

Comments of the Attorneys General of Maine, California, Colorado, Delaware, the District of Columbia, Maryland, Massachusetts, Michigan, Minnesota, New York, and Washington

May 5, 2026

Submitted via e-mail and electronic submission to www.regulations.gov

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Administrator
U.S. Energy Information Administration
U.S. Department of Energy
1000 Independence Ave., SW
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Re: *Agency Information Collection Proposed Extension*, 91 Fed. Reg. 11069 (Mar. 6, 2026); EIA_FRDOC_0001-0295; OMB Control No. 1905-0215

Dear Administrator Abbey:

The undersigned State Attorneys General (collectively, States) respectfully submit this comment letter to the U.S. Energy Information Administration (EIA) on EIA's notice of its proposal to extend its emergency information collection under the Paperwork Reduction Act (PRA)¹ of air permit and other data on backup generation from air permitting agencies in all 50 States, the District of Columbia, and five U.S. territories, using EIA's new Form EIA-860 Supplement (EIA-860S): State Level Generator Air Permit Inventory Report.

The States recognize and appreciate the value of the statistical data collected and disseminated by the EIA in its analysis of the U.S. energy supply system. The States also recognize EIA's broad, yet defined, statutory authority to collect certain types of information related to performing its functions. However, notwithstanding that recognition, the undersigned States submit this comment in opposition to EIA's novel information collection from States using EIA-860S for the following reasons. First, EIA's cited statutory authority does not authorize it to collect information from States, and EIA-860S improperly seeks from the States information about generators that EIA could obtain directly from generators themselves. Second, in the event that EIA continues to collect information using EIA-860S in some form, the States submit that EIA's estimated burden on the States is generally inaccurate and EIA should narrow the scope of EIA-860S to seek only that information readily available to all state air permitting agencies.²

¹ Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3521.

² The phrase "state air permitting agencies" is intended to refer to and include any agency of each State or locality to which EIA-860S was issued.

Background and Procedural History

As early as February 9, 2026, at least some of our state air permitting agencies and local air permitting authorities received correspondence from EIA seeking “collaboration in providing a list of companies that have received air permits for back-up generators issued by” our States.³ Soon after, on February 11, 2026, EIA requested emergency processing and clearance from the Office of Management and Budget (OMB) to collect data on backup generation from 56 respondents including air permitting offices in the District of Columbia, five U.S. territories, and all 50 States.⁴ In its memo to OMB, EIA stated that Form EIA-860, Annual Electric Power Industry Report, which surveys electricity generating units with a generation capacity equal to or greater than 1 megawatt (MW), includes backup generators if the generators meet the 1 MW threshold, but that “many backup generators are often excluded or inconsistently captured due to capacity limitations or intermittent operation, revealing data gaps.”⁵ EIA stated it “has a critical need to enhance the completeness and accuracy of the frame for EIA-860.”⁶ In its rationale for emergency clearance, EIA referenced increased electricity demand and cited three Executive Orders.⁷ Despite the inherently temporary nature of an emergency clearance, EIA stated that

³ A federal agency may not collect answers to identical questions posed to ten or more persons before first obtaining OMB clearance, regardless of whether the information collection is voluntary or mandatory. *See* 44 U.S.C. §§ 3502(3)(A)(i), 3506(c)(1)(B)(iii)(IV), 3507(a); 5 C.F.R. §§ 1320.3(c), 1320.5(a).

⁴ With limited exception, the PRA implementing regulations require the federal agency seeking an emergency information collection from OMB to set forth notice in the Federal Register. 5 C.F.R. § 1320.13(d) (requiring notice as prescribed by 5 C.F.R. § 1320.5(a)(1)(iv)). The EIA did not issue notice in advance of its emergency processing request. *See* EIA, “Supporting Statement—Part A,” Question 8 at page 7 (uploaded Feb. 11, 2026) (stating in response to the heading “Provide a copy and identify the date and page number of publication in the Federal Register of the agency’s notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to that notice and describe actions taken by the agency in response to these comments,” “This is an emergency survey request and there is currently no Federal Register Notice. A 60-day Federal Register Notice will be published subsequent to the ICR approval, if approved.”).

⁵ EIA Memo to OMB, “Subject: Backup Generator Data Integration—Request for Emergency Review and Clearance,” at 3 (Feb. 11, 2026).

