ARGUED DECEMBER 10, 2013
DECIDED APRIL 15, 2014

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

WHITE STALLION ENERGY CENTER, LLC, et al.,	)	
Petitioners,	)	
v.	)	**Case No. 12-1100 (and consolidated cases)**
U.S. ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

JOINT RESPONSE OF THE STATE, LOCAL GOVERNMENT, AND PUBLIC HEALTH RESPONDENT-INTERVENORS TO STATE AND CERTAIN INDUSTRY PETITIONERS' MOTIONS TO GOVERN

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GLOSSARY

Air Toxics Rule	Mercury and Air Toxics Standards, Final Rule, *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units*, 77 Fed. Reg. 9304 (Feb. 16, 2012)
EGU	Electric Utility Steam Generating Unit, as defined in 42 U.S.C. § 7412(a)(8)
EPA	U.S. Environmental Protection Agency
SEC	Securities and Exchange Commission

INTRODUCTION

State petitioners, together with coal producers and other industry petitioners, have filed a motion to vacate the Air Toxics Rule ("Rule") ("Pet'r Joint Mot.," ECF No. 1574809). Tri-State Generation and Transmission Association ("Tri-State") separately moves for vacatur, or, in the alternative, asks that the Court either (1) temporarily enjoin application of the Rule as to all units that have "future compliance deadlines" due to extensions, or (2) temporarily enjoin the Rule's hydrochloric acid requirements as applied to a single generating unit at Tri-State's coal-fired Nucla Station ("Tri-State Mot.," ECF No. 1574817). These motions should be denied, and, as State, Local Government,[1] and Public Health Intervenors have shown ("State/NGO Mot.," ECF No. 1574820), the Air Toxics Rule should be remanded to EPA without vacatur.

Petitioner-Movants principally argue that vacatur should follow *automatically* from the Supreme Court's decision. But the Court did not vacate any part of the Air Toxics Rule, and neither precedent nor principle supports that result in this Court. As EPA and Respondent-Intervenors have shown, under the test set forth in *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146

[1] The Commonwealth of Massachusetts; the States of California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, and Vermont, the District of Columbia; the Cities of Baltimore, Chicago, and New York; and the County of Erie, New York join this response.

(D.C. Cir. 1993), this is a paradigmatic case for remanding without vacatur. EPA's error is one that it can readily correct. And, as Respondents have demonstrated, the consequences of vacating the Rule while EPA fixes the error would be highly disruptive for public health and the environment, State/NGO Mot. at 10-17 & Exs. 1-6; EPA Mot. (ECF. No. # 1574825) at 12-17 & Declaration of Janet McCabe ("McCabe Decl.") ¶¶ 12-17, 26-28; for other state pollution control programs and efforts that depend on emissions reductions from the Rule, State/NGO Mot. at 17-20; EPA Mot. at 17 & McCabe Decl. ¶ 30; and for the regulated industry itself, Industry Respondent-Intervenors Mot. (ECF No. 1574838) at 13-17 & Ex. B, Declaration of William B. Berg; EPA Mot. at 18-20.

Petitioner-Movants fail to address the serious health hazards the Air Toxics Rule was designed to remedy and that would be left unchecked if it were set aside. They do not, and cannot, deny that vacatur would lead to significant increases in emissions of a multitude of harmful air pollutants, including from (1) sources that have installed controls to meet current obligations under the Rule but that would no longer be required to operate those controls, and (2) scores of power plants, including many high emitters, whose owners secured compliance extensions and are scheduled to comply with the Rule beginning in April 2016. *See* State/NGO Mot. at 10-17, Ex. 3, Declaration of Ranajit Sahu ("Sahu Decl.") ¶¶ 7-9; EPA

Mot., McCabe Decl. ¶¶ 20-22; *see also* Pet'r Joint Mot. at 19 (complaining of costs of "[o]perating th[e] new equipment" installed to comply with Rule).

For its part, Tri-State fails to justify interim injunctive relief for the entire category of plants that received compliance extensions, facilities whose circumstances Tri-State itself emphasizes are "very different" from its own single Nucla Station unit, Mot. at 16, and whose owners have *not* moved for injunctive relief. Granting Tri-State's requested delay of these other parties' obligations would cause significant emissions of dangerous toxic pollution. Finally, Tri-State's third request to this Court still fails to show grounds for a stay of the Rule's hydrochloric acid gas compliance deadline for the Nucla Station unit.

ARGUMENT

I. PETITIONER-MOVANTS' ARGUMENTS FOR VACATUR ARE MERITLESS

A. Contrary to Petitioner-Movants' Claims, the Remand Without Vacatur Remedy Is Available Here

Petitioner-Movants principally argue that remand without vacatur is unavailable because they interpret the Supreme Court's *Michigan* decision as holding that EPA's failure to consider costs in its appropriateness determination so "exceed[ed] the bounds of reasonable statutory interpretation, [that] it [was] acting without authority," Pet'r Joint Mot. at 9 (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)). This, they claim, makes the entire Air Toxics Rule an

"unlawful rule" that "cannot impose enforceable legal obligations" and that must be vacated. Pet'r Joint Mot. at 10; *see also* Tri-State Mot. at 10.

