**ORAL ARGUMENT NOT YET SCHEDULED**

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

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|---|---|---|
| STATE OF WEST VIRGINIA,<br>STATE OF TEXAS, et al. | ) | |
| Petitioners, | ) | Case No. 15-1363<br>(consolidated with Nos. |
| v. | ) | 15-1364, 15-1365, |
| UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and<br>REGINA A. MCCARTHY, Administrator, | ) | 15-1366, 15-1367,<br>15-1368, 15-1370,<br>15-1371, 15-1372,<br>15-1373, 15-1374, |
| Respondents. | ) | 15-1375, 15-1376,<br>15-1377, 15-1378, |
| | ) | 15-1379, 15-1380,<br>15-1382, 15-1383, |
| | ) | 15-1386) |

**PEABODY ENERGY CORP.'S MOTION FOR STAY**


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## GLOSSARY

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| 1995 EPA Landfill Memo | EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines, Pub. No. EPA-453/R-94-021 (1995), available at http://www.epa.gov/ttn/atw/landfill/bidfl.pdf. |
| $CO_2$ | Carbon dioxide |
| EGUs | Electric Generating Units |
| EPA | United States Environmental Protection Agency |
| Galli Decl. | Declaration of Bryan A. Galli of Nov. 5, 2015, attached as Exhibit A |
| Peabody | Peabody Energy Corporation |
| Proposed Rule Legal Memo | Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, available at http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-legal-memorandum. |
| Rule | *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, issued Aug. 3, 2015, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). |
| Section 111 | 42 U.S.C. § 7411 |
| Section 111(b) | 42 U.S.C. § 7411(b) |
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| Section 112 | 42 U.S.C. § 7412 |

## INTRODUCTION

The Rule[1] is a Draconian measure that seeks to shut down coal-fueled Electric Generating Units ("EGUs"), even though they are traditionally the most reliable and affordable source of electricity. The Rule rests on radical reinterpretations of the Clean Air Act.[2]

Numerous stay motions have already been filed, including motions by a majority of States in the Union; a coalition of utilities and rural electric cooperatives; leading members of the business community as represented by the U.S. Chamber of Commerce, National Association of Manufacturers, and other trade groups; and the National Mining Association and related entities. Peabody will not duplicate the arguments raised by the previously filed motions, but will instead focus on constitutional concerns raised by the Rule.

EPA is attempting an unconstitutional trifecta. It seeks: (1) to violate the separation of powers by usurping congressional prerogatives; (2) to

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[1] Attached as Exhibit D hereto.

[2] On Aug. 6, 2015, Peabody filed an application with EPA asking for an immediate stay of the Rule. EPA informed Peabody that the Agency would not be granting the relief requested. On Sept. 9, 2015, this Court denied Peabody's petition under the All Writs Act for a writ before publication of the Rule in the Federal Register. *In re Peabody Energy Corp.*, No. 15-1284 (D.C. Cir. Sept. 9. 2015) (*per curiam*). The instant motion is filed post-publication. Peabody has informed EPA's counsel by telephone about the instant motion.

violate the Tenth Amendment and principles of federalism by upsetting the federal-state bargain embodied in the Clean Air Act and requiring States to implement (and take the blame for) an anti-consumer federal regulatory program; and (3) to violate the Fifth Amendment by forcing coal companies to bear a burden that ought to be shared by all members of society. The Rule flies in the face of structural principles that operate to check governmental power, safeguard individual liberty, and vindicate "the principle that ours is a government of laws, not of men." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

The Rule is a perfect illustration of why these structural principles are necessary. It singles out coal-fueled electric generation for a targeted shut-down even though the emission of $CO_2$ is the byproduct of virtually all human activities. *See American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2538 (2011) ("After all, we each emit carbon dioxide merely by breathing."). EPA seeks to portray the Rule as traditional pollution regulation. But $CO_2$ is completely different from familiar pollutants regulated by the agency, which are typically emitted by discrete (and often localized) sources and whose impacts are usually characterized by straightforward causal chains. EPA's attempt to disguise the Rule as traditional pollution regulation is unavailing.

But this Court need not actually decide any constitutional questions in order to grant the stay. Under the doctrine of constitutional avoidance, Section 111(d) must be interpreted in a manner that escapes the serious constitutional difficulties raised by the Rule. The deference usually accorded by *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council*, 467 U.S. 837, 844 (1984), is inapplicable here. This Court should construe Section 111(d) to bar rather than to authorize EPA's overreach.

