OAR-2013-0602 8/10 628P06 MWB

SHOOK
HARDY & BACON

August 6, 2015

VIA FEDERAL EXPRESS
The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
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Re: EPA Docket No. EPA-HQ-OAR-2013-0602; Application for an Administrative Stay of the Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Dear Administrator McCarthy:

On August 3, 2015, EPA announced its Final Section 111(d) Rule ("Final Rule"). We are disappointed that EPA has formalized a rule that lacks legal authority and that will eliminate jobs, threaten the stability of the electrical grid, and dramatically increase consumer electricity costs.

Given the unprecedented scope and impact of the Final Rule, States, utilities, coal companies, and many others plan to challenge the Final Rule on numerous constitutional and statutory grounds. On August 5, 2015, the State of West Virginia and 15 other states submitted an Application for an Administrative Stay of the Final Rule ("State Stay Request"). Because of the irreparable and immediate harm the Final Rule will cause while judicial review is pending, and for the reasons set forth in the State Stay Request and Peabody's December 1, 2014 comments to EPA, both of which are incorporated by reference, Peabody hereby joins the State Stay Request and asks EPA to stay the Final Rule until judicial review is complete.

If EPA does not stay the Final Rule by Friday, August 7, 2015, Peabody will have no choice but to seek appropriate relief from a court. Please advise by 4 p.m. EDT on August 7 whether EPA will stay the Final Rule.

Thank you for your consideration.

Sincerely,

REQUEST FOR A STAY OF THE FINAL SECTION 111(D) RULE

INTRODUCTION

On August 3, 2015, EPA announced its Final Section 111(d) Rule. Because of the significant constitutional and statutory questions surrounding the Final Rule, Peabody Energy Corporation seeks a stay of the Final Rule and a suspension of all deadlines therein pending the completion of judicial review. Due process, the separation of powers, and sound policy all require that a court be given the opportunity to rule on the lawfulness of the Final Rule before parties are forced to undertake costly compliance efforts. A stay is necessary to prevent irreparable injury and immediate harm that would otherwise occur before judicial review is complete. Indeed, the risk of irreparable harm is so great that, if EPA does not stay the Final Rule by 4 p.m. on Friday, August 7, 2015, Peabody will have no choice but to seek appropriate relief from a court.

I. The Final Rule Lacks Statutory Basis and Violates the Separation of Powers.

EPA's breathtaking exercise of power rests on its novel reinterpretation of a narrow and obscure provision, Section 111(d). EPA has *never before* used its reinterpretation to adopt *any* regulation (let alone one as sweeping as the Final Rule). Reading Section 111(d) as supporting the Final Rule would render that provision "unrecognizable to the Congress that

designed it." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*").

On its face, Section 111(d) prohibits exactly what EPA seeks to do in the Final Rule: to regulate coal-fired power plants *both* under Section 111(d) *and* as a source category under the Hazardous Air Pollutants program of Section 112. 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." This prohibition is the "Section 112 Exclusion." 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. Because coal-fired power plants are sources regulated under Section 112, EPA has no authority to regulate them under Section 111(d).

Chevron does not apply, and EPA is not entitled to deference. 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 (June 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 the regulation of power plants, it expressly delegated that authority. *See* 42 U.S.C. § 7412(n)(1)(A). Second, it is "especially unlikely" that Congress would have delegated the authority in question to EPA, which has "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).

II. The Final Rule Raises Serious Constitutional Questions.

A. The Final Rule Violates Federalism Principles.

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).

Both the extent of federal interference and the degree of coercion make the Final Rule qualitatively different from any previous Clean Air Act program. EPA's plan essentially 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 NO2, SO2, and particulates, that EPA would do an about-face and seek to phase out those power plants altogether by dictating sweeping rules to regulate CO2, which is produced by every human activity.

B. The Final Rule Also Raises Takings, Due Process, and Equal Protection Concerns.

EPA seeks to single out a select set of victims – coal-reliant consumers, communities, regions, businesses and utilities – to bear the burden for a stated objective that is global in nature, triggering a Fifth Amendment duty to compensate. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion).

CO2 is not a traditional pollutant. It is not like lead or acid mist. We all emit CO2. CO2 is necessary for photosynthesis and life on earth. Singling out coal-fueled plants for conduct in which everyone on the planet engages is regulation different in kind and degree from traditional regulation of traditional pollutants. It goes too far. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Moreover, there is no corresponding benefit to justify singling out these companies to bear this burden. EPA demonstrates no causal link between shutting down the subject coal-fired plants and any documented

environmental benefit. The Final Rule will cause substantial harm to consumers, workers, and communities, and for what? For a de minimis impact in worldwide CO2 emissions and an entirely unproven alleged benefit.

This Court should avoid any construction triggering such constitutional problems, especially when Congress never authorized such a result. *Bell Atl. Tel. Cos. v FCC*, 24 F. 3d 1441, 1445 (D.C. Cir. 1994). Both the separation of powers and the Fifth Amendment operate to check the unilateral power of the Executive 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).

III. The Final Rule Imposes Irreparable Injury.

Absent a stay, States and private industry will be forced to take steps to begin complying with the Final Rule while it is being litigated, meaning that irreparable harm will occur. Coal companies and their customers plan on a multi-year horizon and therefore must begin immediately to make decisions on the basis of the Final Rule. Electric utilities will be compelled to make decisions in the coming months to slate coal-fired plants for retirement or curtailment, build new natural gas or renewable capacity, and construct new transmission lines to deliver power from the new units. All of

these decisions involve irreversible aspects and immediate expenses. Harms will hardly be limited to private industry; the Final Rule will irreparably injure consumers, workers, and indeed entire communities that depend on coal.

CONCLUSION

A stay will merely preserve the status quo while a court considers the lawfulness of the Final Rule. Electric power markets will continue business as usual, with no injury as a result of a stay. EPA can hardly claim that 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 an imminent one. In fact, EPA has waited years to regulate power plant CO2 emissions and has already allowed its deadlines to slip numerous times.[1]

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 force States to adopt burdensome laws cannot be easily

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

repealed, and private industry to make irreversible decisions, even if (as is likely) the Rule is ultimately vacated. EPA should not impose that burden.

The Final Rule should be stayed, and all deadlines in it suspended pending the completion of judicial review, including review by the U.S. Supreme Court.

August 6, 2015

Respectfully submitted,

/s/ Tristan L. Duncan
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