WEST VIRGINIA VS. EPA: ROUND TWO

Environmental Federation of Oklahoma | October 11-12, 2022





WEST VIRGINIA VS. EPA

- "Extraordinary" Case -Major Questions Doctrine
- Congress did not authorize generation shifting

(Slip Opinion)

OCTOBER TERM, 2021

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEST VIRGINIA ET AL. v. ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1530. Argued February 28, 2022—Decided June 30, 2022*

In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. For authority, the Agency cited Section 111 of the Clean Air Act, which, although known as the New Source Performance Standards program, also authorizes regulation of certain pollutants from existing sources under Section 111(d). 42 U. S. C. §7411(d). Prior to the Clean Power Plan, EPA had used Section 111(d) only a handful of times since its enactment in 1970. Under that provision, although the States set the actual enforceable rules governing existing sources (such as power plants), EPA determines the emissions limit with which they will have to comply. The Agency derives that limit by determining the "best system of emission reduction . . . that has been adequately demonstrated," or the BSER, for the kind of existing source at issue. §7411(a)(1). The limit then reflects the amount of pollution reduction "achievable through the

In the Clean Power Plan, EPA determined that the BSER for existing coal and natural gas plants included three types of measures, which the Agency called "building blocks." 80 Fed. Reg. 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to have seed

TIMELINE

Congressional Actions and Court Review of EPA Regulations

2005	2009	2015	2016	2019	2021	2022
SENATE 38-60 Failed Climate Stewardship Act 2005	HOUSE 219-212 Passage of	19-212 Final Clean Power assage of Plan for existing utilities lean Energy nd Security	US SUPREME COURT Stay of Clean Power Plan	EPA Final Clean Power Plan replacement – Affordable Clean Energy Rule	DC CIRCUIT Jan 19 – Vacatur and remand of the repeal of the Clean Power Plan and the Affordable Clean Energy Rule	US SUPREME COURT June – WV v. EPA decision
	American Clean Energy and Security Act of 2009					CONGRESS & PRESIDENT August – Passage and Enactment of Inflation Reduction Act
	SENATE No action				US SUPREME COURT October – Petitions accepted for review	



WEST VIRGINIA VS. EPA (2015)

 DC Circuit Court of Appeals Petition for Review (2015)

U.S. Supreme Court Stay (2016)

(ORDER LIST: 577 U.S.)

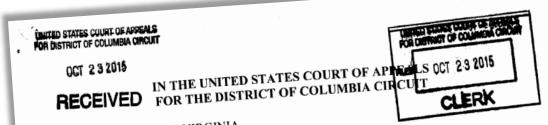
TUESDAY, FEBRUARY 9, 2016

ORDER IN PENDING CASE

15A773 WEST VIRGINIA, ET AL. V EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.



STATE OF WEST VIRGINIA, STATE OF TEXAS. STATE OF ALABAMA, STATE OF ARIZONA CORPORATION COMMISSION. STATE OF ARKANSAS, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY ATTORNEY GENERAL BILL SCHUETTE,

PETITION FOR REVIEW

4 4 1002

NATIONAL MINING ASSOCIATION AMICUS

- The EPA's reliance on two sentences in Section 111(d) would transform nation's electric grid
- Request for Major Question Doctrine review

Nos. 20-1530, 20-1531, 20-1778, and 20-1780

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL., PETITIONERS.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

CARROLL WADE
MCGUFFEY III
TROUTMAN PEPPER
HAMILTON SANDERS LLP
600 Peachtree St. N.E.
Suite 3000

Atlanta, GA 30308

TIMOTHY L. McHugh

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe St.