Petitioner-Movants' effort to avoid application of this Court's settled *Allied-Signal* test is unfounded. First, although most of the present movants explicitly asked the Supreme Court to vacate the Rule, *see* NMA Opening Br. in Nos. 14-46, *et al*. at 45; NMA Reply at 15; States Br. at 48; States Reply Br. at 22, the Court did not do so, *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015). The Court plainly was not persuaded that its ruling mandated vacatur of the Rule pending the further administrative proceedings that it recognized would follow. *See id.* at 2711.

The *Michigan* decision recognizes that EPA can regulate power plants' toxic emissions (and can do so in the particular form of the Air Toxics Rule), provided that the agency considers cost, and it acknowledges that EPA's cost consideration approach will be entitled to judicial deference if reasonable. 135 S. Ct. at 2711; *cf. N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) (finding remand without vacatur favored where *Chevron* deference would apply to agency's decision on remand).[2]

[2] This is not a case in which the emissions standards themselves are subject to reconsideration on remand; this Court upheld the standards against a variety of statutory and record-based challenges, *see* State/NGO Mot. at 9 & n.6, and the Supreme Court did not take up, let alone sustain, any challenge to the standards. *Cf. Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) (granting a stay of standards where emissions "standards could likely change substantially").

Citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the *Michigan* Court identified rationales that might support an "appropriate" determination, but that could not support affirmance because EPA had not relied on them. 135 S. Ct. at 2710-11. Remand without vacatur is appropriate in such circumstances. Indeed, *Chenery* itself remanded without vacatur, after holding that the SEC had relied upon an invalid rationale, but might be able to present a valid one for the same decision. 318 U.S. at 95. *See also SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (upholding same SEC order after remand).

Nor does *City of Arlington* help Petitioner-Movants. In rejecting arguments for a separate subset of "jurisdictional" interpretive issues on which agencies are not entitled to deference, the Court reasoned that agencies' "power to act and how they are to act is authoritatively prescribed by Congress," so that *every* agency interpretation of a statute (indeed, even compliance with procedural requirements) goes to an agency's "authority." 133 S. Ct. at 1865. *Michigan*'s ruling that EPA misread the statute goes to EPA's authority in this universal sense, but does not render irrelevant the normal rules regarding remand versus vacatur.

This Court's precedents confirm that, when an agency has made an error of statutory interpretation in a rulemaking, the remedy question is governed by *Allied-Signal*. This Court, in *North Carolina v. EPA*, emphasized that EPA is a "'creature of statute'" with "'only those authorities conferred on it by Congress'." 531 F.3d

896, 922 (D.C. Cir. 2008) (citation omitted). The Court also held there that EPA had committed numerous "fundamental" statutory errors, such as "reading a substantive provision out of [the Clean Air Act]," and adopting measures it had "no authority" to adopt, *id.* at 910, 920, 928, yet also ruled that remand without vacatur was the proper remedy, 550 F.3d 1176, 1178 (D.C. Cir. 2008). In *Northern Air Cargo*, 674 F.3d at 860-61, the Court concluded that the agency had failed even to interpret the statutory provisions that might justify its action, and remanded without vacatur. And in *Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002), the Court remanded without vacatur even after finding that the agency had failed to make any of the four findings that were statutory prerequisites to agency action.[3]

Even if they were not foreclosed by precedent, Petitioner-Movants' calls to disregard the *Allied-Signal* doctrine have nothing to recommend them. The doctrine recognizes that because agency decisions (especially rulemakings) can

[3] Movants' position (Petr Joint Mot. at 10-11) that Section 10(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2)(A), should be construed to prohibit the remedy of remand without vacatur is irreconcilable with this Court's large body of remand without vacatur precedent. Nor is the argument persuasive; Section 10(e) was intended to "restate[] the present law as to the scope of judicial review." Attorney General's Manual on the Administrative Procedure Act at 108 (1947). In any event, review of the Air Toxics Rule is governed by Section 307(d) of the Clean Air Act, which does not contain the APA's "shall," on which Movants' argument is predicated. *See* 42 U.S.C. 7607(d)(9) ("the court *may* reverse any such action" affected by the listed defects) (emphasis added).

affect millions of people, engender substantial reliance interests, and represent years of policy development, it sometimes makes good sense – and avoids gratuitous difficulties – to leave the agency action in place while the agency conducts further administrative proceedings necessitated by a judicial decision. A rule requiring automatic vacatur would force courts to choose between rigorous policing of agency action and protecting the public and the parties from serious harms and harsh burdens. No statutory restriction, and certainly no principle of equity, requires such a procrustean rule.

B. The Prerequisites for Remand Without Vacatur Are Plainly Satisfied Here

1. EPA Can Justify the Rule on Remand (*Allied-Signal* Prong I)

As respondents have demonstrated, there is much more than a "non-trivial likelihood," *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002), that on remand EPA will easily conclude that, considering cost, it is "appropriate" to regulate hazardous air pollution emissions from power plants. *See* State/NGO Mot. at 6-9. Petitioner-Movants never really address that question; instead (after attempting to avoid the *Allied-Signal* framework entirely), they incorrectly posit that the first inquiry under *Allied-Signal* is *whether there is doubt that the agency erred at all* and then declare victory because, they assert, the Air Toxics Rule "has been definitively declared unlawful" by the Supreme Court. Pet'r Joint Mot. at 14-15; *see also* Tri-State Mot. at 10-11.