⁶ *Id.*

⁷ *Id.* at 1-2; *see* Exec. Order. No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025) (“Declaring a National Energy Emergency”); Exec. Order. No. 14262, 90 Fed. Reg. 15521 (Apr. 8, 2025) (“Strengthening the Reliability and Security of the United States Electric Grid”); Exec. Order. No. 14365, 90 Fed. Reg. 58499 (Dec. 11, 2025) (“Ensuring a National Policy Framework for Artificial Intelligence”). Although not the focus of this comment letter, the States question the urgent nature of EIA’s information collection request (ICR) that would justify an emergency clearance for this particular information, the sufficiency of EIA’s showing of emergency need in the first instance, and the lack of any advance notice in the Federal Register notifying the public that it was requesting emergency processing from OMB. *E.g.*, U.S. Office of Personnel Management, Paperwork Reduction Act (PRA) Guide, Version 2.0, section 3.8.3 (Apr. 2011), <https://www.opm.gov/about-us/open-government/digital-government-strategy/fitara/paperwork-reduction-act-guide.pdf> (explaining that “[b]efore OMB will take action [on an emergency clearance request] the agency must publish an Emergency Federal Register Notice with a shortened timeframe for public comment and with reduced time for OMB to take action.”); USDA, Information Collection: Appendix A – Process for Preparing an Information Collection Approval Request Package, <https://www.usda.gov/about-usda/general-information/staff-offices/office-chief-information-officer/guidelines-and-compliance-resources/information-collection> (“Emergency approvals will only be granted in extenuating circumstances for both renewals and new collections.”).

EIA-860S would be an annual requirement of States.⁸ OMB approved EIA’s emergency request without change the next day on February 12 for a period of six months, noting that if EIA intended to continue the information collection past the approved emergency clearance, “it must resubmit an [information collection request (ICR)] to OMB under the normal PRA clearance process.”⁹ No opportunity for public comment on the emergency information collection was provided.¹⁰

On February 18, EIA contacted most of our States’ air permitting agencies, as well as some local air districts and permitting authorities, “initiating the data collection for the mandatory Form EIA-860 Supplement.” EIA included a link to Form EIA-860S and stated that submissions would be accepted through May 1, 2026. At the time, the form provided an estimated burden of one (1) hour per respondent. On February 19, EIA submitted to OMB a “nonsubstantive change request” seeking changes to the information collection including increasing the reporting burden from 1 hour to five (5) hours “to reflect OMB approved reporting burden of the ICR.” OMB approved the change request the same day.

On March 6, 2026, EIA published notice in the Federal Register proposing to extend clearance for the collection of information from States using EIA-860S, originally obtained through emergency clearance, for an additional three years.¹¹ In its notice, EIA invites comments on: (1) the necessity for and utility of the proposed information collection from the States using EIA-860S in carrying out its agency functions; (2) the accuracy of EIA’s burden estimation and validity of the methodology and assumptions used; (3) whether EIA can improve the quality, utility, and clarity of the information collection; and (4) proposed methods EIA could utilize to reduce the burden of the information collection on respondents.¹²

⁸ See EIA, “Supporting Statement—Part B,” Section B.2 (“The proposed survey is scheduled to be annual.”); see generally EIA, “Supporting Statement—Part A.”

⁹ OMB, “Notice of Office of Management and Budget Action” (Feb. 12, 2026) (OMB Control No. assigned: 1905-0215) (“In accordance with 44 [U.S.C. § 3507(j)(2)] as amended and 5 [C.F.R. §] 1320.13, this information collection is approved as an emergency clearance, in part to comply with Executive Orders referred in [sic] EIA’s memo requesting emergency clearance.”); see 44 U.S.C. § 3507(j)(2).

¹⁰ PRA implementing regulations provide that for emergency processing, “The agency need not seek or may shorten the time allowed for such public comment if OMB grants an exemption from such requirement for emergency processing under [5 C.F.R.] § 1320.13.” 5 C.F.R. § 1320.8(d)(4). In the normal (non-emergency) course, an agency must notice a 60-day public comment period, followed by a 30-day public comment period when the agency submits its clearance request to OMB. 44 U.S.C. §§ 3506(c)(2)(A), 3507(b).

¹¹ Agency Information Collection Proposed Extension, 91 Fed. Reg. 11069 (Mar. 6, 2026).

