15-1277 & 15-1284

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

IN RE: PEABODY ENERGY CORPORATION,
Petitioner

PETITIONER PEABODY ENERGY CORPORATION'S REPLY BRIEF IN SUPPORT OF ITS EMERGENCY PETITION FOR EXTRAORDINARY WRIT

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GLOSSARY

CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
EPA Br.	EPA Response Brief
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).
Heidell/Repsher Decl.	Declaration of James A. Heidell And Mark Repsher of Sept. 4, 2015, Ex. B hereto
Initial Galli Decl.	Declaration of Bryan A. Galli of Aug. 13, 2015, attached as Exhibit A to Emergency Renewed Petition for Extraordinary Writ, filed by Peabody on Aug. 13, 2015
Interv. Br.	Response Brief of Intervenors
Peabody	Peabody Energy Corporation
Peabody Petition	Emergency Renewed Petition for Extraordinary Writ, filed by Peabody on Aug. 13, 2015
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)
Section 112	42 U.S.C. § 7412
Supp. Galli Decl.	Declaration of Bryan A. Galli of Sept. 4, 2015, attached as Exhibit A hereto

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court opined on June 9, 2015, that it "will not be very long from now, according to EPA," when a final rule will issue and parties can "seek a stay of the rule." *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). Judge Henderson stated that "by the time the majority opinion and this concurrence issue – or shortly thereafter – the petitioners will have a final rule that can be challenged as final agency action in this Court." *Id.* at 339 (concurring opinion). Those assumptions – which were based on EPA's representations – have not come to pass. EPA has released its Final Rule but now explains it does not expect the Rule to be published in the Federal Register until late October. EPA Br. 10. Assuming there are no delays in the publication of its 1,560-page Final Rule, EPA says that parties will not be able to file petitions for review or seek a stay until nearly two months from now – and nearly five months after this Court's June 9 decision.

That is too late. Irreparable harm is occurring now, before the Final Rule is published. Utilities are making irreversible decisions ***today*** about how to comply with the Final Rule, which cause irreparable injury to Peabody and others. EPA's own projections show the Final Rule will cause a shutdown of more than 30 coal-fueled Electric Generating Units ("EGUs") ***by 2016***, including plants supplied by Peabody. Planning for such closures is happening ***now.*** For example, a Minnesota plant supplied by Peabody announced in July 2015 that it was closing in response

to the Clean Power Plan. After the Final Rule's announcement, industry planning decisions will accelerate in the immediate short term and lead to the irreparable loss of coal sales. *See* Initial Galli Decl. ¶¶ 9, 12-17; Supp. Galli Decl. ¶¶ 3-5. "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 ¶ 5. As two expert energy consultants concluded, "[t]he coal industry thus will suffer immediate irreparable harm, including irreparable harm between now and the EPA's planned publication date of the Final Rule." Heidell/Repsher Decl. ¶ 17.

EPA asserts there is simply no judicial authority to prevent it from imposing months' worth of irreparable injury before Petitioners can even raise the question whether the Final Rule is *ultra vires.* EPA seeks to railroad revolutionary changes in the U.S. energy sector and induce early compliance before any court can provide meaningful review. Unless the Court acts now, the bell will have been rung, and the Court as a practical matter will be powerless to unring it.

EPA is trying to repeat its strategy under the Mercury and Air Toxics ("MATS") rule, where, absent a stay, the agency was able to force utilities to install billions of dollars in abatement equipment ahead of time, despite the subsequent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015). EPA announced the MATS rule in Dec. 2011, with compliance set to begin in Apr. 2015 (or Apr. 2016 with an extension). In the three months that followed that announcement –

roughly equivalent to the time between the August 3 Final Rule's announcement and its anticipated late October publication – utilities announced at least 16 power-plant retirements, some of which were complete within eight months. *See* Supp. Galli Decl. ¶¶ 7-8. Six of these closure announcements were made between the MATS rule's Dec. 2011 issuance and its Feb. 2012 Federal Register publication. *Id.* at ¶ 8.

EPA is using the MATS playbook here, with a new wrinkle: it has taken the highly unusual step of setting a fixed Sept. 6, 2016 deadline for submission of state plans, untethered to the date of publication. EPA also seeks to move the goalposts: It argues that some announced plant closures come too early (EPA Br. 30), while other plant closures in 2016 come too late (*id.* at 29), to warrant a writ now. According to EPA, the timing is ***never*** right for judicial review. Surely no agency should be allowed to manipulate ripeness to manufacture mootness. It should not be able to force early compliance to change the facts on the ground and render judicial review ineffective as a practical matter.

ARGUMENT

I. This Court Has Authority To Stay The Final Rule Under The All Writs Act.

Under the All Writs Act, this Court may grant a stay in cases "within [the] court's appellate jurisdiction although no appeal has been perfected." *In re Tennant*, 359 F.3d 523, 528 (D.C. Cir. 2004) (Roberts, J.) (quoting *FTC v. Dean*

Foods Co., 384 U.S. 597, 603 (1966)). In *American Pub. Gas Assn. v. FPC*, 543 F.2d 356, 358 (D.C. Cir. 1976), this Court opined that the All Writs Act applies to prevent "even temporary immunity from judicial scrutiny of agency actions before statutory review provisions become available." This authority disposes of EPA's objections. *See also Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (writ potentially available where "no direct appeal from [order] yet lay, and a stay pending appeal was not available to prevent irreparable injury that was arguably occurring").