Petitioner-Movants' thesis cannot survive even a casual review of this Court's *Allied-Signal* case law. In *most* of the cases in which it has remanded without vacatur, this Court found the agency had made a perfectly clear statutory error. As examples, in *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 130, 132 (D.C. Cir. 2015), this Court remanded without vacatur despite finding "rather clear transgressions of the statutory boundaries as set forth by the Supreme Court"; in *Mississippi v. EPA*, 744 F.3d 1334, 1358-59, 1362 (D.C. Cir. 2013), this Court did likewise after holding that part of the challenged rule "violate[d] the statute as interpreted" in a prior decision of this Court; in *North Carolina*, 550 F.3d at 1178, this Court remanded without vacatur after finding numerous "fundamental flaws" in the rule; and in *Sugar Cane Growers Co-op.*, 289 F.3d at 97-98, this Court's no-vacatur remand followed a decision finding "clear[]" violations of APA notice requirements and a failure to make multiple statutorily required findings.

The question under *Allied-Signal* is not how certain it is that the agency committed an error, but whether the agency's error is such that the same *outcome* (or "result," *Black Oak Energy v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013)) could be supported after remand, whether by means of further analysis of law or facts, further explanation, or after provision of public comment (where it has been unlawfully denied in the initial rulemaking). *See* State/NGO Mot. at 4-5, 6. Given EPA's finding that the Air Toxic Rule's benefits far exceed its costs; the

significance of the health and environmental harms shown by the record; the breadth of EPA's discretion in interpreting how cost is considered; and the extensive work EPA has already done with respect to cost in the rulemaking here, it is manifest EPA could readily conclude that regulation is "appropriate" on remand. *See* State/NGO Mot. at 6-9.[4]

There is no merit to Movants' complaint that remanding without vacatur would "nullif[y] the point of the Supreme Court's ruling," Pet'r Joint Mot. at 17. The "point" of the *Michigan* decision was not to free power plants from air toxics regulation, but rather to settle that EPA must consider cost as part of deciding whether air toxics regulation is "appropriate." EPA has committed to remedy that error promptly. The agency's consideration of cost as part of the appropriateness determination (a decision subject to further review in this Court at the behest of any aggrieved parties) is enough to give effect to the Supreme Court's decision.[5]

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[4] Tri-State's assertion that vacatur is required because *Michigan* requires a "new determination supported by a new record," Tri-State Mot. at 11, lacks merit. The need to conduct further administrative proceedings and to reach a "new determination" is the norm in remand-without-vacatur cases. Moreover, nothing in *Michigan* requires EPA to restart the decade-plus rulemaking from square one.

[5] Movants suggest that this Court should vacate the Rule because EPA might fail to act promptly on remand. Petr. Joint Mot. at 19-20. But EPA has committed to act promptly, EPA Mot. at 12; McCabe Decl. ¶ 18, and this is not a case in which the agency must devise a new set of regulations, *cf. North Carolina*, 550 F.3d at 1176-78 (remanding without vacatur *despite* recognized need for EPA to devise an entirely new replacement rule in an unusually complex area). This case instead involves a single discrete regulatory finding on matters EPA has already considered in detail in the rulemaking. In any event, if there were a concern,

2. Vacating the Air Toxics Rule Would Cause Serious Health and Environmental Harms (*Allied-Signal* Prong II)

Under *Allied*-Signal's second prong, this Court has underscored time and again the appropriateness of remand without vacatur to avoid even "temporary defeat" of a rule's congressionally intended health and environmental benefits. *North Carolina*, 550 F.3d at 1178; *see also Mississippi*, 744 F.3d at 1361-62; *Am. Farm Bureau Fed. v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009); *Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458-59, 1460 (D.C. Cir. 1997); *Envtl. Defense Fund v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990).

Petitioner-Movants almost entirely fail to address the substantial health and environmental harms that vacatur of the Air Toxics Rule would cause. Tri-State asserts, without support, that vacatur would "not be disruptive *to anyone*." Tri-State Mot. at 11 (emphasis added). It then proceeds to request a stay of the compliance dates for *all units with extensions* (not just for one unit at its Nucla

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despite EPA's representations, about the swiftness of agency action on remand, judicial mechanisms exist to address that concern, *see*, e.g., *Nat'l Wildlife Fed'n v. EPA*, No. 03-1458, 2005 WL 80958, at *1 (D.C. Cir. Jan. 13, 2005) (noting agency's stated intention to act promptly on remand and declining to impose deadline "at this time") (unpublished order); *North Carolina*, 550 F.3d at 1178 (noting availability of mandamus); *Natural Res. Def. Council v. EPA*, 706 F.3d 428, 437 n.10 (D.C. Cir. 2013) (declining to impose deadline, but noting availability of mandamus). Vacatur, in contrast, would threaten much greater delays in a regulatory process that already has been delayed by decades. *See* 42 U.S.C. 7412(n)(1)(A) (study informing "appropriate and necessary" finding to be completed "within three years after November 15, 1990").

