

Nos. 14-1112 & 14-1151

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

IN RE: MURRAY ENERGY
CORPORATION,

Petitioner,

MURRAY ENERGY CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY AND REGINA A.
McCARTHY, ADMINISTRATOR,

Respondents.

MOTION TO INTERVENE IN SUPPORT OF PETITIONER

The State of Wisconsin (“State”) respectfully moves to intervene in support of Petitioner Murray Energy Corporation in Consolidated Case Nos. 14-1112 & 14-1151. The State wishes to join the States of West Virginia, Alabama, Alaska, Indiana, Kansas, Louisiana, Nebraska,

Ohio, Oklahoma, South Dakota, Wyoming, Arkansas, and the Commonwealth of Kentucky (“Intervenor States”) in their intervention in support of Petitioner.

Intervention is appropriate if the movant is “directly affected by” the agency action and the motion is “timely.” *See Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 744-45 (D.C. Cir. 1986). Wisconsin should be permitted to intervene because it is directly affected by the agency action and the motion is timely.

The Intervenor States have demonstrated the numerous ways in which they have been harmed by the United States Environmental Protection Agency’s unlawful attempt to impose requirements upon the States under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). (See Motion of State of West Virginia, *et al.*, No. 14-1112 (Consolidated) (ECF 1524570) and Brief for Petitioners, No. 14-1146 (ECF 1524569 at 16-22, 26-29).) Wisconsin is similarly situated to the Intervenor States and incorporates by reference the brief for petitioners in related Case No. 14-1146 and the supporting declarations. (*Id.*; see also **Exhibit 1**, Letter from Wisconsin Governor Scott Walker (Dec. 1, 2014); **Exhibit 2**, Letter from Wisconsin Public Service Commission and

Wisconsin Department of Natural Resources to Respondent McCarthy (Nov. 30, 2014).)

Specifically, under the proposed rule, Wisconsin's carbon reduction goal of 34% by 2030 will have a detrimental impact on our economy, particularly because of Wisconsin's large manufacturing sector. (See Exhibit 1.) Wisconsin's modeling of the proposed rule shows an energy-production cost increase of \$3.3 to \$13.4 billion, in addition to the significant cost of the additional infrastructure that will be necessary to reach this magnitude of carbon reduction. (See Exhibit 2 at 3, ¶ 2.) On a more general level, Intervenor States' brief, declarations, and the accompanying exhibits demonstrate how Wisconsin is "directly affected" by the proposed rule.

While the State acknowledges that this motion is filed after the deadline in the Court's Order of November 7, 2014 (ECF 1522086), the State believes the motion is timely and respectfully asks the Court to consider the circumstances that prevented the State from moving to intervene along with the State of West Virginia, *et al.* Like Arkansas, whose motion to intervene in this matter was filed on February 12, 2015, and granted by the Court on March 9, 2015,

Wisconsin Attorney General Brad Schimel became the Attorney General-elect on November 4, 2014. He took office on January 5, 2015. After taking office Attorney General Schimel reviewed the issues presented in this matter and the positions of the Petitioner, Respondents, and assorted Intervenors. He consulted with appropriate officials in Wisconsin concerning the issues presented in this case and sought authority to join as provided by the Wisconsin Statutes. Now that Attorney General Schimel has the legal authority to join on behalf of the State, he wishes to join with the Intervenor States in support of the Petitioner.

A motion to intervene is required to be timely in order to prevent disruption of existing litigation and causing detriment to existing parties. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). If permitted to intervene, the State will not file any further briefing on the matters pending before the Court or request time for oral argument at the hearing on April 16, 2015. The State will join the Intervenor States in resting upon the amicus brief filed in Case No. 14-1112 (ECF 1499435), the Intervenor States' brief in support of Petitioners filed in Case No. 14-1112 (ECF 1528700), and the briefing submitted in

related Case No. 14-1146 (ECF 1524569). Given the totality of the circumstances, this motion is timely in that it does not add any issues to the case nor affect the briefing schedule already ordered by the Court.

The State respectfully requests that it be allowed to intervene in Consolidated Case Nos 14-1112 & 14-1151. (*See* Order dated March 9, 2015 (granting intervention motion of the State of Arkansas).)

Counsel for Intervenor State of West Virginia has indicated that they support this motion.