¹² *Id.* In the typical, non-emergency clearance process, 44 U.S.C. § 3506(c)(2)(A) of the Paperwork Reduction Act requires a federal agency to provide a 60-day public comment period to evaluate these four factors before the agency can collect information. Here, these questions are being noticed for the first time after the emergency clearance for the collection of information that is now proposed for extension.

Argument

I. EIA Lacks the Statutory Authority to Gather Information from the States Under 15 U.S.C. § 772(b).

A. States are not “persons” subject to the EIA’s information collection using EIA-860S.

Congress enacted the PRA to minimize the burden imposed on respondents when federal agencies seek to collect information from the public.¹³ The PRA imposes procedural requirements federal agencies must follow in pursuing collection activities but does not “authorize *what* information an agency may collect.”¹⁴ A federal agency cannot rely on the PRA to “expand substantive power” and must draw from independent statutory authority to compel the collection of information from its targeted respondents.¹⁵ Importantly, an approval by the OMB Director of an agency’s ICR does not act as a bestowal or confirmation of statutory authority for the agency to demand that particular information from the public.¹⁶

In its emergency ICR, and in its present proposed extension of that information collection, EIA relies on 15 U.S.C. § 772(b) for its independent authority to demand that the States’ air permitting agencies provide data on backup generators in their respective States.¹⁷ Section 772(b) is the EIA Administrator’s information-gathering authority and states only that “[a]ll persons owning or operating facilities or business premises who are engaged in any phase of energy supply or major energy consumption shall make available” information and data “necessary or appropriate for the proper exercise” of EIA’s functions.

The operative term in section 772(b) is its applicability to “*persons* owning or operating facilities or business premises.”¹⁸ Neither section 772 nor its chapter within Title 15, Chapter 16B, contain a definition of “persons.” However, there is no support to construe the term “persons” or the phrase “persons owning or operating facilities or business premises” to include States. In fact, the interrelated statutory schemes for the reporting of energy information under

¹³ 44 U.S.C. § 3501(1); *see Steele v. United States*, 144 F.4th 316, 320 (D.C. Cir. 2025).

¹⁴ *Steele*, 144 F.4th at 323.

¹⁵ *Id.* at 322-23 (“While [the PRA] adds conditions to the collection process, it does not say anything about whether an agency possesses statutory authority to demand particular information.”).

¹⁶ The court in *Steele* made a distinction between the Director of OMB’s decision that an information collection request is “necessary for the proper performance of the functions of the agency” and “has practical utility,” and a court’s “responsibility to decide whether the agency acted within the scope of its statutory authority.” *Id.* at 323; 44 U.S.C. § 3508.

¹⁷ *See* EIA’s Emergency Survey Supporting Statement – Part A, *supra* note 4, Question 1 at page 1. In support of its emergency ICR, EIA also references 15 U.S.C. § 764, which authorizes the EIA Administrator to “collect, evaluate, assemble, and analyze energy information,” and 15 U.S.C. § 790a, which established the National Energy Information System (NEIS). However, because the States are not commenting on EIA’s authority to collect information on backup generators, only on *whom* that information may be collected from, this comment does not provide an analysis of those sections except as it may be relevant to the States’ discussion on whether EIA may request information from States.

¹⁸ 15 U.S.C. § 772(b) (emphasis added).

both 15 U.S.C. Chapters 16B and 16C—which contain independent but complementary energy reporting requirements administered by the Department of Energy¹⁹—indicate that “persons” explicitly does not include States.

First, because Title 15 U.S.C. Chapter 16B does not contain a definition of “persons,” the most natural reading of the information-gathering authority in 15 U.S.C § 772(b) is one informed by, and in the context of, the definition of “person” in the Administrator’s complementary information collection authority in 15 U.S.C § 796, contained in Chapter 16C.²⁰ The Administrator is authorized to collect information under section 796(a) and (b) from “any person.” Section 796(e)(2) defines “person” as “any natural person, corporation, partnership, association, consortium, or any entity organized for a common business purpose, wherever situated, domiciled, or doing business, who directly or through other persons subject to their control does business in any part of the United States.” The definition of “person” in section 796(e)(2) does not include States.²¹ There is no support to suggest that the Administrator’s information-gathering authority in section 772(b) intended to expand that authorization to a different set of “persons” other than that explicitly defined in section 796(e)(2), particularly in light of the fact that these two information collection provisions overlap.²² Both Chapter 16B and 16C require the Administrator to collect “energy information” as that term is defined in section 796, further underscoring the interrelatedness of these provisions.²³