Station), without mentioning the additional toxic emissions those units would be permitted to release during the remand period. *Id.* at 15.[6] The additional emissions from units with extensions, alone, are substantial. Response Declaration of Ranajit Sahu ¶¶ 5-7 ("Sahu Response Decl.," Exhibit 1 hereto) (estimating annual emission increases of approximately seven to eight tons of mercury and 17,000 to 40,000 tons of hydrochloric acid gas, as well as a 43 to 52 percent increase in secondary particulate matter pollution, as compared to full Rule implementation by April 2016, if the Rule is stayed as to units that have obtained compliance extensions).

State and industry movants, while admitting that the Rule has had "beneficial effects," claim that "many" of those benefits have resulted from power-plant retirements or conversions to natural gas. Pet'r Joint Mot. at 16. They make no effort, however, to quantify the retirement- and conversion-related benefits that they assert would be unaffected by vacatur. *Id.*[7] Instead, they stake out a contradictory position that acknowledges the real and ongoing benefits of emissions reductions resulting from power-plant retirement or conversion but denies harms caused by emissions from the remaining plants. The emissions (and harms) of plants that have not retired or been converted to natural gas, however,

[6] Instead, Tri-State simply claims that its single Nucla Station unit alone has low emissions. Tri-State Mot. 17-18.

[7] There is no guarantee coal-fired plants that have announced they will shut-down will do so if the Rule is vacated, or that plants that have ceased operating will not resume operating. *See* Industry Respondent-Intervenors Mot. at 15, 16.

are significant. Together, they would be permitted to emit or cause very large quantities of mercury, hydrochloric acid gas, and particulate matter each year if the Rule is vacated. *See* State/NGO Mot., Ex. 3, Sahu Decl. ¶¶ 3, 7-9 (quantifying vacatur-related emission increases of 59 to 72 percent per year for mercury, 61 to 75 percent per year for hydrochloric acid gas, and 61 to 75 percent per year for particulate matter, as compared to full Rule implementation by April 2016). Thus, even assuming emission reductions from retirements and conversions are irreversible, vacatur would permit very large additional releases of toxic pollutants.

Petitioner-Movants also fail to address the fact that the pollutants at issue here – metals like mercury, chromium, arsenic, and selenium; acid gases like hydrogen chloride, hydrogen cyanide, and hydrogen fluoride; and fine particulate matter – are extremely dangerous to humans. Among the serious health harms they cause are increased risk of permanent neurological damage (especially to developing fetuses and children) from mercury exposure, State/NGO Mot., Ex. 1, Declaration of Philippe Grandjean ("Grandjean Decl.") ¶¶ 11, 15; increased risk of acute and chronic respiratory illnesses from acid gas exposure, *id.*, Ex. 6, Declaration of Amy B. Rosenstein ("Rosenstein Decl.") ¶¶ 11-19; and increased

risk of heart attack, stroke, and premature death from particulate matter[8] exposure, *id.*, Ex. 5, Declaration of Douglas W. Dockery ("Dockery Decl.") ¶¶ 10-11.[9]

Vacating the Rule would mean that residents living near power plants (in the case of acid gas emissions) and the broader public (in the case of toxins like long-lived mercury) – would face numerous serious health harms during the remand period. *Id.*, Grandjean Decl. ¶ 12, 30; Miller Decl. ¶ 20; Rosenstein Decl. ¶¶ 31-32; Dockery Decl. ¶¶ 10-11, 24. *See also* 77 Fed. Reg. at 9429 (Table 9) (full implementation of the Rule in 2016 would result in 4,200 to 11,000 fewer premature deaths related to fine particulate matter exposure alone). Petitioner-Movants, however, make no attempt to explain why those significant public health harms are in any way tolerable.

Further, state and industry movants' argument that a decision to remand without vacatur would mean that "no environmental regulation that provides any benefits should ever be vacated, even where there is no doubt that the regulation is unlawful," Pet'r Joint Mot. at 17, is wrong. First, as discussed above, there is "no

[8] Particulate matter emitted directly from power plants invariably includes toxic metals that are known and probable carcinogens, such as arsenic, chromium, and nickel. 77 Fed. Reg. 9304, 9310 (Feb. 12, 2012), 76 Fed. Reg. 24,976, 25,021, 25,038 (May 3, 2011). Vacatur would also increase emissions of those toxic metals and the health risks they pose. Grandjean Decl. ¶ 12; Dockery Decl. ¶ 24.