Dated this 25th day of March, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

s/Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Intervenor
State of Wisconsin

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**CERTIFICATE AS TO PARTIES, AMICI CURIAE,
AND RELATED CASES**

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the movant states as follows:

Parties, Intervenors, and Amici

Petitioner: Murray Energy Corporation.

Respondent: The United States Environmental Protection Agency and Regina A. McCarthy, Administrator of the United States Environmental Protection Agency.

Intervenors for Petitioner: The National Federation of Independent Business, the Utility Air Regulatory Group, Peabody Energy Corporation, the States of West Virginia, Alabama, Alaska, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, Wyoming, Arkansas, and the Commonwealth of Kentucky are Intervenors in support of Petitioner. The State of Wisconsin has filed the accompanying motion to intervene in support of Petitioner.

Intervenors for Respondent: Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, States of Connecticut, California, Delaware, Maine, Maryland, New Mexico, New York,

Oregon, Rhode Island, Vermont, Washington, Commonwealth of Massachusetts, the District of Columbia, and the City of New York.

Amici Curiae for Petitioner: The National Mining Association, American Coalition for Clean Coal Electricity, American Coatings Association, Inc., American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, Chamber of Commerce of the United States of America, Council for Industrial Boiler Owners, Independent Petroleum Association of America, National Association of Manufacturers, Metals Service Center Institute, State of South Carolina, and American Chemistry Council.

Amici Curiae for Respondents: State of New Hampshire, Clean Wisconsin, Michigan Environmental Council, Ohio Environmental Council, Calpine Corporation, Jody Freeman, and Richard J. Lazarus.

RELATED CASES

State of West Virginia, et al. v. Environmental Protection Agency,
No. 14-1146.

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2015, the foregoing motion to intervene for the State of Wisconsin was served electronically through CM/ECF system to all registered attorneys in Consolidated Case Nos. 14-1112 & 14-1151.

s/Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. Box 7863
MADISON, WI 53707

December 1, 2014

Ms. Gina McCarthy
Administrator
US Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OAR-2013-0602
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Comments on EPA's Proposed Carbon Pollution Guidelines for Existing Stationary Sources
- Electric Utility Generating Units

Dear Administrator McCarthy:

Since the release of the Environmental Protection Agency's (EPA) Clean Power Plan, an array of elected leaders, business and industry representatives and consumer advocates have raised concerns regarding the proposal to regulate carbon dioxide emissions from existing fossil fuel-fired utilities pursuant to section 111(d) of the Clean Air Act. This proposed rule will have severe negative economic impacts on Wisconsin, as well as the nation as a whole.

These comments further build on concerns that I previously shared with you in a letter on August 6th, 2014 following introduction of the proposed rule. Additionally, the Wisconsin Department of Natural Resources (WI DNR) and Public Service Commission of Wisconsin (PSCW) will be submitting technical comments outlining in detail the flaws and negative consequences of the proposed rule.

Preliminarily, it is important to recognize that Wisconsin has made major investments to provide its citizens with affordable, reliable and clean power. Wisconsin utilities have invested over \$4.5 billion for 4200 megawatts (MW) of new coal and natural gas generation since 2000. On top of those investments, \$3.2 billion has been invested in air pollution control equipment and efficiency upgrades at existing power plants since 2000.

Moreover, another \$2.3 billion has been spent for approximately 1100 MW of clean, renewable energy. Since 2000, ratepayers have also provided \$469 million to Wisconsin's energy efficiency program, Focus on Energy. The Focus on Energy program, along with Wisconsin's investment in renewables, has resulted in over 10 million tons of avoided carbon dioxide emissions. This equates to a 20% reduction from 2005 emissions.

EPA's proposal does not recognize this approximately \$10.5 billion in investments, and threatens Wisconsin's ability to continue to meet the energy needs of its citizens. In regard to costs, the PSCW preliminarily estimates a cost of compliance with this proposal to be \$3.3 to \$13.4 billion for our state alone. This cost estimate does not include any costs related to additional infrastructure needs associated with this rule, such as natural gas infrastructure necessitated by increased gas use contemplated under this proposal, or the need for new transmission lines. Wisconsin currently does not have the infrastructure in place for this conversion, and it would take years to build. Furthermore, the EPA's plan does not consider "stranded costs," which are those investments that have been made in coal-fired power plants that may need to be retired earlier than anticipated due to the requirements contained in this rule proposal.