EPA concedes an extraordinary writ may be used to "address[] important issues that may otherwise be 'lost to appellate review'" (EPA Br. 17) (quoting *Colonial Times v. Gasch*, 509 F.2d 517, 524-26 (D.C. Cir. 1975)). *Gasch* granted a writ to review a mere discovery order. This case is far more compelling. Without a writ staying the deadlines of the Final Rule pending judicial review, the Final Rule will cause irreparable harm for months. EPA also concedes a writ was appropriate to restrain a merger in *Dean Foods* because it "was a bell that could not be unrung," "rendering later appellate review ***effectively*** meaningless." EPA Br. 21 n.17 (emphasis added).[1] The same is true here. A writ in this case would not be "a

[1] In *Dean Foods*, the court's remedial power would have been limited by practical realities absent a writ, even if appellate review were technically possible. The All Writs Act is "not limited to those situations where it is 'necessary' to issue the writ or order 'in the sense that the court could not otherwise physically discharge its appellate duties,'" but also extends to orders issued "to avoid impairing or

substitute for an appeal" (EPA Br. 17 n.13), because only a writ can remedy the irreparable harm to be suffered by Petitioners in the months ahead. A motion for stay filed after publication will come too late to undo or rectify this interim harm.

EPA's attempt to expand the *Murray Energy* decision to preclude Peabody's writ (EPA Br. 18-19) is mistaken. In *Murray Energy*, this Court held that EPA's proposed rule was not final agency action subject to review. 788 F.3d at 334 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). That decision rested on "bedrock finality principles." *Id.* at 335. The new writs stand in a different posture. The Final Rule meets the *Bennett* test for final agency action, and EPA does not argue otherwise. All that remains is the ministerial task of Federal Register publication.[2]

EPA's argument that Petitioners would "thwart" the CAA's statutory review procedures (EPA Br. 16) is wrong. The All Writs Act offers its own judicial remedy, which the CAA does not withdraw. One of EPA's principal cases opines that "[a] statute does not strip [judicial] authority under the All Writs Act absent a 'clear[]' statement to that effect" and that the contrary approach "would present a

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frustrating the Court of Appeals' appellate jurisdiction." *United States v. New York Telephone Co.*, 434 U.S. 159, 173 (1977) (citations omitted).

[2] EPA's invocation of issue preclusion (EPA Br. 19 n.16) lacks merit, because the issues presented here are not the same as in *Murray Energy*. *See United States v. Hubbard*, 650 F.2d 293, 310 n.62 (D.C. Cir. 1980) (denial of extraordinary writ not accorded preclusive effect); *United States v. Dean*, 752 F.2d 535, 541 (11th Cir. 1985) (same).

'serious constitutional question' — one we should avoid, if possible." *In re al-Nashiri*, 791 F.3d 71, 76-77 (D.C. Cir. 2015) (citations omitted). The CAA contains no "explicit direction" to limit the All Writs Act. *Dean Foods*, 384 U.S. at 608. The provisions cited by EPA (EPA Br. 16) mention neither the All Writs Act nor traditional equitable powers.

EPA contends a stay here would open the floodgates. Yet courts have always assumed the All Writs Act is available even where a party theoretically has the opportunity for subsequent judicial review pursuant to statute, as in *Dean Foods*, *Reynolds*, and *American Public Gas*. This Court has treated motions for stay, filed prior to petitions for review, as petitions for mandamus. *E.g.*, *AT&T Corp. v. FCC*, No. 98-1404, 1998 WL 704403, at *1 (D.C. Cir. Sept. 28, 1998); *In re Nelson*, No. 99-1181, 1999 WL 414213, at *1 (D.C. Cir. May 21, 1999). No flood has occurred. EPA ignores the nature of equitable authority under the All Writs Act, which is flexibly exercised on a case-by-case basis. It is EPA that is arguing for an extreme and limitless position: a categorical rule that a court may *never* stay a final rule prior to Federal Register publication, even when the rule is final under *Bennett*. This Court has long recognized its power to stay agency orders and that "no artificial restrictions of the court's power to grant equitable relief . . . can be acknowledged." *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921, 924

(D.C. Cir. 1958). EPA's position is the kind of "artificial restriction" that *Petroleum Jobbers* rejected.

II. Peabody Has Shown Imminent and Irreparable Harm.

Peabody has demonstrated it is already suffering irreparable harm from the Final Rule, harm that is occurring before the anticipated October publication of the Final Rule. 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, which EPA does not deny. Initial Galli Decl. ¶ 28.[3]

That harm is continuing. EPA admits its own "modeling based on the final rule shows 11 gigawatts of coal-fired generation shutting down ***in 2016***" (EPA Br. 29 (emphasis added)). EPA's own modeling shows that more than 30 coal-fueled EGUs will shut down in 2016, including important customers of Peabody. *See* Supp. Galli Decl. ¶ 3; Heidell/Repsher Decl.¶ 8. EPA's curious assertion that its