A stay is also warranted because the Rule will cause extensive irreparable harm during the pendency of judicial review. EPA's own modeling shows that in the ***year 2016*** the Rule will cause the closure of more than 30 Electric Generating Units ("EGUs"), including customers of Peabody. *See* Declaration of Bryan Galli ¶ 11 (attached as Exhibit A hereto). EPA itself acknowledges the need for shuttering these coal-fueled EGUs by including the closures in its modeling for compliance with the Rule. The upshot is clear: the Rule is aimed squarely at coal.

Worse yet, planning for such EGU closures must begin immediately. *Id.* at ¶¶ 18-20. Absent a stay, irreparable harm on a massive, multi-state and unprecedented scale will occur every day that judicial review is pending.

Further, the stay motions implicate due process, the separation of powers, and the authority of this Court to provide meaningful judicial

review. Absent a stay, EPA will be able to railroad revolutionary changes in the U.S. energy sector and induce early compliance while petitions for review are still pending. The bell will have been rung, and the Court as a practical matter will be powerless to unring it. EPA would be able to render judicial review a dead letter by forcing compliance before this Court is able to render a decision on the lawfulness of the Rule. "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). Such agency action is also unthinkable in a nation that values an independent judiciary with the power to say "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).[3]

## REASONS FOR GRANTING THE STAY

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.*

[3] EPA is trying to repeat its strategy under the Mercury and Air Toxics ("MATS") rule, where, without a stay, the agency was able to force utilities to install billions of dollars in abatement equipment ahead of time. After the Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), EPA announced that the ruling was essentially irrelevant, because industry had already complied. *See* Galli Decl. ¶¶ 23-28.

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

## I. Movants Are Likely To Prevail On The Merits.

Because the Rule raises grave constitutional issues, EPA is not entitled to *Chevron* deference. *See Edward J. DeBartolo Corp. v. Florida Gulf Construction Trades Council*, 485 U.S. 568, 574-75 (1988). Instead, under the doctrine of constitutional avoidance, Section 111(d) must be interpreted to bar rather than authorize the agency's extravagant assertion of power. *See id.*

### A. The Rule Raises Serious Questions Under The Separation of Powers, Which The Clean Air Act Should Be Interpreted To Avoid.

#### 1. The Rule Represents Agency Lawmaking Rather Than Interstitial Rulemaking.

The Rule is not an example of interstitial rulemaking. Quite the reverse. The changes wrought by the Rule are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency regulation. The Rule is an energy policy – a shift from coal to

other fuel sources (*e.g.*, wind) – masquerading as a Section 111(d) emissions regulation. It is agency overreach, pure and simple, predicated on an unprecedented statutory reinterpretation of the Clean Air Act. Ironically, EPA touts the Rule as creating cap-and-trade systems, *see* 80 Fed. Reg. at 64,667-78, when a bill to do just that was rejected by Congress in 2009-2010. Yet EPA seeks to usurp legislative power and circumvent the democratic process.

The Supreme Court's decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), makes clear that *Chevron* deference is inapplicable here. EPA would not be entitled to deference even if its legal authority were ambiguous (which it is not). "This is hardly an ordinary case." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000). Rather, 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*, 135 S. Ct. at 2489 (quoting *UARG*, 134 S. Ct. at 2444). 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*, 135 S. Ct. at 2489 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)).

If Congress had intended to confer such revolutionary power on EPA, it would have said so clearly. Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Assns*., *Inc*., 531 U.S. 457, 468 (2001). If ever there were an elephant in a mousehole, the Rule is it – and it is an unconstitutional elephant to boot. But far from authorizing the Rule, Section 111(d) prohibits exactly what the Rule seeks to do: to regulate coal-fueled EGUs *both* under Section 111(d) *and* as a source category under the Hazardous Air Pollutants program of Section 112. EPA acknowledges that under the agency's prior interpretations of Section 111(d), adopted by both the Clinton Administration in 1995[4] and the Bush Administration in 2005, the Rule would be impermissible. 80 Fed. Reg. at 64,714.