These costs will have a real impact on Wisconsin ratepayers. According to a recent study by Energy Ventures Analysis, the average annual Wisconsin household will see electricity and gas bills increase by more than \$485 in 2020. Modeling studies performed by PSCW confirm that this rule will increase electricity rates by up to 29%, excluding upgrades to necessary transmission and gas supply infrastructure.

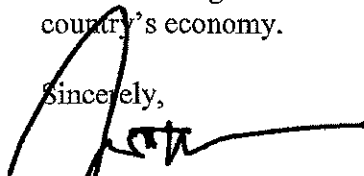
Many Wisconsin families depend on jobs in our state's large manufacturing sector to make ends meet. In fact, Wisconsin consistently ranks among the nation's top states for manufacturing jobs per capita. Double digit rate increases attributable to this rule will have a detrimental impact on this sector of our economy and as a result, impact family budgets across our state. This rule and other pending rules from the EPA will take Wisconsin backwards.

In Wisconsin, we are also greatly concerned about electric reliability. EPA has not adequately examined the impact of the proposal on this critical issue. As a state that obtains more than fifty percent of its electricity from coal, I am very concerned that a shift away from a coal-fired fleet to natural gas plants, which are designed to supplement coal-generated power to meet peak demands, will jeopardize our ability to meet electricity needs.

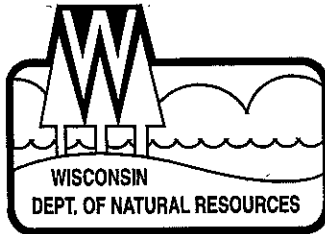
The additional correspondence you are receiving from WI DNR and PSCW highlights numerous other concerns with this proposed rule. Perhaps one of the most significant issues is the inherent inequity and absurd result reflected in this proposal. States that have already obtained large CO₂ emission reductions, such as Wisconsin, are being required to reduce emissions more than those that have not taken significant steps to decrease emissions. For example, those states that have invested in efficient natural gas plants, and consequently are reducing emissions from other higher emitting sources, have more stringent goals than they would have if they had not invested in these facilities. This perplexing approach needs to be corrected in any final rule.

I urge you to consider the comments submitted by WI DNR and PSCW and address the substantial negative economic consequences that this proposal will have on Wisconsin's and this country's economy.

Sincerely,



Scott Walker
Governor

**State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES**Scott Walker, Governor
Cathy Stepp, Secretary101 S. Webster St.
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Madison, Wisconsin 53707-7921
Telephone 608-266-2621
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TTY Access via relay - 711**Public Service Commission of Wisconsin**Phil Montgomery, Chairperson
Ellen Nowak, Commissioner610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

November 30, 2014

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OAR-2013-0602
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: Comments on EPA's Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2013-0602

Dear Administrator McCarthy:

The Wisconsin Department of Natural Resources (WDNR), in conjunction with the signatory Commissioners of the Public Service Commission of Wisconsin (PSCW), is submitting these comments regarding the United States Environmental Protection Agency's (EPA's) proposed "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" ("Clean Power Plan") published in the Federal Register on June 18, 2014 (79 FR 34830). While this letter touches on some of the major issues associated with EPA's proposal, attached are detailed comments relating to the following specific aspects of the proposed rule:

- General comments on the proposal and EPA's approach
- Specific comments on the four "building blocks"
- Technical corrections to EPA's data for Wisconsin
- Actions taken by Wisconsin to reduce power sector CO₂ emissions
- Legal issues associated with EPA's proposed action
- Wisconsin-specific modeling results and cost estimates

We request that EPA thoroughly consider the comments and information provided in the attachments, make the necessary corrections and adjustments to any state data used to develop emission reduction goals, and modify the rule as needed to address the concerns we raise.

EPA provided additional information related to its proposal in a notice of data availability (NODA) published on October 30, 2014 (79 FR 64543). Wisconsin has provided comments on the specific issues and alternatives raised in the NODA in a separate submission to the docket. EPA also published a technical support document on translating rate-based CO₂ goals to mass-based equivalents on November 13, 2014 (79 FR 67406), which we considered in the comments provided in this submittal.

To give context to our comments, we want to first remind EPA that Wisconsin has made significant strides in reducing CO₂ emissions from the power sector over the past 15 years. In fact, Wisconsin was among the first states to implement many actions EPA is just now considering in its proposal. For example, in 1999 Wisconsin became the first state to enact a renewable portfolio standard (RPS) without having restructured its electric utility industry. In 2005, Wisconsin increased the RPS to 10%. Our utilities embraced the challenge, achieving our statewide target of 10% renewable generation in 2013 – two full years ahead of schedule.