[9] These same pollutants also imperil the environment – mercury harms fish-eating wildlife and acid gases contribute to acidification of ecosystems. Miller Decl., ¶ 5; 77 Fed. Reg. at 9310, 9362; 76 Fed. Reg. at 25,012-13, 25,015-16.

doubt" in this particular case that *Allied-Signal's* first prong favors keeping the Rule in place, because EPA would be fully justified in adopting the same regulation on remand, after it corrects its error. Second, the public health and environmental benefits provided by the Air Toxics Rule are not just "any benefits." They are substantial – a fact no Movant has made any science-based attempt to dispute – and they reflect Congress's determination in enacting Section 112 that there is an urgent health-based need to reduce emissions of toxic air pollutants like mercury, other heavy metals, and acid gases.[10]

Finally, Petitioner-Movants incorrectly assert that, in contrast to the situation in *North Carolina*, 550 F.3d at 1178 (Rogers, J., concurring), there is no state

[10] Petitioner-movants cite, as purportedly reflecting the sum total of the Rule's health benefits, EPA's estimates of $4-6 million in annual losses in forgone income due to lifelong I.Q. deficits. *See, e.g.*, Petr Joint Mot. at 5, 19. As EPA recognized, however, this figure reflects only a "small subset of the benefits of reducing [mercury] emissions," 77 Fed. Reg. at 9428, let alone all the other pollutants controlled by the Rule, *see id.* at 9323, 9363, 9428-32. Moreover, published, peer-reviewed estimates of the lost lifetime earnings due to power-plant mercury emissions are dramatically higher, in the billions of dollars annually. *See* State/NGO Mot., Grandjean Decl. ¶ 26 (citing recent estimates in the billions for lost lifetime earnings due to lower I.Q. from exposed children, and noting that these estimates "capture only one narrow aspect of the adverse human health effects of power plant mercury"). *See also id.* at ¶ 27 (noting extreme conservatism of EPA's methodology, the narrow scope of the costs it sought to measure – *i.e.*, "lost earnings by children exposed in utero to mercury from freshwater fish caught by a recreational angler in the same household" – and EPA's use of now-outdated dose-response information that resulted in a "severe underestimation of the costs").

reliance on the Air Toxics Rule for compliance with other federal regulatory programs. Pet'r Joint Mot. 16-17; Tri-State Mot. at 11-12. In fact, however, the air pollutant reductions the Rule requires are important to numerous states' efforts to meet federal water quality standards for mercury, national ambient air quality standards ("NAAQS") for certain criteria pollutants, and federal visibility goals for national parks and wilderness areas. State/NGO Mot. at 19-20; EPA Mot. at 17.

II. TRI-STATE'S REQUESTS FOR DELAYS OF COMPLIANCE DEADLINES FAIL TO SATISFY BASIC REQUIREMENTS FOR INTERIM INJUNCTIVE RELIEF

A. Tri-State Has Not Demonstrated that a Nationwide Injunction for All Extended Power Plants Is Warranted

As an alternative to vacating the Air Toxics Rule, Tri-State requests that the Court stay the compliance dates of all power plants with compliance extensions, Tri-State Mot. at 15, 19-20, even though not one of the owners of those scores of other plants has moved for such relief. Because Tri-State has introduced no evidence that a stay is warranted for all extended plants, there is no lawful basis for an across-the-board stay of compliance dates.

A movant for a stay or injunction – here, Tri-State – bears the burden to establish that equitable relief is warranted. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). *See also Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("same principles" apply in "related context[s]" of stays and preliminary injunctions); *Winter v. NRDC*, 555 U.S. 7, 32

(2008) (standard for permanent injunction is "essentially the same" as for preliminary injunctions). Tri-State's factual allegations concern only its own unit at Nucla Station, *see, e.g.*, Tri-State Mot. at 17, 18, and Tri-State concedes that the other plants for which it requests extensions may be differently situated, *see, e.g.*, *id.* at 16 (Nucla Station's situation is "very different"); *id*. at 20 n.6 (Tri-State is "not aware of any other companies or places in a similar situation"). In the absence of an adequate factual showing, Tri-State's request for sweeping, nationwide relief should be denied. *See Lewis v. Casey*, 518 U.S. 343, 359 (1996) (party seeking system-wide injunctive relief must show that harm is "widespread"); *see also State of Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) ("We have long held that an injunction must be narrowly tailored to remedy the specific harm shown.") (citation and internal quotation marks omitted).

Tri-State fails to demonstrate that it is likely to prevail in EPA's reconsideration of "appropriateness" on remand, or that widespread irreparable injury will result absent a stay, *Nken*, 556 U.S. at 434; *Lewis*, 518 U.S. at 359, and its showing is, if possible, even weaker as to the third and fourth stay factors: "assessing the harm to the opposing part[ies] and weighing the public interest," *Nken*, 556 U.S. at 435. The evidence before this Court shows that the harms to

public health from a stay of future compliance deadlines would far outweigh any asserted injuries to power plant owners from complying with the Air Toxics Rule.