The Rule also turns the proper relationship between agency and legislature upside down. This Court has instructed that an administrative agency "is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'" *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)

[4] Since the 1990 Clean Air Act amendments, EPA has successfully used Section 111(d) only once, to adopt a rule involving municipal landfills. 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" – *i.e*., precisely the situation here. (1995 EPA Landfill Memo, at 1-6.)

(citation omitted). EPA lacks "implied" or "inherent" powers to plug alleged gaps in the Clean Air Act ("gaps" that in any event do not exist).[5]

EPA's new-found interpretation would trigger a sea change in the way Section 111(d) has always been understood. As the Supreme Court 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." *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014). The Rule should be rejected as an unlawful agency overreach.

### 2. EPA's "Two Versions of Section 111(d)" Theory Distorts the Legislative Record and Triggers a Separation of Powers Violation.

EPA advances an astonishing theory that Congress unwittingly enacted two "versions" of Section 111(d) in 1990, one in a substantive House amendment and the other in a conforming Senate amendment, and that in 1992 the Office of Law Revision Counsel ("OLRC") mistakenly

[5] EPA's claim that there is a "gap" is wrong. (80 Fed. Reg. at 64,715). EPA ignores the 1990 amendments, which revised Section 112 by replacing its prior pollutant-specific focus with a new "source category" structure. Congress aligned Section 111(d) with this new source-category approach, and there is no "gap" with respect to coal-fueled EGUs, which are regulated not only under Section 112, but also under the agency's permitting (or "PSD") program involved in *UARG*. This case involves *duplication* (regulation of the same source category under both Section 111(d) and Section 112), not a regulatory "gap."

codified only one. *See* 80 Fed. Reg. at 64,711-15. EPA's theory is wrong. The conforming amendment was not an independent version of Section 111(d) at all but simply deleted six characters, four of which were parentheses.[6] Such a scrivener's provision cannot possibly provide the legal basis for a massive rule transforming the entire U.S. energy sector. If there were any doubt as to Congress' intent (and there is not) the 1990 Conference

[6] 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-fired 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. 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.

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.

Report indicated that the "Senate recedes to the House" with respect to the language in question.[7]

Remarkably, in the last several months EPA has intervened in ***and attempted to block*** the positive law codification of the Clean Air Act, as recounted in the letters attached as Exhibit C hereto, in a vain bid to rescue its meritless statutory interpretation.[8] EPA's interference reveals its own recognition that the version of Section 111(d) actually in the U.S. Code repudiates the statutory basis for the Rule. EPA therefore made a back-door attempt to rewrite Section 111(d). OLRC responded to EPA's gambit with a five-page letter (also included as part of Exhibit C) rebutting EPA's argument point-by-point. For example:

> If the amendment made by section 302(a) were to be executed to section 111 of the Clean Air Act, how should it be done? The EPA letter does not say. Nor, in the more than 2 decades following the Code's rendition of section 111(d) or in the 8 years since EPA was asked for its input on title 55, has EPA made any communication of which we are aware suggesting that EPA had an issue with that rendition. . . .

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

[8] Pursuant to 2 U.S.C. § 285(b)(1), OLRC assists with codification of existing titles of the U.S. Code in a routine effort to restate the statutory law in comprehensive fashion.

> . . . For a member to include under the heading "CONFORMING AMENDMENTS" a provision that actually is intended to make a change in the meaning or effect of a law, not as an adjunct to but as an addition to changes made elsewhere in a bill, would be seen as a breach of trust among the members, to put it mildly.

*See* Exhibit C. The OLRC encouraged the House Judiciary Committee to "proceed with the bill, which has already been 8 years in the making, as expeditiously as possible." *Id.*

Further evidence of the weakness of EPA's statutory argument is the flip-flop in its descriptions of the 1990 substantive House and conforming Senate amendments. With the proposed rule, EPA issued a legal memo concluding that "[t]he two versions [of Section 111(d)] conflict with each other and thus render the Section 112 Exclusion ambiguous." Proposed Rule Legal Memo at 3. In the final Rule, EPA acknowledges that it has "revised" its position (80 Fed. Reg. at 64,711) and now contends that the House amendment is ambiguous, the Senate amendment is clear, but the two do not conflict. (*Id.* at 64,711-12, 64,715). The agency's latest gymnastics cannot save its legal rationale, as the Clinton Administration EPA properly concluded in explaining that the substantive House amendment was "the correct amendment" to follow. (1995 EPA Landfill Memo at 1-5).