Wisconsin also was an early adopter of energy efficiency programs, having implemented a utility-funded energy efficiency and renewables program (known as Focus on Energy) since 2001. This initiative recently received EPA's 2014 Energy Star "Partner of the Year - Sustained Excellence Award" for its years of leadership in protecting the environment through superior energy efficiency measures. This program, combined with the state's early actions to promote renewable energy, resulted in more than 10 million tons of avoided CO₂ emissions in 2013 – equivalent to a 20% reduction from 2005 emissions.

At the same time, Wisconsin also meaningfully reduced CO₂ emissions from our fossil-fuel plants. Wisconsin's utilities are regulated by the Public Service Commission of Wisconsin (PSCW), which means they have been and continue to be incentivized to improve and maintain efficient fleets. As a result, over the past two decades our utilities have closed many older coal-burning plants, improved the efficiency of those remaining, and invested in cleaner natural gas facilities. In addition, they have constructed several of the newest, most efficient coal-fired plants in the nation. We take pride in the fact that we have been able to sustain a reliable base of electrical generation while simultaneously reducing emissions and improving the quality of our air. In fact, EPA's own data shows that, of the highest CO₂-emitting power plants in the nation, Wisconsin does not have a single unit listed in the top 50, and only one in the top 100.¹

It is unfortunate, then, to see that Wisconsin's early, aggressive, and measureable actions to reduce CO₂ emissions are largely ignored by EPA's proposed best system of emission reduction (BSER) approach. In fact, rather than recognizing and rewarding our leadership, EPA's proposal seriously penalizes Wisconsin relative to other states that have taken little to no action on renewables, energy efficiency, and traditional "inside the fence line" controls. This will have real and dramatic consequences on Wisconsin ratepayers, as well as the state economy. Above all else, it is imperative that EPA address and remedy these inequities in any final rule.

As mentioned above, attached are detailed comments regarding this proposal. In summary, our core issues with the proposed rule include the following:

- Insufficient credit for CO₂ reductions already achieved. As noted above, a fundamental weakness in EPA's proposal is that it fails to recognize the CO₂ reductions that Wisconsin (and other early acting states) has already achieved. This problem persists throughout the proposal, but in particular in EPA's proposed structure and implementation of the BSER building blocks, and use of the recent and unrepresentative single baseline year of 2012.
- Inequity across states. Relatedly, states that already reduced emissions significantly, such as Wisconsin, are being asked to reduce emissions *more* than states that have done less. In addition, states that emit the most CO₂ are asked to do the least. As a result, states end up with very different, and largely counterintuitive, emissions reduction goals. These inequities and the methods used to apply the building blocks to each state must be addressed in any final rule.
- Inability of the building blocks to be implemented as proposed. EPA defined BSER in this proposal using four building blocks. However, EPA generally fails to recognize that the four building blocks, if applied simultaneously, work against each other. For instance, Wisconsin's modeling consistently

¹ U.S. EPA, Inventory of Greenhouse Gas Emissions from Large Facilities, 2012.

shows that increasing in-state gas generation to comply with building block 2 drives coal-fired plants to become load-following and less efficient, thereby making building block 1 entirely unattainable. In setting BSER, EPA must adjust its building blocks to reflect what is actually achievable by an individual state in practice.