Suite 3900 Chicago, IL 60606 (608) 999-1240 misha.tsevtlin@

troutman.com

HAMILTON SANDERS LLP 1001 Haxall Point, 15th Floor

TROUTMAN PEPPER

Richmond, VA 23219

Counsel for National Mining Association Additional Captions Listed on Inside Cover

NMA – "TWO SENTENCES" IN 111(d)

- Clean Air Act 111d The Administrator shall prescribe regulations which shall establish a procedure ... which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source ... and provides for the implementation and enforcement of such standards of performance.
- Is the "Best System" unlimited discretion to reduce carbon-dioxide emissions from power plants by changing the resources used to generate electricity?



REGULATION OF POWER PLANT EMISSIONS (2015)

- New Source Performance Standards (Clean Air Act 111b)
- Clean Power Plan (Clean Air Act 111d)
- Best System for Emission Reductions?
 - Building Blocks:
 - Heat Rate Improvements New Efficiencies
 - Generation Shifting



REGULATION OF POWER PLANT EMISSIONS (2019)

- Clean Power Plan (Clean Air Act 111d)
- Best System for Emission Reductions?
 - Source Efficiency Improvements



USE OF CLEAN AIR ACT 111(d)

- Obscure, never-used section of the law
- Modest words
- Vague terms
- Subtle devices
- Oblique or elliptical language

AND...

"The last place one would expect to find it is in the previously little-used backwater of Section 111(d)."





THE SUPREME COURT IS CLEARLY LISTENINING...

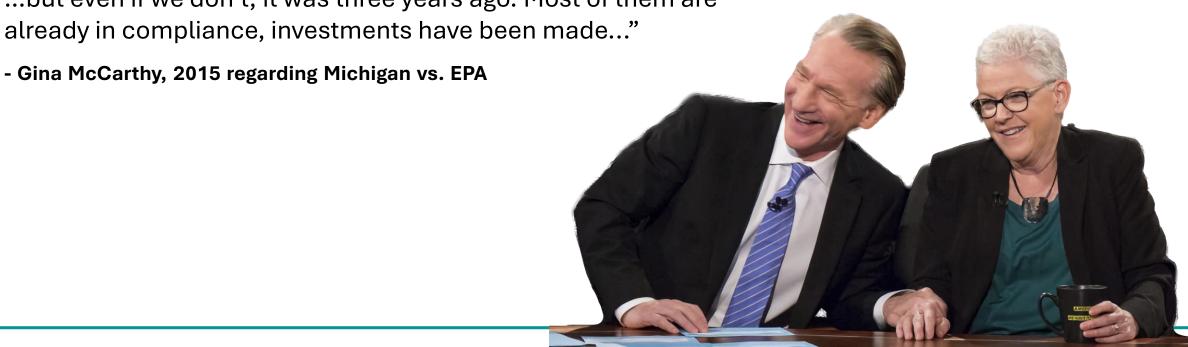
"The rule (Clean Power Plan) was 'not about pollution control' so much as it was 'an investment opportunity' for States, especially investments in renewables and clean energy."

- Gina McCarthy, 2014

"This is a rule that actually regulates toxic pollution emissions from primarily coal facilities, and we think we're going to win because we did a great job on it...

...but even if we don't, it was three years ago. Most of them are

- Gina McCarthy, 2015 regarding Michigan vs. EPA



"We have identified different options for responding depending on what the Supreme Court tells us the nature and contours of what our authorities are."

- Joe Goffman, 2022

HEARING ON THE NOMINATION OF JOSEPH GOFFMAN TO BE ASSISTANT ADMINISTRATOR FOR THE OFFICE OF AIR AND RADIATION AT THE ENVIRONMENTAL PROTECTION AGENCY

Wednesday, May 25, 2022

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee, met, pursuant to notice, at 10:03 a.m. in

room 406, Dirksen Senate Office Building, the Honorable Thomas

R. Carper [chairman of the committee] presiding.

Present: Senators Carper, Capito, Cardin, Whitehouse,

Markey, Kelly, Padilla, Inhofe, Cramer, Lummis, Boozman, Sullivan, Ernst.