More fundamentally, even if there were two "versions" of Section 111(d) (and there are not), EPA's job would be to reconcile them by applying both prohibitions together, *see Brown & Williamson*, 529 U.S. at 133, not by throwing the substantive amendment into the trashcan, as the 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. This reconciliation means that the Rule fails because coal-fueled EGUs are a "source category" regulated under 112 and are therefore excluded from regulation under Section 111(d).

Any other approach would raise constitutional difficulties. *Chevron* does not allow an agency to toss two "versions" of a statute into the air and choose which one to catch. The decision of which one to make legally operative is an exercise of lawmaking power. *See 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.").

### B. The Rule Raises Serious Questions Under The Tenth Amendment and Principles of Federalism, Which The Clean Air Act Should Be Interpreted To Avoid.

The States' stay motions have cited the Tenth Amendment, but private parties as well as States can invoke the protections of federalism, because "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. . . . 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation omitted).

The Rule's focus on shutting down coal-fueled EGUs demonstrates the importance of structural principles for the protection of liberty. The Supreme Court has made clear that the federal government may not compel the States to implement federal regulatory programs. *See Printz v. United States*, 521 U.S. 898, 926 (1997); *New York v. United States*, 505 U.S. 144, 176-77 (1992). Because this limitation on federal power arises from a structural constitutional principle, "a 'balancing' analysis" is "inappropriate." *Printz*, 521 U.S. at 932. Further, even when some States agree to expand federal power, structural principles of federalism prevent such collusion. *New York*, 505 U.S. at 181-82. 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 Rule will force States to adopt policies that will raise energy costs, deprive the states of tax revenue from coal royalties and severance payments, which States use to fund schools and social services[9] 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.

EPA's response is that, if a State declines to propose a state plan, the agency will impose a federal plan instead (essentially a federal cap and trade plan). *See* 80 Fed. Reg. at 64,942. But the situation in *New York* was completely different.[10] Here, as the States themselves have indicated, they face overwhelming pressure to kowtow to the Rule. Any option is purely a Hobson's choice, and that is the very defect that the Court identified in

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[9] State of North Dakota, Motion for Stay, No. 15-1380, *North Dakota v. EPA*, Doc. #1580920, at 13-15 (Oct. 29, 2015).

[10] The federal plan under the Rule is completely different from the back-up "federal option" in *New York*, 505 U.S. at 174, which entailed no direct regulation of anything in a noncomplying State. Rather, it simply authorized States with waste disposal sites to raise fees and ultimately shut their sites to waste from freeloading States that were not managing their own waste. Moreover, the "federal option" in *New York* was enacted by Congress, where States, through their representation in the Senate and in other ways, retain an assured avenue of direct political influence over how the legislature will decide to regulate their citizens under Article I. But the situation is entirely different if, as here, a *federal agency* makes the decision of how the people of noncomplying States will be regulated, because an agency is not open to the structurally assured state influence that rescued the fallback in *New York* from constitutional infirmity.

striking down the Medicaid expansion in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

### C. The Rule Raises Serious Questions Under The Fifth Amendment, Which The Clean Air Act Should Be Interpreted To Avoid.

The Rule is an extraordinary regulation, outside the *Chevron* norm of interstitial agency rulemaking, that takes direct aim at coal companies and singles them out for an action (emitting $CO_2$) that is not intrinsically harmful and is something that virtually all human activities involve. Although EPA tries to cast the Rule as a traditional air emissions regulation, it is anything but.

- We are all $CO_2$ emitters, and atmospheric $CO_2$ is the intermingled result of all human activity and Mother Nature. $CO_2$ 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. EPA seeks to pit different parts of the country against one another and to foist

disproportionate burdens on coal-reliant States and communities.[11] Balancing competing interests is the job of Congress, not an unelected agency.

• The 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."[12] This deliberate targeting is qualitatively different from other programs. The transportation sector accounts for 27% of total greenhouse gas emissions, barely less than 31% from the entire electric power industry (*see* EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule ("RIA") at 2-25, Table 2-15), and yet transportation does not face the same treatment. Although the government regulates cars, it does not embark on a "war" against the automobile.