[3] Intervenors contend Peabody's stock decline was part of a larger market trend. Interv. Br. 9. However, its decline was far greater than the small decrease experienced by indexes on Aug. 3, and overall gainers led decliners on Aug. 3 by nearly 2 to 1. *See* Supp. Galli Decl. ¶ 9. Intervenors cite a subsequent increase in Peabody's stock price, but overlook the fact that (in the absence of the $90 million Aug. 3 decline) the increase would have started from a higher base. Intervenors also note the bankruptcy announcement of another coal company, Alpha Resources, on Aug. 3, yet that event proves our point: Alpha's bankruptcy announcement cited "increasing government regulation that has pushed electric utilities to transition away from coal-fired power plants." http://ir.alphanr.com/file.aspx?IID=4100842&FID=30542039.

modeling is not "intended to be predictive" (EPA Br. 29) flies in the face of its own statements that its modeling produces the "***best assessment*** of likely impacts of the CPP under a range of approaches that states may adopt," and is "a state-of-the-art, peer-reviewed, dynamic linear programming model that can be used to project power sector behavior" and "to project likely future electricity market conditions with and without the Clean Power Plan Final Rule."[4] EPA's modeling not only provides the basis for the Regulatory Impact Assessment (RIA) of the Final Rule, but also is the basis for the design and level of the performance standards that ***constitute*** the Final Rule. EPA cannot disavow its own modeling without rendering the Final Rule fatally defective.

Based on EPA's own modeling, Peabody will suffer irreparable harm before publication as utilities make irreversible decisions to curtail coal use and to close over 30 coal-fueled EGUs in 2016. The unrebutted evidence shows that utilities, coal companies, and others in the energy industry must begin planning

[4] Regulatory Impact Assessment for Final Rule at 3-1, 3-11 (emphasis added). According to EPA, "[t]he analysis is a reasonable expectation of the incremental effects of the rule." *Id.* at 3-11. "This type of analysis, using IPM, has undergone peer review and been upheld in federal courts." 76 Fed. Reg. at 48,314 (Aug. 8, 2011). EPA recently told this Court that "the Integrated Planning Model ('IPM'), [is] an economic model widely used throughout private industry and the government to forecast how the power sector produces electricity at least cost while meeting energy demand, reliability constraints, and environmental requirements. This Court has previously recognized the use of IPM as reasonable for this purpose." EPA Respondents' Brief, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, at 40 (D.C. Cir. filed Jan. 16, 2015), Doc. No. 1532516 (citing *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1052-53 (D.C. Cir. 2001)).

immediately for the more than 30 coal-fueled EGU shutdowns that EPA projects will occur in 2016. *See* Initial Galli Decl. ¶¶ 9, 12-17; Supp. Galli Decl. ¶¶ 3-5; Heidell/Repsher Decl. ¶¶ 8-15. In fact, Peabody's customers have already started making planning decisions in anticipation of the Final Rule, and the pace of closure and curtailment decisions will only accelerate, leading to irreparable losses of coal sales. *See* Initial Galli Decl. ¶¶ 9, 12-17; Supp. Galli Decl. ¶¶ 4-5; Heidell/Repsher Decl. ¶¶ 10-17.

For example, in July 2015 Minnesota Power announced the closure of the Taconite Harbor Energy Center plant, supplied by Peabody, in anticipation of the Final Rule. *See* Initial Galli Decl. ¶14 (Taconite announcement specifically citing EPA's "proposed Clean Power Plan to regulate CO2 from existing power plants, due to be finalized next month"). EPA tries to brush off the Taconite shutdown as "likely part of the general shift" "away from coal," EPA Br. 30, but the unrebutted evidence is that the Final Rule was a precipitating factor. Whether the Final Rule will be the ***only*** cause of coal plant shutdowns is irrelevant; legal principles require only that a factor be a ***contributing*** cause of harm, not that it be the ***sole*** cause. *See Massachusetts v. EPA*, 549 U.S. 497, 523-25 (2007); *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 160-66 (2003). Indeed, a sector already weakened by market forces and pre-existing environmental regulations is even more vulnerable to draconian regulatory measures like the Final Rule. *See also* Supp. Galli Decl. ¶ 6.

EPA cites this Court's statement that the All Writs Act is not available merely because "compliance with statutory procedures appears inconvenient or less appropriate." EPA Br. 15, 18. But that is not Peabody's argument. Rather, as EPA acknowledges, "lost sales by private parties that were the direct target of government action" can demonstrate irreparable harm. EPA Br. 27; *see also* Peabody Petition 23 n.16 (citing cases).

EPA's blithe assurances that the Final Rule is not "effective" until 60 days after publication (EPA Br. 12) or that emission reductions are not required until 2022 (*id.* at 28) ignore the unrebutted showing of immediate and irreparable concrete harm due to the long planning horizons of the capital-intensive and highly complex energy sector. EPA's claim that "utilities cannot currently know what specific measures will be required" until plans are submitted in 2016 or 2018 (EPA Br. 29) ignores the fact that EPA has already modeled what will happen and has compiled the RIA on that basis. Moreover, the contours of state plans will be known well in advance. States must provide "appropriate explanations" for obtaining extensions beyond the Sept. 6, 2016 deadline, including what type of plan the state is considering, the schedule for obtaining approval of that plan, or "[a] commitment to maintain any existing measures the state intends to rely upon for its final plan." (Final Rule 1012-13). EPA's suggestion that utilities will not know how they will be affected until September 2018 is baseless.