Joseph Goffman

INFLATION REDUCTION ACT

 In new and existing programs greenhouse gas is explicitly defined but struck provision on economy wide carbon emissions

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S.L.C.
689
Administrator of the Environmental Protection Agency for graph of the Environmental Protection Agency for
2 fiscal year 2000
2 fiscal year 2022, out of any money is the
2 fiscal year 2022, out of any money in the Treasury not
appropriated, \$25,000,000 to remain
4 until September 30, 2021 c
4 until September 30, 2031, for grants and other activities 5 authorized under a large state of the second
authorized under subsections (a) through (a)
5 authorized under subsections (a) through (c) of section 6 103 and section 105
of the Clean Air Act (49 Has
7 7403(a)-(c), 7405).
8 (g) OTHER ACTIVITIES.—In addition to amounts oth-
9 erwise available, there is appropriated to the Adminis-
10 trator of the D
the Environmental Protection A
11 year 2022, out of any money in the Treasury not otherwise
out of any money in the Treasure
12 appropriated, \$45,000,000 to real interview.
12 appropriated, \$45,000,000, to remain available until Sep-
y, 2001, to carry out with possess
14 gases, sections 111, 115, 165, 177, 202, 211, 213, and
15 231 of the Cl
15 231 of the Clean Air Act (42 U.S.C. 7411, 7415, 7475,
16 7507, 7521 7545 7545
16 7507, 7521, 7545, 7547, and 7571).
17 (h) Greenhouse Gas and Zero Engage

ERN22410 5DM S.L.C.

AMENDMENT NO.
Purpose: In the nature of a substitute.
IN THE SENATE OF THE UNITED STATES-117th Cong., 1st Sess.
H. R. 5376
To provide for reconciliation pursuant to title II of S. Con. Res. 14.
Referred to the Committee on and ordered to be printed
Ordered to lie on the table and to be with a
Amendment In the Nature of a Substitute intended to be proposed by
Viz:
1 Strike all after the enacting clause and insert the fol- 2 lowing:
3 SECTION 1. SHORT TITLE.
This Act may be cited as the "Inflation Reduction 5 Act of 2022".
6 TITLE I—COMMITTEE ON
FINANCE
8 Subtitle A—Deficit Reduction
9 SEC. 10001. AMENDMENT OF 1986 CODE.
10 Except as otherwise expressly
10 Except as otherwise expressly provided, whenever in 11 this subtitle an amendment or repeal is expressed in terms 12 of an amendment to
12 of an amendment to, or repeal of a scotion

"EVERY TOOL IN THE TOOL BOX"

"The decision does constrain what we do. But let me be clear. It doesn't take us out of the game. We still will be able to regulate climate pollution....

And we're going to use all of the tools in our toolbox to do so."

- EPA Administrator Michael Regan, 2022



WHAT TOOLS MIGHT THOSE BE?

立

HAPPENING NOW

Coal Ash Closure Decisions

 Particulate Matter National Ambient Air Quality Standards reconsideration

Interstate Transport Rule Proposal

TUTURE ACTIONS

- Regional Haze SIPs / FIPs
- Effluent Limitation Guidelines Proposal
- CPP / ACE Replacement Rule



BIPARTISAN CONGRESSIONAL OVERSIGHT

Congress of the United States Mashington, DC 20515

The Honorable Michael S. Regan Administrator
U.S. Environmental Protection Agency 1200 Pennsylvania Ave, NW Washington, DC 20460

Dear Administrator Regan

We write in regard to the November 25, 2020, application submitted by the Sebree-Green Power Station We write a regard to the November 25, 2020, application submitted by the Sebree-Green Power Station, in our state, to the U.S. Environmental Protection Agency (EPA) for an extension allowed under the coal combustion and residual rule (CCR Rule) for surface impoundment compliance.