In addition, when Congress amended section 772 to add an enforcement mechanism for the failure to respond to the Administrator’s information request, it determined that violators of

¹⁹ The temporary Federal Energy Administration was the original agency tasked with administering section 772(b). It was abolished and its functions were transferred to the DOE when that department was established in 1977. Department of Energy Organization Act (DOE Act), Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified as amended at 42 U.S.C. §§ 7101-7386); *see* 42 U.S.C. § 7151. The DOE Act also created the Energy Information Administration and delegated to the Administrator the functions related to the gathering of information under both the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 107 (1974) (codified as amended at 15 U.S.C. §§ 761-790h) (FEA Act), and the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 (1974) (codified as amended at 15 U.S.C. §§ 791-798) (ESCA), which was enacted one month after the FEA Act. *See Shell Oil Co. v. DOE*, 477 F. Supp. 413, 423 (D. Del. 1979). When the EIA was established within DOE, “persons” as used in that section was given the same meaning as in 15 U.S.C. § 796. 42 U.S.C. § 7135(h)(6)(C).

²⁰ *See Shell Oil Co.*, 477 F. Supp. at 422 (explaining that because section 796 also confers a broad authority on the Administrator to collect energy information determined necessary “[i]t is thus apparent that the information gathering powers of the Administrator under the FEA Act and the ESECA overlap to a considerable degree.”) (emphasis added).

²¹ *See also*, DOE’s collection authority codified at 10 C.F.R. § 207.2 (defining “person” identical to the statutory definition in section 796(e)(2)).

²² *See Shell Oil Co.*, 477 F. Supp. at 422.

²³ 15 U.S.C. § 764(b)(9); *id.* 796(e)(1) (the term “energy information” is defined to include “(A) all information in whatever form on (i) fuel reserves, exploration, extraction, and energy resources (including petrochemical feedstocks) wherever located; (ii) production, distribution, and consumption of energy and fuels wherever carried on; and (B) matters relating to energy and fuels, such as corporate structure and proprietary relationships, costs, prices, capital investment, and assets, and other matters directly related thereto, wherever they exist.”).

section 772(b) would be subject to the same penalties as violators of section 796.²⁴ Congress envisioned that the “persons” submitting information under section 772(b) were the same “persons” submitting information under section 796.²⁵ Had Congress intended for the “persons” in section 772(b) to have a different or more expansive definition than in section 796, it clearly could have done so when enacting or amending these two complementary provisions.²⁶

Moreover, when a term is not explicitly defined in a statute, Congress has given express direction to apply the definitions in the Dictionary Act, 1 U.S.C. § 1, unless otherwise indicated by the context of the statute.²⁷ Title 1 U.S.C. § 1 defines “person” to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Absent from this definition is “States” or “state governments.” This comports with the courts’ “longstanding interpretive presumption that ‘person’ does not include the sovereign,” whether that sovereign is a State or the federal government.²⁸ Simply put, whether the definition

²⁴ Federal Energy Administration Act Amendments of 1976, § 108, 15 U.S.C. § 772(i) (incorporating by reference the penalties for violations of 15 U.S.C. § 796). *See also* 15 U.S.C. § 797 (making it unlawful for any “person” to violate provisions related to energy information reporting).

²⁵ H.R. Rep. No. 94-1392, at 25506 (1976) (Conf. Rep.), discussing penalties:

The conferees have agreed to add a system of penalties for failure to comply with the Administration’s lawful demands for information, but have modified the provisions of the Senate bill so as to incorporate by reference the system of penalties already provided for in existing law relating to a failure to comply with rules, regulations or orders of the Administrator issued under authorities of the Energy Supply and Environmental Coordination Act of 1974. *The conferees believe that persons required to submit information should not be placed in jeopardy of differing sanctions depending on which energy information-gathering authorities the Administrator chooses to employ* (i.e., those contained in section 13 of the Federal Energy Administration Act or those provided in section II of the Energy Supply and Environmental Coordination Act). Accordingly the conference substitute makes parallel the enforcement mechanisms applicable to the information-gathering authorities contained in these Acts.

(emphasis added).