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[11] Notably, the 26 States that have challenged the rule — most ever to challenge an EPA rule — represent almost 80% of the Rule's emissions reductions. The 18 that have filed in support of the Rule represent 12% of the emissions reductions — including two States that the Rule does not affect (Vermont and Hawai'i). *See* Robin Bravender, "44 States Take Sides in Expanding Legal Brawl," *Greenwire* (Nov. 4, 2015), available at http://www.eenews.net/greenwire/2015/11/04/stories/1060027463.)

[12] 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.

- Worse, EPA does not contend that the Rule will have any measureable impact on climate. EPA declined to quantify ***any impact*** of the Rule on global temperatures or the environment – not a hundredth or thousandth degree of temperature, or single millimeter of sea level change. (RIA, at ES-10 through ES-14). 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*."[13]

- In the 20 years prior to the 1990 amendments, EPA used Section 111(d) exceedingly sparingly, regulating only three pollutants from four source categories. *See* 80 Fed. Reg. at 64,703 ("sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), Kraft pulp plants (total reduced sulfur)."). All involved unique, localized pollutants emitted from distinctive, local sources, with direct and *measurable* causal connections between the local source, emission and harm rather than a ubiquitous substance like $CO_2$, benign in itself, emitted and commingled from sources across the nation and indeed the globe.

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[13] 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).

These striking features of the Rule are so serious as to raise serious constitutional questions and eliminate any EPA claim to *Chevron* deference. 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 potential duties to compensate, especially when Congress has not clearly authorized such a result. *Bell Atl. Tel. Cos. v FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

## II. The Rule Will Cause Irreparable Injury.

The Sixth Circuit recently stayed a Clean Water Act rule even without any showing of irreparable harm, because "[a] stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *In re EPA*, Nos. 15-3799, *et al.*, 2015 WL 589381, *3 (6th Cir. Oct. 9, 2015). The Rule here causes even more disruption and uncertainty.

The Rule is also causing substantial irreparable harm. 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 Rule is now imposing. Galli Decl. ¶¶ 29-30. EPA's own modeling shows that the Rule will cause a shutdown of 11 gigawatts of coal-fueled generation ***in 2016***, which translates into the loss of more than 30 coal-fueled EGUs, including customers of Peabody. *See id.* at ¶¶ 11-12. For example, the Rule will result in the loss of approximately 5.5 million short tons of coal sales to the Powerton Generating Station in Illinois, which will cost Peabody revenue, profits, and jobs. *Id.* at ¶ 22. Planning for such closures is happening ***now.*** *See id.* at ¶¶ 16-22. "Once utility decisions are made, they will be locked in. They will not be undone no matter how the Court rules months or years from now." *Id.* at ¶ 21.

Peabody's customers have already started making planning decisions in anticipation of the Rule, and the pace of closure and curtailment decisions will only accelerate, leading to irreparable losses of coal sales. *See id.* at ¶¶ 12-13, 16-22. In the Rule, EPA states that it seeks "to promote early action" (80 Fed. Reg. at 64,669), 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 64,675). "The final guidelines include provisions to encourage early actions." (*Id.* at 64,670).

Moreover, the harm will not be confined to coal producers and utilities. A declaration submitted by the National Black Chamber of Commerce shows the 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 African-American poverty numbers by 23% and Hispanic poverty by 26%; reduce average African-American 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."[14]

## CONCLUSION

The Rule should be stayed pending the completion of all judicial review, and all deadlines in it suspended.

November 5, 2015 Respectfully submitted,

[14] 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/.

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## CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 21(d) because it does not exceed 20 pages, excluding the parts of the motion exempted by Rule 21(d). This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times Roman.

/s/ Tristan L. Duncan

## CERTIFICATE OF SERVICE

I certify that on this November 5, 2015, a copy of the foregoing was transmitted by email on each the following with their consent:

Eric Hostetler: eric.hostetler@usdoj.gov

Norman Rave: norman.rave@usdoj.gov

Scott Jordan: jordan.scott@epa.gov

Howard Hoffman: hoffman.howard@epa.gov

In addition, I hereby certify that on this day, November 5, 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

## ADDENDUM

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

Pursuant to D.C. Circuit Rule 18(a)(4) and 28(a)(1), counsel certifies as follows:

**A. Parties, Intervenors, and *Amici*.**

Petitioners in No. 15-1363 include the States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, the State of North Carolina Department of Environmental Quality, and Attorney General Bill Schuette on behalf of the People of Michigan. Respondents include the United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency.