The Sebree-Green Power Station anticipates an upcoming retirement date for the plant and has requested a two-year extension under the rule. Although EPA has not yet opened a forming pathic comment docket, we believe it is important to perfect in signification and the timeling pathic comment docket, the CPA has already by address this application and the timeling CCR production of the CPA has already by a substantial paperous of extension (CCR production of the CPA has already by a substantial paperous of extension (CPA has already to the comment of the co waste in surface impoundments, meaning they spend plant operations unless the utility is able

Member of Congress

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Republican Leader United States Senate

PJM, which serves part of Ke

wire a 135-day compliance pe summer peak months on the F

On June 2, the North Ame

On June 2, the North American E. Westingtone Port at a spring, "We are seven uncer retirements [from coal plants] occur at a faster pace than expected," MISO chief executive John Bear also commented for the story, "We are moving in that https://www.washingtonpost.com/businesa/2022/06/02/blackout-states

Congress of the United States Mashington, DC 20515

January 21, 2022

The Honorable Michael Regan U.S. Environmental Protection Agency 1200 Pennsylvania Avenue N.W. Washington, D.C. 20004

Dear Administrator Regan:

Last week, the U.S. Environmental Protection Agency (EPA) announced that it will take a Lass week, and C.S. Environmental resociation Agency (Er A) announced that it will take a number of steps to address the disposal of coal combustion residuals (CCRs), including making manifest of the company of the c analog of sueps to authress the unspond of coal comoustion residuals (CCRs), include eterminations on requests for extensions to EPA's CCR surface impoundment clo-

EPA received \$2 completed applications for an extension, which included three requests from American Electric Power (AEP) for the Mitchell, Amos, and Mountaineer power plants in West American Execute Fower (AEF) for the Mitchell, Altos, and Mountaineer power plants in West Virginia. We respectfully request that you approve these three requests so that the critizens of West Virginia, their communities, and families can avoid the devastating economic impacts of One of the Communities of the Communities. taking those plants offline or having them close prematu-

The Mitchell, Amos, and Mountaineer power plants are significant economic drivers in the ripple effects throughout the

Stelly More Capito

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Shelley Moore Capito

United States Senator

almost all of the coal use revenues needed to fund impact businesses in the directly or indirectly rely supply the coal for it.

In addition to supportir provide the fuel diversity the region with reliable, seven-year high and infla cannot afford to take three

n generates is critical to our state's economy.

Last Fall, the West Virginia Public Service Commission (WVPSC) took action to preserve ther Last Fain, the west virginial rudius service commissions of the power plants and allow AEP to take the necessary steps to comply with EPA's r

United States Senate

The Honorable Michael S. Regan

U.S. Environmental Protection Agency 1200 Pennsylvania Ave., NW Washington, DC 20460

Dear Administrator Regan:

We write to express our concerns regarding the Environmental Protection Agency's (EPA) proposed Federal Implementation Plant (FIP) to implement a "Good Neighbor" plan for transport of coone in Compilance with the 2015 2000e National Ambient Air Quality Sandadas (NAAQS). The proposed first seek to include our states within the Cross State Agency Sandadas (NAAQS). The proposed that NOs amissions from Wavenine and Ends contribute to the formation of around-level crosses. FIP seeks to include our states within the Cross state Art Portation scare (tramport late), Chamming that NOx emissions from Wyoming and Utah contribute to the formation of ground-level ozone, and

Under the proposed FIP, EPA seeks to require the installation of selective catalytic reduction (SCR) Uncer the proposed FIF, IPA seeks to require the installation of selective entalytic reduction (SCR), or coad-fired electric generating units in Wyoming and Ulash by 2026, while uporting the NOx reductions already schewed through compilance with the IPA's Regional to EIPA's Regional Regions. Due to to the high coad of reforbilling an SCR control significance with coad and the results of the re nga cost of reronting an act, como an existing unit (potentiant) exceeding associación per santi-compliance with experimental proposal proposal proposal proposal proposal proposal proposal proposal contrata con entrepayers. Not to mention, utilities in our states have alteady invested handreds of millions of dollars to install coursols for NOs tumers in our saires nave arready invested minutees or minioris or domain to install controls our second and other criteria pollutants. To require the installation of an SCR on those same units would result. stranded investment of those controls already installed.