²⁶ *See, e.g., Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 583 U.S. 109, 128 (2018) (rejecting an overbroad reading of the statute as “unmoored from the statutory text” and noting that Congress “could easily have drafted” the language in question to read more broadly but “chose not to do so”); *see also Bostock v. Clayton Cty., Ga.*, 590 U.S. 644, 654-55 (2020) (describing the Court’s role to interpret statutes in accordance with ordinary meaning and observing that if courts were to alter statutory language, they would risk amending statutes outside the legislative process).

²⁷ *See Return Mail, Inc. v. U.S. Postal Serv.*, 587 U.S. 618, 628 (2019) (explaining that, related to the definition of “person,” for the “context” to “indicate[] otherwise” there must be “some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government.”). For the avoidance of doubt, the States assert here that within the specific framework of EIA’s information-gathering statutory scheme, neither the text nor context suggests that an alternative definition of “persons” that includes States or state governments would apply.

²⁸ *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000); *see id.* at 782 (citing the Dictionary Act, 1 U.S.C. § 1, and observing that “corporations” are presumptively covered by the term ‘person,’ whereas a presumption exists that “States are *not* covered” by the statute in question); *see Return Mail, Inc.*, 587 U.S. at 627 (“Notably absent from the list of ‘person[s]’ is the Federal Government.”); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947) (explaining that “persons” in “common usage . . . does not include the sovereign, and statutes employing it will ordinarily not be construed to do so,” and that “Congress made express provision, . . . 1 U.S.C. § 1, for the term [person] to extend to partnerships and corporations. . . . The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.”).

of “person” provided in 1 U.S.C. § 1 is applied, or the definition contained in section 796 is applied, the overall effect of this absence from both the general definition of “person” and specific definition in 15 U.S.C. § 796 is that neither the text of section 772(b) nor its context within the statutory information collection framework supports the Administrator’s authority to solicit or collect energy information from States.²⁹

Second, a review of the legislative history of the Federal Energy Administration Act (FEA Act)³⁰ demonstrates the intent of Congress to extend the Administrator’s information collection authority no further than to certain individuals and business entities. A joint statement from the conference committee on the consolidation of energy-related functions in the FEA Act’s proposed amendments—ultimately agreed to by both the House and Senate—that incorporated House amendments that “limit[] the persons subject to the Administrator’s information-gathering powers to owners or operators of business premises engaged in energy supply or major energy consumption rather than to persons subject to any rule, regulation or order of the Administrator.”³¹

In addition, in analyzing the data and information that should be made accessible to the Comptroller General under FEA’s statutory scheme, the conference committee declined to adopt a Senate amendment in full that would have granted the Comptroller General the authority to “access . . . data from any public or private source or organization relating to the management and conservation of energy,” and instead limited that authority to “request[ing] information or records only from owners or operators of business premises engaged in any phase of energy supply or major consumption of energy.”³²

Furthermore, the conference committee carved out a specific exception to the Administrator’s limited power to collect information and authorized the Administrator to “access . . . data in other agencies concerning energy resources on [Federal] Government-owned lands.”³³ Conspicuously absent from the report and statutory text is a similar carve-out for collecting information from the States. In authorizing the Administrator to collect energy information, it is clear that Congress envisioned that this power would be limited to gathering

²⁹ If it was not otherwise clear that “persons” does not include the States, the application of universal principles of statutory interpretation leads to the same understanding and prohibits applying the information-gathering authority in section 772(b) to the States. When Congress uses a term in a statute without defining it, courts construe the word to have its plain and ordinary meaning. *See, e.g., Bondi v. VanDerStok*, 604 U.S. 458, 477 n.4 (2025) (stating that the Court’s task “is to interpret the words Congress enacted ‘consistent with their ordinary meaning’” (quoting *Wisconsin Central Ltd. v. U.S.*, 585 U.S. 274, 278 (2018))); *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (“When a term goes undefined in a statute, we give the term its ordinary meaning.”). A review of various dictionary definitions for “person” reveals a lack of an inclusion of sovereign state governments within its ordinary meaning.

³⁰ FEA Act of 1974, 15 U.S.C. §§ 761-790h.

³¹ S. Rept. No. 93-788, at 11282 (1974) (Conf. Rep.).