Petitioners in No. 15-1364 include the State of Oklahoma, ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma, and the Oklahoma Department of Environmental Quality.

Petitioners in 15-1365 include the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.

Petitioner in No. 15-1366 is Murray Energy Corporation.

Petitioner in No. 15-1367 is the National Mining Association.

Petitioners in No. 15-1368 is the American Coalition for Clean Coal Electricity.

Petitioners in No. 15-1370 include the Utility Air Regulatory Group and the American Public Power Association.

Petitioners in No. 15-1371 include the Alabama Power Company, Georgia Power Company, Gulf Power Company, and the Mississippi Power Company.

Petitioner in No. 15-1372 is the $CO_2$ Task Force of the Florida Electric Power Coordinating Group, Inc.

Petitioner in No. 15-1373 is Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

Petitioner in No. 15-1374 is the Tri-State Generation and Transmission Association, Inc.

Petitioner in No. 15-1375 is the United Mine Workers of America.

Petitioners in No. 15-1376 include the National Rural Electric Cooperative Association, Arizona Electric Power Cooperative, Inc., Associated Electric Cooperative, Inc., Big Rivers Electric Corporation, Brazos Electric Power Cooperative, Inc., Buckeye Power, Inc., Central Montana Electric Power Cooperative, Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative, Dairyland Power Cooperative, Deseret Generation & Transmission Co-operative, Inc., East Kentucky Power Cooperative, Inc., East River Electric Power Cooperative, Inc., East Texas Electric Cooperative, Inc., Georgia Transmission Corporation, Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Northeast Texas Electric Cooperative, Inc., Northwest Iowa Power Cooperative, Oglethorpe Power Corporation, Powersouth Energy Cooperative, Prairie Power, Inc., Rushmore Electric Power Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., San Miguel Electric Cooperative, Inc., Seminole Electric Cooperative, Inc., South Mississippi Electric Power Association, South Texas Electric Cooperative, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, Tex-La Electric Cooperative of Texas, Inc., Upper Missouri G. & T. Electric

Cooperative, Inc., Wabash Valley Power Association, Inc., Western Farmers Electric Cooperative, and Wolverine Power Supply Cooperative, Inc.

Petitioner in No. 15-1377 is Westar Energy, Inc.

Petitioner in No. 15-1378 is NorthWestern Corporation, doing business as NorthWestern Energy.

Petitioner in No. 15-1379 is the National Association of Home Builders.

Petitioner in No. 15-1380 is the State of North Dakota.

Petitioners in No. 15-1382 include the Chamber of Commerce of the United States of America, National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, National Federation of Independent Business, American Chemistry Council, American Coke and Coal Chemicals Institute, American Foundry Society, American Forest & Paper Association, American Iron and Steel Institute, American Wood Council, Brick Industry Association, Electricity Consumers Resource Council, Lignite Energy Council, National Lime Association, National Oilseed Processors Association, and the Portland Cement Association.

Petitioner in No. 15-1383 is the Association of American Railroads.

Petitioners in No. 15-1386 include Luminant Generation Company, LLC, Oak Grove Management Company, LLC, Big Brown Power

Company, LLC, Sandow Power Company, LLC, Big Brown Lignite Company, LLC, Luminant Mining Company, LLC, and Luminant Big Brown Mining Company, LLC.

Respondents in all cases include the Environmental Protection Agency and Regina A. McCarthy, Administrator, U.S. Environmental Protection Agency

**B. Rulings under Review.** The motion relates to EPA's Final Rule styled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric* Utility *Generating Units*, issued Aug. 3, 2015 (published at 80 Fed. Reg. 64,662 (Oct. 23, 2015) and codified at 40 C.F.R. pt. 60).

**C. Related Cases:** This Court has previously issued opinions and orders in the related cases of *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. June 9, 2015); *West Virginia v. EPA*, Nos. 14-1112, 14-1146, 14-1151 (D.C. Cir. June 9, 2015); *In re West Virginia*, No. 15-1277 (D.C. Cir. Sept. 9. 2015) (*per curiam*); *In re Peabody Energy Corp.*, No. 15-1284 (D.C. Cir. Sept. 9. 2015) (*per curiam*). This Court also lists as related the pending case *State of West Virginia,* et al. *v. EPA,* et al., No. 15-1381 (D.C. Cir.).

Dated: November 5, 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: November 5, 2015 /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.

