 1.1%. However, it is certain that the economic impact in the area is far greater. This is because of two factors. The first is that Luminant jobs are comprised of higher paid

skilled professionals. These higher earning families have a higher level of disposable income, and generally spend more dollars in the community. The second factor is described through economic impact multipliers which highlight that the loss of spent income resulting from the loss of Luminant jobs represents a reduction in consumption spending, which will ripple through the economy as other jobs originally supported by that spent income are no longer supported and will also vanish.

11. In addition, there are a host of contractors that provide services to the Turlington/Big Brown mining operations. These contractors pay for hotels, gas, food and other services in the area. If Luminant cannot obtain a stay of the rules to avoid ceasing mining operations, then those contractors are likely to also need to reduce their operations, compounding the impact from CSAPR.

12. There is no doubt that the loss of those jobs will erode the area's tax base, harm businesses that sell goods and services to those employees, lower property values and potentially increase foreclosures. The announced idling at these mining facilities will result in a material decrease – over a million dollars annually – in the taxes that Luminant pays.

13. Luminant employees also provide valuable community service in our area. They are among the biggest supporters of local organizations such as 4-H Club, Rotary Club, Lions Club, American Cancer Society, the state fair and other community organizations. These are the things that make a community thrive and improve the quality of life in Fairfield. The loss of Luminant's support for these activities will severely impact our town.

14. FIDC will also be directly harmed by the cessation of mining at Luminant's Turlington/Big Brown mining facilities. As noted above, almost all of our work is funded by revenues from local sales taxes, which will undoubtedly decrease if CSAPR goes into effect and Luminant must idle these mining facilities. In addition, it will be much harder to convince businesses to open up in this area. The businesses that FIDC targets prefer to locate in thriving rural communities and the reduced operations at Luminant will make it much harder to convince people that Fairfield fits in that category. Declining tax revenues and the flight of a skilled labor pool from the area present a "hard sell" to relocating companies.

15. While there is never a good time for this type of news, this is particularly bad timing. Our area is not in good shape. Local retailers have been struggling in recent years and local companies are working day-to-day. FIDC's revenues last year were reduced by 21% due to reductions in the amount of sales tax paid and, this year, it is looking like we are down another 2 basis points over last year, for a two year total of 23%. While the decrease in local tax revenue has continued at a lesser rate this past year, the loss of Luminant's local mining facilities would further erode the cycling of the associated income dollars throughout our community and impede the turnaround in the decline of local tax dollars collected that we are all trying so hard to achieve.

16. In talking with FIDC's board members about the impact that the idling of these Luminant facilities would have, we agree that the only way to describe it would be: devastating. It would be a game changer and would go a long way to shutting down the town. We have been barely treading water, and if CSAPR forces Luminant to go through with the announced idling of these facilities, it will threaten the very survival of our town.

I, David E. Zuber, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 13th day of September, 2011.

David E. Zuber

# EXHIBIT B

# DECLARATION OF HARRY C. ALFORD

I, Harry C. Alford, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge and belief:

## Title and Background

1. I am the President and CEO of the National Black Chamber of Commerce. The National Black Chamber of Commerce is a nonprofit, nonpartisan, nonsectarian organization that represents 2.1 million Black-owned businesses in the United States, which account for $138 billion of annual revenue.

2. I graduated from the University of Wisconsin and earned top honors in the Army's Officer Candidate School.

3. I have held numerous sales and executive positions in Fortune 100 companies such as: Procter & Gamble, Johnson & Johnson, and the Sara Lee Corporation. I have been named a Cultural Ambassador by the State Department for my work in establishing economic opportunities for African Americans and entrepreneurs in Africa.

4. I provide this declaration in support of Peabody Energy Corporation's ("Peabody") motion to stay the final rule issued by the United States Environmental Protection Agency ("EPA"), "Carbon Pollution

Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (the "Final Rule"), and also known as the Clean Power Plan ("CPP"), which will have highly damaging and irreparable impacts on the African-American and Latino communities in the United States, as discussed below. This declaration is based on my personal knowledge of facts and analysis conducted by my staff and me.