If the Rule's future compliance deadlines were stayed nationwide, power plants with extensions would continue to emit thousands of tons of dangerous air pollutants that would otherwise have been eliminated. Sahu Response Decl. ¶¶ 5-7. Further, Tri-State understates the fraction of power plants that have received extensions. *See* Tri-State Mot. at 5 (claiming that about 165 of 1,400 electric generating units ("EGUs") obtained extensions). Many power plants contain multiple EGUs, and the most recent National Association of Clean Air Agencies survey indicates that at least 184 of the 460 (or 41 percent of) coal-fired *power plants* affected by the Air Toxics Rule received extensions.[11] Due to the significant number of extensions, approximately 34 to 42 percent of the Rule's expected annual emissions-reduction benefit for mercury would be lost each year that compliance is postponed, as well as approximately 43 to 52 percent of the expected annual benefit for hydrochloric acid gas and approximately 43 to 52 percent of the annual expected benefit for secondary particulate matter. Sahu Response Decl. ¶¶ 5-7. This additional pollution would have substantial, irreversible public health impacts. *See* State/NGO Joint Mot. at 13-16.

[11] *See* National Association of Clean Air Agencies, Survey on MATS Compliance Extension Requests (Aug. 11, 2015), *available at* EPA Mot., Att. G.

On the other side of the scale, if the Rule remains in effect, then power plants with April 2016 deadlines will be required to bring additional pollution controls fully online or otherwise come into compliance. However, "virtually all capital investments that will be required to comply with the Rule *have either been made or contractually committed*" and "[w]hile some minor controls might still be installed, these will not materially affect the industry's annual compliance costs." *See* Industry Respondent-Intervenors Mot. at 9 (emphasis added). Indeed, Tri-State admits that it is virtually alone in having *not* yet undertaken the expenditures necessary to comply by April 2016. Tri-State Mot. 16 & 20 n.6.

Because Tri-State has failed to provide evidence to support its request for a stay of compliance obligations as to all extended plants, and the evidence available to the Court in fact shows that a stay would be grossly inequitable, Tri-State's request should be denied.

B. Tri-State Again Fails to Justify Injunctive Relief as to Nucla Station

Alternatively, Tri-State seeks relief in the form of a narrowly tailored order extending the hydrochloric acid gas standards as applied to one unit at its Nucla Station. For reasons set forth in prior oppositions to Tri-State's two previously-denied motions,[12] Tri-State's renewed request must also fail.

[12] *See*, *e.g.*, Opposition of Respondent-Intervenors American Lung Association, *et al.*, to Tri-State Generation's Emergency Motion (filed Aug. 10, 2015) (ECF No.

Tri-State again alleges that Nucla Station is important to maintaining electric reliability in southwestern Colorado while an ongoing transmission project is completed. Tri-State Mot. at 7. But Tri-State still has not presented evidence that it has taken the steps necessary to receive an additional one-year, reliability-based extension pursuant to EPA's Enforcement Response Policy. *See* NGO Opp. to 2nd Emerg. Mot. at 9-13. Tri-State's situation does not present any "exceptional circumstance[]" allowing it to "circumvent an administrative process in favor of a judicial decision" granting injunctive relief. *See Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986).

Even if Tri-State decides to install hydrochloric acid controls at the one affected unit at Nucla Station, this expenditure must be evaluated in the context of its overall business, not based on the effect on one particular asset. *See*, *e.g.*, *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). When viewed in relation to Tri-State's annual operating revenue of $1.4 billion in 2014 and its $91 million investment to upgrade its transmission system around Nucla Station, Tri-State's potential compliance costs for the Nucla unit (approximately $1.1 million) do not constitute irreparable harm. *See* NGO Opp. to 2nd Emerg. Mot. at 16.

1567035); Opposition of Respondent-Intervenors American Lung Association, *et al.*, to Tri-State Generation's Emergency Motion (filed Aug. 28, 2015) (ECF No. 1570376) ("NGO Opp. to 2nd Emerg. Mot.").

Finally, Tri-State's claim that the Nucla Station unit's hydrochloric acid gas emissions "do *not* pose a risk to public health" again misreads EPA's conclusions regarding chronic health impacts. *See* Tri-State Mot. at 18. Tri-State completely disregards EPA's overall analysis, which found that the acid gases cause significant acute health effects to exposed individuals, including, among other adverse effects, severe respiratory irritation and burning and breathing problems, particularly in the most sensitive populations (children, for example, and those suffering from asthma). 76 Fed. Reg. at 25,004-05; *see also* State/NGO Mot., Rosenstein Decl. ¶¶ 23-24, 31-32. The Nucla Station emitted over 27,000 pounds of hydrochloric acid gas into the air last year.[13] Allowing it to continue to emit such significant quantities of hydrochloric acid gas would continue to expose nearby communities to increased risk of acute respiratory distress, pulmonary edema, nervous system effects, and other health harms. *See* State/NGO Mot. at 15.

CONCLUSION

The motions to vacate the Air Toxics Rule or to stay it in part should be denied, and the Rule should be remanded without vacatur.

Respectfully submitted,

[13] *See* EPA, 2014 Toxic Release Inventory Data for Nucla Station, *available at* http://iaspub.epa.gov/enviro/tri_formr_v2.fac_list/tri_formr.fac_list?rptyear=2014&facopt=dcn&fvalue=1314212586768&fac_search=fac_beginning.

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[14] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this motion.