In the event utilities are unable to bear the significant cost of an SCR, the proposed FIP would alm grid already facing perilous shortages. In fact, the

The EPA has fi nited States Senator (R-WY)

impact on regic period, states a used by EPA to indicates that EP and Utah contri ovided by EPA

provides by the PA to justify any contribution to nonattainment in Colorado. Monitoring and other as gaps and inconsistencies in the data collection and methodolog: used by the terra to Justity any contambution to industrations in Colorado. Situationing and unner datasets indicate contributions to Colorado ozone are below the screening threshold for EPA, and that datasets indicate contributions to Colorado ozone are below the screening intesnor for PPA other emissions from mobile and natural sources (i.e., wildfires), as well as variable meteor nt levels, and clearly beyond the contr

Congress of the United States Mashington, DC 20515

July 8, 2022

The Honorable Michael S. Regan U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, DC 20460

Dear Administrator Regan:

As members of the Texas Delegation, we are writing today regarding the Environmental Protection Agency's (EPA) premature implementation of a Federal Implementation Plan (FIP) as part of its (Nood Neighber Than Order 2015 National Ambient Air Quality Standards for zonce (Tinasport Rule). More specifically, we are concerned with the Air Stapproval of the Texas revision to not Clean Air Act State Implementation Plan (TX Transport SIP) without any comments from the EPA during the over three-and-a-half-year review before the agency.

We have serious concerns that the dramatic emission reductions being imposed by EPA's Transpor we have schouls concerns man me gramanic emission reductions being imposed by EPA's Franspor Rule FIP are not warranted. Nationwide, dramatic reductions in emissions of nitrogen oxides (NOx Auto Fire are not warranted. Pattornwise, gramatic reductions in emissions of nitrogen oxides (NO from power plants have resulted in significant environmental improvements. This includes downwise the power plants have resulted in significant environmental improvements. from power plants have resulted in againstant environmental improvements. Into measures downwing states, where the ole of upwind framport of emissions from power plants has dropped significantly, the diminishing role of upwind more plant emissions is well-documented in Texas as fully demonstrated by the TX Transport SIP that was submitted on August 17, 2018.

f 2021, the potential grid impacts of the Transpor vid detail what happens when it does not have

Vicente Gonzalez Member of Congress

> Henry Lillar Henry Cuellar

See Sections 2.1-2.4, pages Clean Air Act, Sections 110(A)(I) and National Ambient Air Qua EPA on August 17, 2018)

EPA on August 17, 2013)

See, 64, B Federal Register 20, 22-vers or mecunion of proposed state budgets, including key
fements including Austrance Levels (5). Amoust Recalibration of Albourner Basis (6), 10% Specific to
Emission Rates (7), Unit-Specific Emission Emissions Contingent on Assurance Level Exercisence (8)

ens, clean and distribute its water, and fuel the FIP is almost certain to result in reliability risk

Member of Congress

Rep. Chris Stewart FY23 - Interior

ective NO

AMENDMENT TO INTERIOR AND ENVIRONMENT APPROPRIATIONS BILL OFFERED BY MR. STEWART OF UTAH

At the end of the bill (before the short title), insert the following:

Sec.___. None of the funds made available by this or any other Act may be used by the Administrator of the Environmental Protection Agency to write or issue pursuant to section 110(a)(2)(D)(i)(I) of the Clean Air Act (42 U.S.C. § 7410(a)(2)(D)(i)(I)) referred to as the "good neighbor provision" or the "interstate transport provision" of the Act."