Against these harms, EPA makes oblique reference to the "threat" of climate change. EPA Br. 3. Yet it has declined to quantify ***any impact*** of the Final 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. EPA's own Administrator has declared that the plan is "not about pollution control." Peabody Petition at 28.[5] EPA is imposing a rule that is designed to eliminate a substantial portion of current U.S. generating capacity without any quantified environmental benefit.

III. Peabody Has Shown A Clear And Indisputable Right To Relief.

This is an extraordinary case appropriate for an extraordinary writ. The Final Rule is the opposite of interstitial rulemaking; it is wholesale lawmaking – a legislative restructuring of the energy sector and creation of a cap-and-trade scheme through the back door. Tellingly, EPA's response never once cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), and never denies that *Chevron* would be inapplicable in light of *King v. Burwell*, 135 S. Ct. 2480 (2015). EPA does not dispute that the Final Rule is utterly unprecedented: (1) never before has the agency used its reinterpretation of

[5] Intervenors inadvertently highlight the severity of Peabody's injuries by citing their own speculative, generalized, and insubstantial "harms": stress to dairy cows (Reopelle Decl., ¶ 12); limited ice fishing (Reopelle Decl., ¶ 17); aesthetic harm (Pannone Decl., ¶ 14); and difficulty landing a helicopter to photograph seals (Ross Decl., ¶ 10).

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 (EPA does not deny its new theory is contrary to the position the Clinton EPA took in 1995); and (2) never before has shutting down a coal plant in favor of other sources been used as a component of the "best system of emission reduction." EPA would render Section 111(d) "unrecognizable to the Congress that designed it." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

EPA incorrectly asserts that there were "two different amendments to the same text" in 1990 and that "Petitioners do not dispute that the Senate amendment would allow EPA to regulate power plants' CO2 emissions under section 111(d)." EPA Br. 32, 33. The House and Senate amendments did ***not*** amend "the same text," and Peabody has ***never*** conceded that the Senate amendment would authorize the Final Rule. To the contrary: Peabody's Opening Petition took great pains to argue the Senate conforming amendment consisted of six characters (four of them parentheses) buried in a grab-bag of clerical changes. It ***was not a separate "version"*** of Section 111(d) at all and therefore could not ***possibly*** authorize EPA to do ***anything***. EPA cannot cite a single instance in which its approach has ever been accepted in the dozens of situations where conforming amendments have been mooted by substantively amended statutory provisions, and it has no answer to the point that its approach would turn the U.S. Code upside down.

EPA contends its approach is necessary to avoid "creating a conflict within the statute." EPA Br. 35. That is backwards. Even if there were two "versions" of the Section 112 Exclusion (and there are not), EPA has never denied that the obvious way to "harmonize" them would ***not*** be to ignore the substantive House version (as EPA does), but to prohibit EPA from setting a Section 111(d) standard ***either*** for source categories regulated under Section 112 ***or*** for pollutants regulated under Section 112.

The ***Final Rule itself rejects*** the reading of the Section 112 Exclusion the EPA's lawyers propose in an attempt to manufacture an ambiguity. Compare EPA Br. 34 ("Read literally, the House's text in fact affirmatively authorizes the Rule…") (emphasis in original), with Final Rule 260 ("This reading, however, is not a reasonable reading. . . ."). EPA's gambit is barred by *SEC v. Chenery Corp*., 318 U.S. 80, 87–88 (1943), and effectively concedes the statute is clear. There is no "ambiguity" because EPA's new interpretation renders the Section 112 Exclusion completely nugatory and is irreconcilable with this Court's decision in *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"). EPA's confessed contradictory reasoning on the merits should not be twisted into a procedural roadblock to a writ.

EPA repeatedly cites *Am. Elec. Power, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), but that case supports Peabody, not EPA. The Court described the Section 112 Exclusion in the same terms as Peabody – as a ***prohibition*** on EPA power, not an ***authorization***. *Id.* at 2537 n.7.

EPA resorts to a non-textual claim that "section 111(d) is one leg of a tripod of CAA programs" and is a "gap-filling" provision. EPA Br. 35. Peabody has already responded to this argument: (i) the statutory ***text*** precludes it, because the phrase "any air pollutant" ***cannot*** refer solely to HAPs (Peabody Petition 20 n.13); (ii) the statutory ***structure*** precludes EPA's interpretation, which fails to align Section 111(d) with the "source category" focus of the post-1990 Section 112 (*id.* at 20-21); and (iii) EPA's appeal to statutory "purpose" fails, because Section 111(d) is not a "gap-filling" provision, there is no "gap" in EPA's authority, and any "gap" would need to be filled by Congress, not the agency. *Id.* at 11-12, 20-22. EPA has no answer to any of this, and as a creature of statute it lacks implied or inherent power to make law to fulfill the supposed "purpose" of the CAA.

EPA argues that the serious constitutional questions raised by its extravagant assertion of power militate ***against*** a writ. EPA Br. 31. That argument is based on a misapplication of *al-Nashiri*, which was not a statutory case but involved a request for an "advisory mandamus" as to the constitutional status of military judges on the Court of Military Commission Review. This Court denied the request precisely on

the ground of "constitutional avoidance." 791 F.3d at 81. Here, the logic of *al-Nashiri* supports Peabody, not EPA. This is not an "advisory mandamus" case, and here the clear way to avoid the constitutional question is to hold that CAA does not authorize EPA's sweeping assertion of power in the Final Rule.