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Dated: October 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Joint Response of the State, Local Government, and Public Health Respondent-Intervenors for to State and Certain Industry Petitioners' Motions to Govern has been served through the Court's CM/ECF system on all registered counsel. I further certify that a copy has been served by first-class U.S mail on all counsel not registered in the Court's CM/ECF system.

DATED: October 21, 2015 /s/ *Sean H. Donahue*

Exhibit 1: Response Declaration of Ranajit Sahu

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

White Stallion Energy Center, LLC, *et al.*, Petitioners, v. United States Enviromental Protection Agency, Respondent.	Case No. 12-1100, and consolidated cases

DECLARATION OF RANAJIT SAHU

I, Ranajit Sahu, hereby state and declare as follows:

1. I am an engineer and an environmental consultant. My relevant background and a copy of my resume was provided in support of the Joint Motion of the State, Local Government, and Public Health Respondent-Intervenors for Remand Without Vacatur (Doc. #1574820), which was filed in this case on September 24, 2015.

2. I was asked to estimate the amount of mercury, acid gas, and fine particulate matter pollution that would occur should the EPA's Mercury

and Air Toxics Standards ("MATS") Rule (hereafter "Rule") be stayed for all units that received extensions (i.e., those with future compliance deadlines) as compared to the Rule being fully implemented in April 2016.[1]

3. The Rule applies to several types of existing emissions sources.[2] I have only considered the implications of a stay of the Rule for existing coal-fired power plant units with future compliance deadlines and that are not expected to be shut down in 2016, or are otherwise not to be converted to natural gas firing. This analysis includes extended units with contracts to install pollution controls – and associated sunk capital costs – in addition to any units, such as Nucla Station, that have not yet committed to installing pollution controls to comply with the Rule. I have excluded cogeneration units, as well as units firing waste coals

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[1] The final MATS Rule was published in the Federal Register on February 16, 2012. Although there have been additional revisions to the Rule as it applies to certain new units and also to address certain technical issues, the limits relevant to my Declaration are contained in the Final Rule as promulgated on February 16, 2012.

[2] See Table 2 to Subpart UUUUU of Part 63. 77 Fed. Reg. 9490 and subsequent pages.

and petroleum coke from my analysis. I have also excluded certain small coal-fired units that are less than approximately 50 megawatts ("MW"). As such, therefore, the emissions estimates that I discuss below are conservative – i.e., it is very likely that more emissions would be emitted if the Rule were stayed than what I estimate here.

4. Based on the criteria noted earlier, I analyzed 318 coal units expected to be operating in 2016. I relied upon data from EPA's NEEDS database[3] and Acid Rain Database[4] for location and identification data for each unit, as well as the size of the unit (in MW), the heat rate (in Btu/kWh), the type of firing and bottom ash removal, the type of coal burned, and the type of scrubber at the unit if it has one. I obtained data on the extensions granted to affected units from MJ Bradley and Associates, which obtained it from the relevant State environmental agencies. An estimate of the annual emissions that would continue to be emitted if the Rule is stayed, requires, among

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[3] http://www.epa.gov/airmarkets/programs/ipm/psmodel.html

[4] www.epa.gov/ampd

other inputs, an estimate of the capacity factor of units in the future; the capacity factor indicates how much a unit is being run versus being idled. For the purpose of this analysis, I used a range of future capacity factors, applied to the fleet as a whole (i.e., for each unit in my analysis). The Energy Information Administration ("EIA") publishes coal fleet capacity factor information.[5] For 2014 EIA states that the coal fleet capacity factor was 61%. In reviewing data for prior years, the capacity factor was higher – in the upper 60s to lower 70 percent range. I have used a range for 61% to 75% for my analysis.[6]

5. As set forth in my September 24, 2015 declaration, the strategy for reducing mercury emissions relies on the use of additives such as activated carbon or similar additives with the coal itself. While most units that need to use these additives have already installed the requisite equipment, nonetheless they can simply stop using these

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[5] http://www.eia.gov/todayinenergy/detail.cfm?id=21232

[6] It is possible, with an improving economy, that the fleet capacity factor for remaining units may increase as coal units are shut down. Hence, I consider the 61 to 75 percent capacity factor range to be a reasonable one – possibly conservative.

sorbents and additives if the Rule were to be stayed – except for those units that have to meet mercury limits imposed by states, irrespective of the Rule. Thus, I have assumed that units located in states with mercury limits will continue to reduce mercury and meet the Rule limits irrespective of a stay of the Rule. I have also assumed that units that can already meet the Rule's mercury limits without having to do any additional controls are unaffected by a stay of the Rule. To identify such units, I relied on actual testing data required by EPA prior to promulgation of the Rule collected pursuant to an Information Collection Request (hereafter "ICR data"). ICR data was not collected at each of the 318 units in the analysis, but I have relied upon it for emissions rates where available. I have filled in the corresponding data for units without ICR data using expert judgement – considering a variety of factors such as the type of coal burned, the type of scrubber present, the type of unit firing and similar factors. Comparing the estimated emissions rates to the Rule limits, it is clear which units will have to do more via ACI to meet the Rule limits. Using this comparison and the annual heat input (which includes the assumed capacity factor),