- EPA's approach to setting the baseline year. EPA's selection of 2012 as the baseline year not only fails to adequately credit states which made substantial reductions prior to that year, it ignores other serious problems associated with using just a single year to establish the baseline. For example, 2012 does not accurately reflect historical emission levels because the high use of natural gas during that year was reflective of record low natural gas prices. In addition, using a single year as a baseline rather than, for example, a three-year average, substantially increases the risk of having the baseline inaccurately represent past emissions, as is exactly the case EPA's use of 2012 as a baseline creates. EPA has since proposed alternatives to using 2012 as a single baseline in its NODA, which we respond to in a separate submission to the docket.
- Compliance costs. As detailed in the attachment, PSCW estimates that the costs to comply with EPA's proposal over the compliance period range from \$3.3 to 13.4 billion. These estimates are preliminary, based on our current understanding of the proposal, and could change depending on alterations EPA makes in the final rule. As highlighted in a previous letter to you from Governor Walker, we are very concerned the costs of EPA's proposal will threaten our most reliable energy source and damage our ability to provide affordable energy to our citizens and manufacturing-based economy.
- Lack of state agency authority. One of the major flaws in EPA's proposal is that it assumes state environmental agencies have the ability to include in state plans methods of compliance over which the agencies have no control. For example, the Wisconsin Department of Natural Resources has no authority or control over which plants are required by regional transmission organizations to dispatch electricity. Similarly, the amount utilities must spend on energy efficiency programs, and the stringency of the state RPS, are determined by the Wisconsin legislature. Other aspects of these programs are the responsibility of the PSCW, which is not responsible for the 111(d) plan. Finally, no state agency has authority to mandate continued operation of a nuclear facility.
- Electric reliability. EPA has not adequately performed sufficient analyses to demonstrate that its proposal will ensure reliability of the grid in Wisconsin. We are particularly concerned that, in the absence of a robust coal-fired fleet, natural gas plants currently used for peaking may not be able to support the electric load.
- Receiving credit for renewables purchased from out-of-state. Pursuant to Wisconsin's state RPS, renewable energy purchased from out-of-state may be used to meet the RPS requirements. Wisconsin utilities have built, own, or operate almost 400 MW of wind energy in other states and have long-term agreements to purchase even more out-of-state renewable power. EPA must establish clear, legally-based guidelines to allow states that own renewable generation in another state, or purchase such generation, to claim compliance credit for that generation. This approach is consistent with how renewable aspects of generation have been treated for many years.
- Consideration of biomass fuels. Biomass is an extremely important renewable energy source to Wisconsin. 46% of the state's land area is forested, and the sustainable use of these forest resources supports many industries, including energy production. Under state law, biomass is allowed to be credited towards meeting RPS requirements. Therefore, EPA should treat biomass differently from fossil fuel CO₂ emissions and consider biomass to be carbon neutral for compliance with the rule.
- Time allowed for submission of state plans. Wisconsin's legislative and regulatory processes require over two years to implement simple, noncontroversial rules. Given the amount of attention this proposal has received, it is unrealistic to expect the state to submit a complete plan within EPA's

proposed timeframes. EPA must provide more time, or, at a minimum, provide guidance on what EPA will accept at the plan due date short of a complete and final plan.

- Lack of timely guidance on critical issues. EPA's proposal lacks important details on several critical aspects of the plan, including how to account for biomass fuels in state plans and account for energy efficiency in a consistent way. Other important information, such as examples of how states could convert their rate-based goals to mass-based equivalents, was released by EPA far too late in the comment period to inform modeling or otherwise be adequately analyzed. This lack of timely information on important elements of the proposal is unacceptable. EPA needs to provide all information prior to finalization of the rule and give adequate time for public review so that the states have opportunity to submit comments with the benefit of more complete information.
- EPA must allow comment on the next version of its proposal prior to finalizing. Relatedly, due to the complex and interconnected nature of this rule, we found it challenging to meaningfully comment on any one aspect of the proposal without knowing how EPA ultimately intends to address other parts. Therefore, it's critical that EPA provide the public with the opportunity to comment on the next version of the proposal, *in its entirety*, prior to finalizing this rule.

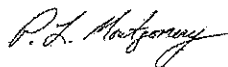
Finally, we note that neither this letter nor any state comments should be interpreted as the State of Wisconsin's acceptance of EPA's proposal. There are significant legal issues with this proposed rule. Perhaps even more fundamentally, we question whether the use of Section 111(d) via this rule proposal is an appropriate vehicle to dictate energy policy for the state of Wisconsin. We elaborate on the legal issues associated with the proposal in an attachment to this letter.

We appreciate the opportunity to comment on this proposal and look forward to seeing changes addressing our concerns in any final rule.

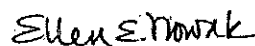
Sincerely,



Cathy Stepp
Secretary
Wisconsin DNR



Phil Montgomery
Chairperson
PSC of Wisconsin



Ellen Nowak
Commissioner
PSC of Wisconsin

cc:

Bob Norcross, Administrator, Division of Gas and Energy, PSCW
Pat Stevens, Administrator, Division of Air, Waste, and R&R, WDNR

Attachments

DL: 00949888