EPA says it needs more space to present its arguments. EPA Br. 32 & n.29. Yet EPA has already issued a 105-page Legal Memo with the proposed rule (arguing the House and Senate amendments conflicted), a 152-page Legal Memo with the Final Rule (changing positions and arguing the Senate amendment was clear, the House amendment was not, but the two did not conflict), full briefing in the *Murray Energy* case, and now a 40-page (rather than customary 20-page) Response (flip-flopping again and setting out an interpretation of the Section 112 Exclusion rejected by the Final Rule's Legal Memo). If EPA believes it has not, in all those pages, adequately articulated the legal basis for the Final Rule, then surely the rule should be stayed pending full review.

CONCLUSION

The Petition should be granted, the Final Rule should be stayed, and all deadlines in it suspended pending the completion of judicial review. In the alternative, the Final Rule should be stayed pending adjudication of motions for stay filed in connection with forthcoming petitions for review.

September 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, September 4, 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

SUPPLEMENTAL 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").

2. I submitted a declaration in support of Peabody's emergency petition for an extraordinary writ. This declaration responds to some of the arguments made with respect to my initial declaration.

3. EPA and the Environmental Organizations assert that Peabody has not shown irreparable injury as a result of the Final Rule. This is incorrect. As explained in my prior declaration (¶ 17 n.5 and accompanying text), Peabody has examined EPA's own modeling of the Final Rule. Based on Peabody's review, EPA projects that the Final Rule will lead to the shutdown of more than 30 coal-fueled Electric Generating Units (EGUs) in the year 2016, including plants currently supplied by Peabody. EPA projects the shutdown of these EGUs will reduce approximately 11 Gigawatts (GW) of coal-fueled power as a result of the Final Rule.

4. EPA and the Environmental Organizations also assert that utilities need not make any decisions in the near term and can wait years

until state plans are formulated (potentially until 2018) and even until EPA's interim deadline of 2022 approaches. However, based on my 33 years of experience working with the utility industry, I disagree. Utilities are planning now (and have been planning since the proposed rule). Shutting down a plant or building a new generation source, for example, takes years of planning, investment, siting decisions, and numerous other activities. Utilities already have been making closure or curtailment decisions in anticipation of the Final Rule. Now that the Final Rule has been announced, we can expect those planning decisions to accelerate in the immediate short term. Those decisions will occur in the next few months, based upon EPA's own modeling, which shows the shutdown of 11 GW of coal-fueled generation in 2016 as a result of the Final Rule. 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 being informed or being made aware of cutbacks in coal purchases based on the Final Rule. This will result in lost business.

5. 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 Final 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.

6. A decision to close any plant often is based on several factors. These factors are reflected in EPA's base case modeling for the Final Rule. However, EPA's compliance-based modeling shows dozens of plant closures under the Final 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 Final Rule.

7. While Dr. Tierney's declaration states that "there is ample time for state plan development through 2018" (Decl. ¶ 22) and that the Final Rule's "first compliance deadline does not come until 2022" (¶ 23), she has been quoted in the press as recently as today saying, "I think you're likely to see — even in some states that want to just say no — some power plant owners that believe they could be at risk of having to do something soon by 2018 [beginning] to do some planning so that they won't just twiddle their thumbs." The same article continued: "Tierney said Midwestern states, particularly those in the northern half of the Midcontinent Independent

System Operator Inc. footprint, are already having closed-door sessions on developing a multi-state effort."[1]

8. Experience from the Mercury Air Toxics Standard ("MATS") indicates that closure decisions caused by the Final Rule will begin immediately, even though compliance is years away. EPA announced the MATS rule in December 2011. The MATS rule required compliance beginning in April 2015, or April 2016 with an extension.

9. In the three months that followed the MATS rule announcement – roughly the amount of time between the Final Rule announcement and EPA's expected Final Rule publication – at least 16 plants publicly announced retirements in response to the MATS rule. Six of these closure announcements were made between the MATS rule's December 2011 issuance and its February 2012 Federal Register publication.[2] Plants continued to close well before the MATS rule compliance deadline. After EPA lost at the Supreme Court in June 2015, EPA shrugged off the defeat by

[1] Annalee Grant, *Clean Power Plan Prep Moves from "Preseason to the Regular Season," Expert Says*, SNL Financial, Sept. 4, 2015, attached as Attachment 1 to this declaration.

[2] *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.

asserting that most power plants already had complied with the MATS rule, as demonstrated by the EPA quotes in my initial declaration (¶ 25).

10. In response to the statement in my declaration that 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, Dr. Tierney asserts that the overall stock market dropped on that day. However, 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 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.

Executed this 4th day of September, 2015.

/s/ Bryan A. Galli
Bryan A. Galli

EXHIBIT A

SNL Energy
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FERC's Bay discusses EPA, priorities, need for federal legislation and enforcement practices

by Glen Boshart

In the first exclusive interview he has granted since assuming the chairmanship of FERC in April, Norman Bay described to SNL Energy his priorities over the next 12 months and addressed some of the most pressing issues facing the agency.