I have estimated the annual reductions of mercury due to the Rule in states that do not have separate (i.e., non-Rule) mercury limits. These reductions are all at risk for units with future compliance deadlines if the Rule is stayed. The sum of these emissions ranges from approximately 6.8 tons per year at an assumed capacity factor of 61% to 8.4 tons per year at a capacity factor of 75%. To put this into context, the expected benefit of the Rule for mercury reduction was 20 tons per year, as shown in Table 3-4 of the Regulatory Impact Analysis ("RIA") accompanying the Rule.[7] Thus, in comparison to the 20 tons per year of mercury reductions expected as a result of the Rule, roughly 6.8-8.4 tons per year of reductions will not occur if the Rule is stayed. Stated differently, if the Rule were stayed for units with future compliance deadlines, approximately 34% to 42% of the expected emissions-reduction benefit would be lost each year that compliance is postponed.

6. I next did a similar analysis for acid gases – but only considering hydrochloric acid ("HCl"). Since other acid gases such as hydrofluoric acid ("HF") and others are also similarly affected, my estimates of the

[7] http://www3.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf

mass of acid gases affected by possible stay of the Rule are conservative. First, using ICR data (which was available for 71 of the 318 extended units at issue), I identified which units already met the Rule limit for HCl directly – without any need for further reductions. These units would not need to do any more HCl reductions and, therefore, their HCl emissions would be unaffected by a stay of the Rule. I also identified the sulfur dioxide ("SO_2") rate for each of the extended units (based on June 2015 EPA Acid Rain data) and noted which scrubbed units already met the 0.2 lb/million Btu SO_2 surrogate limit as allowed by the Rule. The SO_2 emissions of these units would be unaffected by the possible stay of the Rule. It is my opinion that units that have scrubbers will likely be able to meet the HCl limit directly since scrubbers that are properly designed/maintained/operated are quite effective at HCl removal. In addition, it is my opinion that units that burn sub-bituminous coals, which have low chlorine contents (which is the cause of HCl formation and emissions) will also be able to meet the HCl limit without installing additional controls. For some units, however, I note that the limit for HCl appears to be met using a form of

control using direct sorbent injection ("DSI"). DSI is a popular strategy for meeting the HCl and acid gas limit. As with mercury, although units with extensions have likely already installed the needed equipment or are in the process of doing so, they can simply not inject the sorbent if the Rule were stayed. I identified the extended units that will need DSI or similar approaches for meeting the limit and thus, who will continue to emit hydrochloric acid in excess of the Rule's HCl limit if the Rule's compliance deadlines are stayed. For these units, based on my review of ICR data (collected at a variety of units of different types), I assigned an emission rate absent the Rule as shown. While I attempted to differentiate the emission rate by unit type etc., the data did not support significantly different emission rates. Hence I used a single emission rate for this analysis. Using the estimated heat input for each such unit, including the capacity factor assumed – per previous discussion, I then estimated the emission of HCl that would be reduced by the Rule – or continue to be emitted if the Rule were stayed. The sum for all 318 units ranged from 16,939 tons per year assuming 61% capacity factor to 20,827 tons per year assuming a 75% capacity factor.

For context, EPA expected a benefit of 39,800 tons per year of HCl as a result of the Rule.[8] Thus, if the Rule were stayed for units with future compliance deadlines, approximately 43% to 52% of the expected emissions-reduction benefit would be lost each year that compliance is postponed.

7. Finally, I analyzed the additional fine particulate matter pollution that would result from a stay of future compliance deadlines. EPA's modeling to support the Rule showed that reductions in SO_2 would result in reductions of secondary sulfate fine particulate ("$PM_{2.5}$") in the atmosphere. While the relationship between SO_2 emissions and secondary sulfate $PM_{2.5}$ formation is not linear, the magnitude of SO_2 emissions reductions can provide a rough approximation of the resulting reductions in secondary $PM_{2.5}$ formation. EPA notes that "…sulfate reductions contributed 95% of the health co-benefits of all $PM_{2.5}$ components, with an additional 5% from direct $PM_{2.5}$ reductions."[9]

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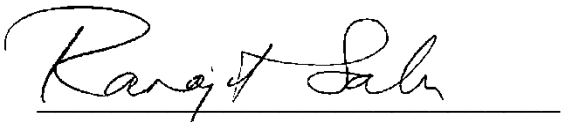
[8] See RIA, Table 3-4.

[9] RIA, p. 5-14.

In other words, the vast majority of the Rule's projected PM-related health benefits result from reductions in SO_2 emissions that contribute to atmospheric fine particulate pollution. For this analysis, I assumed that, upon complying with the Rule on or before April 2016, units with extensions would reduce their SO_2 – and hence their contributions to secondary atmospheric $PM_{2.5}$ – to the same extent that they reduced their HCl emissions. The Rule would result in expected SO_2 reductions since DSI applied to reduce HCl would also reduce SO_2. Therefore, I estimate, that roughly 43% to 52% of the expected pollution-reduction benefit for secondary fine particulate matter would be lost each year that compliance is postponed for the extended units.

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

Executed this 21st day of October, 2015.



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