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 motion for stay in challenges to the Section 111(d) Rule issued by the United States Environmental Protection Agency ("EPA"), "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (the "Rule"). This declaration is based on my personal knowledge of facts and analysis of EPA's own modeling conducted by my staff and me.

## Peabody's Business

3. Peabody is the world's largest private-sector coal company, is 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, about 95% of Peabody's total U.S. coal sales (by volume) went to more than 150 U.S. electricity generating stations 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 North, 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 and brokers coal from its operations and other coal producers, and trades coal and freight-related contracts through 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 affordable fuel source to power plants throughout the country.

**Summary of Harms from the Rule**

9. The Rule is aimed at reducing coal use in the United States. 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."[1] The New York Times reported that "[t]he rule will probably lead to the closing of hundreds of coal-fired power plants."[2]

10. EPA's Regulatory Impact Assessment accompanying the Rule predicts that the Rule will reduce coal production for power sector use by 5-7% by 2020, 14-17% by 2025, and 24-25% by 2030. Table ES-11, p. ES-24. EPA predicts that the Rule will reduce coal-fueled electric generation by 5-6% by 2020, 12-15% by 2025, and 22-23% by 2030. Table 3-11, p. 3-26.

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[1] "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).

[2] "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).

11. In fact, EPA's modeling reveals that the agency expects that the Rule will force the full or partial closure of many coal-fueled power plants ***as early as 2016***. In particular, EPA's own modeling based on Rule shows the shutdown of 11 gigawatts of coal-fueled generation ***in 2016***, which translates into the loss of more than 30 coal-fueled Electric Generating Units ("EGUs"), including customers of Peabody.

12. 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. Peabody's customers already have begun making plant closures and curtailment decisions in anticipation of the Rule. In our discussions with our utility customers, we are already hearing of cutbacks in coal purchases based on the Rule. This will result in lost business.

13. The pace of those closure and curtailment decisions will pick up now that the Rule has been announced. Plant closure and curtailment will irreparably harm Peabody as well as its workers, suppliers, and their communities.

**EPA's Section 111(d) Rule**

14. On August 3, 2015, EPA announced and released the text of the Rule, which sets carbon dioxide emissions rates from existing fossil-fueled

Electric Generating Units ("EGUs") by state. Through these emissions rates, the Rule primarily targets coal-fueled power plants.

15. 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, or seek an extension based on certain criteria. 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 Section 111(d) Rule**

16. EPA expects the Rule will cause 11GW of coal-fueled electricity generation to retire in 2016, representing more than 30 EGUs. Several analyses, including by EVA and PA Associates, have concluded that EPA's projections are a substantial underestimation. *See* Declaration of Seth Schwartz, Ex. 1 to Coal Industry Motion for Stay, No. 15-1367 (Oct. 23, 2015), ¶¶ 4, 17-26, 30 ("Schwartz Decl."); Declaration of James A. Heidell and Mark Repsher, Attachment C to Motion of Utility and Allied Petitioners for Stay of Rule, No. 15-1370 (Oct. 23, 2015), ¶¶ 8-10.

17. A decision to close any plant often is based on several factors. These factors are reflected in EPA's base case modeling for the Rule.

However, EPA's compliance-based modeling shows dozens of plant closures under the Rule that otherwise would not occur in the base case (or would not occur on the same timetable). The only difference – the decisive factor – in these closures, according to EPA's own modeling, is the Rule.

18. The closure process will need to begin immediately for affected plants. The power generation and transmission industry is highly capital intensive, with very long time horizons for planning and decision-making. 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.

19. Utilities are *already* making irreversible and significant decisions to comply with the 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.[3] 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*

[3] 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.

*proposed Clean Power Plan to regulate $CO_2$ from existing power plants*, due to be finalized next month."[4] Peabody supplies coal to the Taconite Harbor Energy Center.

20. Like Minnesota Power's decision to suspend and retire its Taconite Harbor plant, other utilities will begin the closure process for other coal-fueled power plants before judicial review is complete. Our utility customers are making planning decisions in the immediate next few months, which will discontinue or reduce our coal sales consistent with EPA's 2016 modeling. In our discussions with our utility customers, we are already hearing of cutbacks in coal purchases based on the Rule. This will result in lost business.