**The Clean Power Plan Will Disproportionately Harm Blacks and Hispanics**

5. The CPP will lead to lost jobs, lower incomes, and higher poverty rates for the 128 million blacks and Hispanics living in America. The EPA's proposed regulation for GHG emissions from existing power plants is a slap in the face to poor and minority families. These communities already suffer from higher unemployment and poverty rates compared to the rest of the country, yet the EPA's regressive energy tax threatens to push minorities and low-income Americans even further into poverty.

6. A study commissioned by the National Black Chamber of Commerce[1] shows that the CPP will lead to $565 billion in higher annual electricity costs by the time the Final Rule is fully implemented in 2030.

[1] Mgmt. Info. Svcs., *Potential Impact of Proposed EPA Regulations on Low Income Groups and Minorities* (June 2015), available at http://nbccnow.org/wp-content/uploads/2015/06/Minority-Impacts-Report-June-2015-Final.pdf.

7. These costs will fall disproportionately on minority communities, which spend more on household expenses than white Americans do. As a proportion, African-American families spend a larger percentage of their income on everyday living than white families do:

- 10% more on housing;
- 20% more on food;
- 40% more on clothing; and
- 50% more on utilities.

8. Latino families also spend disproportionately more:

- 5% more on housing;
- 90% more on food;
- 40% more on clothing; and
- 10% more on utilities.

9. Not only will the CPP directly raise utility prices for minority families, but it will also indirectly raise the price of goods they already pay a larger percentage of their income for – housing, food, and clothing -- as businesses must pass on higher electricity costs to consumers.

10. Overall, the study estimates that the Final Rule will cause 7 million cumulative job losses for African Americans and 12 million for Hispanics.

11. The study shows that the average black family will have their annual take-home income fall by $455, and the average Hispanic family's income will fall by $515 per year.

12. The combined impact of job loss, lower wages, and higher cost of living will mean that the CPP will cause an increase in black poverty numbers by 23% and Hispanic poverty by 26%.

13. The study demonstrates that the CPP will harm minorities' health by forcing tradeoffs between housing, food, and energy. Inability to pay energy bills is second only to inability to pay rent as a leading cause of homelessness.

14. The states that will be harmed the most will be those with the highest concentrations of black and Hispanic populations: Arizona, California, Florida, Georgia, Illinois, New York, and Texas.

15. The National Black Chamber of Commerce study is in line with other reports. For example, an investigation by NERA Economic Consulting on the costs of EPA's plan predicted an increase of consumer retail electric rates of 12-17%.[2]

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[2] David Harrison Jr. and Anne E. Smith, "Potential Energy Impacts of the EPA Proposed Clean Power Plan," NERA Economic Consulting, October 2014, http://www.nera.com/content/dam/nera/publications/2014/NERA_ACCCE_CPP_Final_10.17.2014.pdf (accessed May 26, 2015).

16. Eventual invalidation of the Final Rule would not necessarily insulate ratepayers from higher costs. For example, Montana ratepayers, right now, are facing rate increases due to the need to comply with the Mercury and Air Toxics ("MATS") Rule, which was the subject of the Supreme Court's decision in *Michigan,* et al. *v. EPA,* et al.[3] In order to comply with the MATS rule, the Montana Dakota Utilities Commission installed pollution controls that now may be called into question by the Supreme Court's decision.[4] "The rule is still in effect. We still have a deadline to meet," the utility's spokesman said. "It's tough to run your business when you don't know what the rules are."[5] Ratepayers are already on the hook for up to $178 per year to cover the equipment because the rule was not stayed during the judicial review.[6]

17. As discussed above, those near-term rate increases will fall disproportionately on black and Hispanic households.

18. I declare under penalty of perjury that the foregoing is true and correct.

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[3] No. 14-46, 576 U.S. ___ (2015).

[4] Tom Lutey, "Montana Utility Rate Increase Based on Disputed Pollution Terms," *Billings Gazette* (Montana) (Jul. 22, 2015), available at http://billingsgazette.com/news/government-and-politics/montana-utility-rate-increase-based-on-disputed-pollution-terms/article_9141011d-3ee1-5656-bdaf-509f9e6f74e1.html.

[5] *Id.*

[6] *Id.*

Executed this 7th day of August, 2015.

/s/ Harry C. Alford