"This is a time of great change," Bay stressed, citing four major trends he says are transforming the energy industry.

The first of those trends is the shale revolution, which he described as a disruptive technology that has created an abundant supply of natural gas at a reasonable price. As a result, he noted that in April, more electricity was generated by burning natural gas than coal for the first time.

Bay said the increasing use of renewables and distributed generation is another trend that is changing the industry, as are state and federal policy changes, including the establishment of state renewable portfolio standards and new emissions rules promulgated by the U.S. EPA. The fourth emerging trend is stagnant load growth, according to Bay, who noted that the Energy Information Administration has predicted that growth will amount to only about 0.8% annually for some time to come.

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EPSA to Supreme Court: FERC wants to dramatically overcompensate demand response

by Glen Boshart

Asserting that the case "is not nearly as complicated" as FERC and others portray it to be, the Electric Power Supply Association told the U.S. Supreme Court that the agency's demand response rule is simply an attempt to influence retail prices and demand, which it lacks the authority to do.

"It is hard to imagine a more obvious effort by federal regulators to override the decisions of state regulators as to the proper price for sales on the retail market. But if FERC can undertake this effort at all, surely it has to undertake it rationally," which it did not do, EPSA and its supporters asserted in a brief to the court.

The implications of the Supreme Court's ultimate ruling could be huge, and the case at first glance appears complicated because it involves technical legal issues and the intersection of retail and wholesale markets.

FERC Order 745, issued in March 2011, essentially mandated that the operators of organized energy markets pay demand response resources for reducing their energy

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Clean Power Plan prep moves from 'preseason ... to the regular season,' expert says

by Annalee Grant

It may be too early to know for sure which states will work together and which will forge ahead alone under the U.S. EPA's Clean Power Plan, but several industry experts and analysts agree that conversations are heating up around the country — even in those states that have said they will not comply.

National Rural Electric Cooperative Association Vice President of Government Relations Kirk Johnson said conversations on how states will comply have been happening for some time, but with the rule's release on Aug. 3, discussions are picking up even more. "That was preseason, now we're on to the regular season," he said.

The Clean Power Plan, promulgated under Section 111(d) of the Clean Air Act, establishes statewide carbon dioxide emission standards for existing fossil fuel-fired electric generating units with the goal of cutting CO2 emissions by 32% as measured from a 2005 baseline by 2030. The rule was released Aug. 3 by President Barack Obama at the White House. States will have until Sept. 6,

2016, to submit an initial state implementation plan or request an exemption for up to two years to 2018. Those plans can include, for example, an emission trading program and other emissions reduction initiatives.

Analyst Sue Tierney of the Analysis Group expects compliance efforts to vary widely. Some states and California will rely on proven trading schemes to meet their goals, she predicted, while others "are going to say no, and they mean it. They're just not going to do anything." Tierney further predicted that certain states will participate in lawsuits against the rule and say they will not try to comply but in reality will begin to work with other states on a compliance plan.

Utilities may also begin to act on their own in the states that have said they will not comply, guided by the EPA's federal implementation plan. "I think you're likely to see — even in some states that want to just say no — some power plant owners that believe they could be at risk of having to do something soon by 2018 [beginning] to do some planning so that they won't just twiddle their thumbs," she said.

Tierney said the final Clean Power Plan offered more flexibility to allow states to work together without all the red tape, making cooperation much more likely. States do not need to sign a memorandum of understanding to proceed with a regional trading plan, she said.

Mark Thimke, a partner at Foley & Lardner, predicted that some states, like Ohio, that have plenty of renewable generation will keep emissions benefits to themselves rather than trade them. Brian Potts, a partner at the same firm, is not sure how feasible the regional trading plans are going to be in practice, even with the changes in the final rule.

"There's going to be interesting turf wars between the states. Obviously some states are going to have advantages over others," Potts said. "I think practically, regional trading, except for maybe the regions that are already set up, is going to be politically difficult."

But Tierney said Midwestern states, particularly those in the northern half of the Midcontinent Independent System Operator Inc. footprint, are already having closed-door sessions on developing a multi-state effort. She also sees possible cooperation between the Organization of PJM States Inc. member states and the PJM Interconnection LLC providing modeling and analyses. PJM spokesman Ray Dotter said there have been no formal conversations between the RTO and any of its member states since the Clean Power Plan was released, but staff is prepared to provide assistance as requested.

Tierney has also heard murmurs that states with a common holding company operating in multiple states might look to work together. While she did not name any specific companies, she said examples would be Xcel Energy Inc., Calpine Corp. or NRG Energy Inc.

The Clean Power Plan "really does invite having proposals either from companies who want to allow their own fleets to take advantage of efficiencies or who want to have their market or integrated dispatches work seamlessly with almost a carbon adder or allowance element," Tierney said.

Johnson could not confirm the compliance options favored most by power cooperatives, but said any option that could lower costs for consumers should remain on the table.

Potts predicted that most states will seek extensions so they can file their implementation plans in 2017 or 2018. He noted that Alabama, California, Hawaii, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Washington and Wisconsin all asked for the ability to participate in a trading program. Wisconsin Gov. Scott Walker, notably, has said his state will not comply with the Clean Power Plan.