21. Once utility decisions are made, they will be locked in. They will not be undone no matter how the Court rules months or years from now. This business assessment is based upon a reasonable forecast of what compliance with the Rule will entail and the very real immediate and irreparable injury such compliance will cause. The harms will fall not just on Peabody, but on customers, employees, ratepayers, vendors, and entire communities.

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[4] *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).

22. For example, I am informed that a realistic assessment of EPA's own IPM analysis projects that EPA underestimated the closures due to the Rule and 56 coal-fired EGUs totaling 18,116 MW will retire in 2016 or 2018 due to the Rule under a rate based compliance scenario. Only 3 of these units (974 MW) are projected to retire in 2018; the rest are projected to retire immediately in 2016. Among EPA's projected retirements are EGUs at the Powerton Generating Station in Tazewell, Illinois. *See Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry*, at 62 (Exhibit 29), 69 (Exhibit 31), attached as an exhibit to the Schwartz Decl. Peabody supplies coal to the Powerton Generating Station from its North Antelope Rochelle Mine (NARM). In 2014, Peabody delivered approximately 5.5 million short tons of coal to the Powerton Generating Station, representing 100% of Powerton's coal receipts that year. Peabody received over $75 million from the delivery of this coal in 2014. The EPA projects the closure of 1,152MW at Powerton in 2016, representing approximately 75% of the plant's coal-fired generating capacity. As a result, Peabody stands to lose a similar percentage of these sales under the forced closure of the Powerton EGUs, under EPA's own projection of the impact of the Rule. A loss of such a high volume of coal would irreparably harm

Peabody. It would cost Peabody lost revenues, profits, and jobs under EPA's own modeling of the impacts of the Rule.

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

23. 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.

24. In its Regulatory Impact Analysis, EPA estimated the MATS Rule would close 4.7 GW in coal-fueled power by 2015.[5] However, in early 2014, the U.S. Energy Information Administration ("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.[6] Moreover, more coal-fueled power plant closures were

[5] 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.").

[6] 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.

announced in the four months between November 2013 and March 2014 – 5.4 GW – than the total projection in EPA's Regulatory Impact Analysis.[7]

25. The MATS rule also demonstrates the irreparable harm that will occur during judicial review. EPA announced the MATS rule in December 2011. The MATS rule required compliance beginning in April 2015, or April 2016 with an extension. In the three months that followed the MATS rule announcement at least 16 plants publicly announced retirements in response to the MATS rule.[8] Plants continued to close well before the MATS rule compliance deadline.

26. 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*, 135 S. Ct. 2699, 2711 (June 29, 2015).

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[7] 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.

[8] *See* Juliet Eilperin, *Utilities Announce Closure of 10 Aging Power Plants in Midwest, East*, WASHINGTON POST, Feb. 29, 2012, available at http://www.washingtonpost.com/national/health-science/utilities-announce-closure-of-10-aging-power-plants-in-midwest-east/2012/02/29/gIQANSLEiR_story.html; Bob Downing, *First Energy Closing 6 Coal-Fired Power Plants*, AKRON BEACON JOURNAL, Jan. 26, 2012, available at http://www.ohio.com/news/break-news/firstenergy-closing-6-coal-fired-power-plants-1.257090.

27. 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 achieve compliance with the Mercury Air Toxics Standards."[9]

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."[10]

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."[11]

28. Because of the advance planning that must begin immediately for power plants to comply with the Rule, a future ruling that the 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

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[9] 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.

[10] 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/.

[11] 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.

Commission has not decided whether to approve a rate increase needed for the utility to pay for the upgrades.[12] 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 Rule predictably will force costly changes by many power plants.

**Other Irreparable Harm Caused by the Section 111(d) Rule Before Judicial Review Is Complete**

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

30. 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 discussion of such a plan can have regardless of its ultimate disposition years later. On August 3, 2015, gainers outpaced declining stocks on the New York Stock Exchange. Sixty-one percent of stocks increased in value, while only 36% declined. The Dow Jones

[12] 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.

Industrial Average lost approximately 0.3% and the Standard & Poor's 500 Index declined a little more than 0.2%. However, Peabody's stock decreased more than 9%, from its close on the previous trading day to its close on August 3.[13]

Executed this 5th day of November, 2015.

Bryan A. Galli

[13] There has been a subsequent increase in Peabody's stock price, but in the absence of the $90 million Aug. 3 decline (the date of the Rule's announcement), the increase would have started from a higher base.

# 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