The Honorable Richard Glick

ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6115

June 6, 2022

Chairman Federal Energy Regulatory Commission 888 First Street, NE Washington, DC 20426

Dear Chairman Glick and Commissioners:

FRANK PALLONE, JR., NEW JERSEY

Last week, the North American Electric Reliability Corporation (NERC) issued an alarming Lass week, the evertal American Electric Kellanthity Corporation (NEKC) issued an atarming assessment, raising concerns about the reliability of the bulk power system for the upcoming

NERC reported that more than half the nation will be at elevated risk of power outages this NERC reported that more than mart the hatten will be at elevated that to power outages unsummer. This is because of insufficient resources to provide power to peoples' homes when their

The electricity resource shortfall is estimated to be even worse for customers living in a large ding from Wisconsin to Louisiana, where the

Cathy McMorris Rodgers Republican Leader House Energy and Commerce Committee

CATHY McMORRIS RODGERS, WASHINGTON

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H. Morgan Griffith

Member of Congress

AMENDMENT TO DIVISION E OF RULES COMMITTEE PRINT 117-55 (INTERIOR AND ENVIRONMENT APPROPRIATIONS DIVISION)

Offered by Mr. McKinley of West Virginia

At the end of division E (before the short title), insert the following:

Sec. ____. None of the funds made available by this

2 Act may be used by the Environmental Protection Agency

3 to deny requests from utilities for extensions of time to

4 comply with the requirements of paragraphs (1) and (2) 5 of section 257.103(f) of title 40, Code of Federal Regula-

6 tions, concerning coal combustion residuals.

AMENDMENT TO DIVISION E OF RULES COMMITTEE PRINT 117-55 OFFERED BY MR. McKinley of West Virginia

At the end of division E (before the short title), insert the following:

Sec. ____. None of the funds made available by this 2 Act may be used to finalize, implement, or enforce the pro-

3 posed rule titled "Federal Implementation Plan Address-

4 ing Regional Ozone Transport for the 2015 Ozone Na-

5 tional Ambient Air Quality Standard" published by the 6 Environmental Protection Agency in the Federal Register

7 on April 6, 2022 (87 Fed. Reg. 20036 et seq.).

AMENDMENT TO DIVISION E OF RULES COMMITTEE PRINT 117-55 (Interior & Environment Appropriations DIVISION) OFFERED BY MRS. HINSON OF IOWA

At the end of division E (before the short title), insert the following:

Sec. ____ None of the funds made available by this

2 Act may be used for implementation or administration of

3 the rule entitled "Hazardous and Solid Waste Manage-

4 ment System: Disposal of Coal Combustion Residuals 5 From Electric Utilities; A Holistic Approach to Closure

6 Part A: Deadline To Initiate Closure" published by the 7 Environmental Protection Agency in the Federal Register

8 on August 28, 2020 (85 Fed. Reg. 53516) that results 9 in the closure of a coal-fired power plant.

RELIABILITY

North American Electric Reliability Corporation (NERC) Warns of Reliability Crisis

"There's clear, objective, conclusive data indicating that the pace of our great transformation is a bit out of sync with the underlying realities and the physics of the system."

John Moura, Director of Reliability Assessment and Performance Analysis, NERC



"The problem is federal and state policies which, by mandate or subsidy, spur the development of weather dependent generation resources at the expense of the dispatchable resources needed for system stability and resource adequacy...That question of the weather's effect on reliability is a subject that doubtless merits study and planning, but misguided government policies are the root cause of the alarming reliability issues facing the nation, not the weather."

FERC Commissioner James Danly Concurrence – NMA Filed Comments on FERC Notices of Proposed Rulemaking Regarding Threat of Adverse Weather to Grid Reliability

Regional Transmission Operators Warn of Grid Reliability

"Implementation of the [Federal Implementation Plan Addressing Regional Ozone Transport] Rule has the potential to pose distinct reliability challenges that must be addressed."

Joint Comments of the Electric Reliability Council of Texas, Midcontinent Independent System Operator, PJM Interconnected, and the Southwest Power Pool in Docket No. EPA-HQ-OAR-2021-0668, June 21, 2022

















Environmental Federation of Oklahoma | October 11-12, 2022

Ryan Jackson

Senior Vice President, Government and Political Affairs | National Mining Association rjackson@nma.org