COMPANIES REFERENCED IN THIS ARTICLE:

Calpine Corp.	CPN
Midcontinent Independent System Operator Inc.	
NRG Energy Inc.	NRG
PJM Interconnection LLC	
Xcel Energy Inc.	XEL

Industry Document: Carbon Pollution Emission Guidelines for Existing Stationary

Industry Document: The "Clean Power Plan" and Other Significant New Clean Air Act Developments

Read this article on SNL web.

Republican Gov. Snyder says Michigan will comply with Clean Power Plan

by Annalee Grant

Breaking from leading Republican voices and even his own attorney general, Michigan Gov. Rick Snyder has announced that his state will develop a plan to comply with the U.S. EPA's Clean Power Plan to ensure state officials have control over the state's energy future.

But even as the state pledges to develop its own plan, officials have lingering concerns they say were not addressed with the release of the final Clean Power Plan. Specifically, the state embarked on renewable portfolio standards in 2008, requiring the state's electric providers to include 10% renewable generation in their portfolios by 2015. Under the Clean Power Plan, the development of renewables in the early term of the state's RPS may not count toward Clean Power Plan compliance.

The Clean Power Plan, released on Aug. 3, pledges to cut carbon emissions 32% below 2005 levels by 2030, and is seen as one of the landmark climate change efforts of the Obama administration. President Barack Obama himself released the plan at the White House, touting it as the first ever attempt to regulate carbon dioxide emissions from the nation's power plants.

Snyder formed the Michigan Agency for Energy just months ago, tasked with reforming the state's energy future, and the agency will now lead the state's efforts to develop a state implementation plan, or SIP, in partnership with related state agencies. Director Valerie Brader said in a media call Sept. 1 that the Clean Power Plan will work well with initiatives already announced by Snyder to address particulate matter, mercury and other pollutants.

Even though Michigan's leadership has said it will comply, the state's attorney general, Bill Schuette, has joined multiple states in requesting an early stay to the rule. Brader stepped back from the attorney general, who has previously claimed that the Clean Power Plan violates the Clean Air Act and will cause electricity prices to increase.

"The attorney general is pursuing that case in his individual capacity, and at this time there are no plans for the state to join the current challenges," Brader said.

Brader said that after a number of agencies reviewed the Clean Power Plan, it was determined that not only was it possible for the state to develop a workable plan, but doing so would be the best

EXHIBIT B

DECLARATION OF JAMES A. HEIDELL AND MARK REPSHER

We, James A. Heidell and Mark Repsher, 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 our knowledge and belief:

1. I, James Heidell, am a Director at PA Consulting Group, 1700 Lincoln Street, Suite 1550, Denver, Colorado 80203. I provide consulting services to the electric utility industry and non-utilities engaged in the production and sale of electricity. I have an MBA in Finance (1989), MS in Engineering Economics (1982) and a BSE in Civil Engineering (1979). I am also a Chartered Financial Analyst.

2. I, James Heidell, have worked for more than twenty years in roles as a consultant to the electric industry and to U.S. Department of Energy and ten years as an employee of an electric utility. My work has involved providing economic and technical analysis on a range of regulatory issues, resource planning, and analysis of potential investments in generation. My areas of expertise include energy market modeling and resource planning. I have eight years of experience working in the regulatory department of an investor owned utility in addition to consulting engagements working with the regulatory and planning groups of electric utilities.

3. I, Mark Repsher, am a Managing Consultant at PA Consulting Group, 1700 Lincoln Street, Suite 1550, Denver, Colorado 80203. I provide consulting services to the electric utility industry and non-utilities engaged in the production and sale of electricity, and supporting industries. I have a BA in Economics (2001).

4. I, Mark Repsher, have worked for more than fourteen years in roles as a consultant to the electric industry. My work has involved guiding clients through initiatives spanning strategic resource and environmental compliance planning (for utilities, cooperatives, and municipalities), divestitures of non-core assets to enhance shareholder return, mergers and acquisitions, restructurings and other litigation, off-take contract structuring and valuation, asset financing, identification of concrete value 'off-ramps' to realize investment returns for specific power assets, and best practice analyses. I have extensively analyzed North American wholesale energy markets, with a focus on coal and environmental regulatory issues.

5. PA Consulting Group's energy industry experience is extensive. We have analyzed and modeled U.S. electricity markets for over twenty five years. Since 2011, our M&A advisory practice has supported more than 150 electric infrastructure purchases, sales, financings and appraisals in every power market in the U.S., including over 200 GW of

power generation (including natural gas, coal, hydroelectric, solar and wind). Our electric market modeling uses a mix of third party hourly chronological production cost models and proprietary models. This modeling includes analysis of economic retirements of power plants, forecasts of which plants will install pollution control equipment, and the impacts of environmental regulation. PA's energy practice also includes strategic advisory service to electric utilities, including resource planning. .

6. We 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 our personal knowledge of facts and analysis conducted by us and staff under our supervision..

7. We have reviewed the declaration of Dr. Susan Tierney (the "Tierney Declaration"), the Final Rule, including the modeling inputs and assumptions, and the opposition brief filed by the United States Environmental Protection Agency ("EPA").

8. Dr. Tierney asserts that challengers to the Final Rule have "greatly overstate[d] the effect of the 2022 standards on near-term demand

for coal."[1] EPA's modeling projects that 33 coal-fueled power plants representing over 11 GW will close in 2016 because of the Final Rule. It additionally models an incremental reduction in coal consumption by 2016 of 22 million short tons, or 2.7 percent.[2] In other words, EPA's own modeling refutes Dr. Tierney's position.

9. EPA, in page 29 of its opposition brief, distances itself from its own analysis claiming that "the modeling is intended merely to illustrate possible effects of the Rule and is not intended to be predictive." It appears that EPA is failing to distinguish between its own description of the two illustrative compliance approaches and the purpose of the detailed technical modeling that it engaged in. In my extensive professional experience the purpose of market modeling with models such as IPM is intended to be predictive (regardless of its accuracy). EPA's own extensive modeling has concluded that virtually all of the coal EGUs that will shut down due to the CPP will happen before 2020 and will not wait until 2022

10. We similarly disagree with Dr. Tierney's contention that power companies need not make immediate changes in response to the Final Rule. It requires long lead times to plan, permit, and construct power plants and the associated infrastructure, such as transmission lines and gas pipelines.

[1] Tierney Declaration, at page 13.
[2] EPA Technical Documents. These values refer to the mass-based compliance approach, which we view as the likelier approach.

The North American Electric Reliability Corporation ("NERC") estimates that it takes, on average, 64 months complete all of the required planning, permitting and construction for a combined-cycle gas turbine facility, the most likely replacement capacity for retiring coal plants.[3] Grid operators, including PJM, SPP and MISO, have cautioned that the necessary transmission build-out to accommodate a substantially different mix of generators may take longer than what EPA requires. PJM estimates 5 to 16 years, and cautions that "the lack of equipment availability could increase lead-times substantially."[4]

11. Although the construction of renewable projects can take fewer years, these decisions too will start to be made immediately (a) to take advantage of federal investment tax credits set to expire at the end of 2016 and (b) to ensure completion by 2020 or 2021, for which EPA has provided incentives under the CPP. Therefore, in order to be in compliance by 2022, the power industry will begin acting immediately before the Final Rule's publication to comply with EPA's required transformation of the electric sector.

[3] NERC, "Potential Reliability Impacts of EPA's Proposed Clean Power Plan – Phase I," April, 2015, at page 38.
[4] PJM Regional Transmission Expansion Plan Process, "Reliability Scenario Studies Related to the Proposed Clean Power Plan," July 31, 2015, at page 6.

12. Dr. Tierney suggests that complying entities have various other options available to them that may not require infrastructure with long lead times. While there are other potential compliance paths, the feasibility of these paths has not been proven. For example, states such as Wyoming have identified barriers to expanding renewables to the extent EPA suggests and the ability to make the 2 to 4 percent heat rate improvements assumed by EPA is a generalized assumption that some coal plant operators say is not feasible. Hence, the reliance on a shift from coal to natural gas (Block 2 of the Final Rule) is likely understated by EPA, and therefore understates the irreparable harm.

13. Based upon EPA's own modeling, power producers and utilities will need to commit immediately to coal plant retirements and to the investment of billions of dollars to build low-emitting replacement capacity to ensure sufficient resources will be available to meet the electricity demand of their customers. Once committed, the decisions to retire and replace existing coal-fired power plants are irrevocable.

14. Due to long lead times, utility planning and decision making for 2022 and beyond needs to reflect a reasonable expectation of future environmental regulations. Hence decisions about future resources need to be made even though the Final Rule is not yet published. For example, 25

states require utilities to prepare integrated resource plans that have at least a ten-year time horizon.[5]

15. Since the Final Rule has been announced and released in full, utilities have begun to incorporate it into their decision-making processes. Minnesota Power's 2015 IRP, filed after the announcement of the Final Rule, reflects this reality, noting that although it "does not attempt to contemplate a specific compliance outcome in this 2015 Plan," the company's "prudent steps" to reduce coal-fired emissions "strongly position its customers for compliance with the… CPP."[6] Once approved, utilities will begin to implement these plans. Once firm commitments to procure alternative resources are made, the plans essentially become irreversible.

16. EPA claims that the modeling is only illustrative, but it relied on the modeling for its analysis of the Final Rule's impact. Plants that EPA projects will close next year must immediately begin making closure plans, informing workers, and securing alternative resources to meet their customers' electricity demands.

17. Approximately 90 percent of the coal sold in the United States from U.S. mines is supplied to electric utilities. Like the electric utility

[5] Regulatory Assistance Project, Best Practices in Electric Utility Integrated Resource Planning: Examples of State Regulations and Recent Utility Plans, June 2013, at page 6, available at http://www.raponline.org/document/download/id/6608.
[6] Minnesota Power, 2015 Integrated Resource Plan, September 1, 2015, in Minnesota Public Utility Commission Docket No. E015/RP-15-690, at pages 3 and 37.

industry, the coal industry is highly capital-intensive and must make investment decisions that have long lead times. The industry cannot wait another year or two to make the decisions necessary to adjust to the new market reality that the Final Rule imposes. The coal industry thus will suffer immediate irreparable harm, including irreparable harm between now and the EPA's planned publication date of the Final Rule, while the Court reviews the many challenges to the Final Rule.

Executed this 4th day of September, 2015.

/s/ James A. Heidell
James A Heidell

/s/ Mark Repsher
Mark Repsher