³² *Id.*

³³ *Id.*; *see also*, 15 U.S.C. § 772(f) (authorizing the Administrator to “collect [energy information] from departments, agencies and instrumentalities of the executive branch of the Government (including independent agencies).”).

such information from certain individuals and businesses, and other federal agencies in some specific instances.³⁴

Since its enactment, Congress never intended to grant the EIA Administrator authority to demand energy information from States under section 772(b). The statutory text, both clear on its face, and in the context of related statutory authority in section 796 and in legislative history, plainly and unambiguously limits the “persons” the Administrator may solicit energy information from to exclude States. Because EIA lacks the statutory authority to solicit this information from the States, EIA should thus discontinue its utilization of Form EIA-860S.

B. Constitutional principles of federalism bolster the understanding that 15 U.S.C. § 772(b) does not authorize EIA to collect information from the States through EIA-860S.

EIA’s lack of statutory authority to gather information from States is further underscored by constitutional principles of federalism. Specifically, if 15 U.S.C. § 772(b) were read to include States as persons subject to the information collection using EIA’s new form 860S, such a reading could run afoul of the anti-commandeering doctrine of the Tenth Amendment to the U.S. Constitution.³⁵ Reading section 772(b) within the context provided by the Tenth Amendment reinforces what is already clear from the plain language and legislative intent: Congress did not intend section 772(b) to apply to States.

The Tenth Amendment reserves “powers not delegated to the United States by the Constitution, nor prohibited by it to the States . . . to the States respectively, or to the people.”³⁶ The anti-commandeering doctrine provides that, even where the federal government may have the ability to require or prohibit certain acts, it may not directly command the States to require or prohibit those acts or to administer or enforce a federal program.³⁷ The doctrine promotes political accountability by ensuring that the public understands which sovereign is acting such

³⁴ The language in section 772(b) has not materially changed since its enactment in 1974. However, statutory amendments to section 772 in 1976 only provide further support for limiting the Administrator’s information-gathering authority. Among those amendments, a paragraph (h) was adopted that aimed to alleviate reporting requirements for small businesses, and in a conference committee report discussing potential restatements of the Administrator’s information-gathering authority it is clear that “[t]he conferees believe that the energy information authority already vested in the Administrator is adequate to permit him to obtain information from both United States and foreign domiciled firms.” H.R. Rep. No. 94-1392, at 25506 (1976) (Conf. Rep.).

³⁵ Courts apply a presumption that acts of Congress are constitutional. *Reno v. Condon*, 528 U.S. 141, 148 (2000) (“We of course begin with the time-honored presumption that the [act] is a ‘constitutional exercise of a legislative power.’”) (quoting *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883)). When construing statutes, courts apply the understanding that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *New York v. United States*, 505 U.S. 144, 170 (1992) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

³⁶ U.S. Const. amend. X.

³⁷ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 473 (2018) (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)); *New York*, 505 U.S. at 166. The principle extends “not only to state officers with policymaking responsibility but also to those assigned more mundane tasks.” *Murphy*, 584 U.S. at 473 (citing *Printz*).

that “the responsibility for the benefits and burdens of the regulation is apparent.”³⁸ If a State “imposes regulations only because it has been commanded to do so by Congress, responsibility” between the federal and state governments is “blurred.”³⁹ Relatedly, the doctrine serves to prevent the federal government from “shifting the costs of regulation to the States.”⁴⁰ This is especially salient here, where the primary stated purpose of the PRA is to minimize burden resulting from collection of information by the federal government on those persons subject to information collection.⁴¹

As further described below in Section II, the information sought in EIA-860S exceeds the realm of information readily available to most state air permitting agencies in their permitting capacity. This means that in order to fully comply with the demands of 860S, state air permitting agencies would likely be required to solicit information beyond the scope of state air permitting from sources that States permit. In doing so, EIA-860S, in effect, commandeers State officers to carry out the aims of the federal government, blurring the lines of responsibility between federal and state action in the eyes of the permitted sources and the public.⁴² Put another way, by requiring the State permitting authorities to solicit more information from sources than would be required to secure a permit from that agency in the first instance, States are essentially being improperly commanded to redefine their permitting processes—a state regulatory function—to ensure that information that EIA desires from sources is being provided to the States, so that the States can in turn provide that information to EIA.

Here, that line-blurring between federal and state authority appears to be by design. Rather than obtain the answers to the technical questions posed in EIA-860S from regulated entities directly, EIA’s February 11, 2026, memo to OMB seeking emergency clearance reveals EIA has opted to seek the information “from all 50 states, the District of Columbia, and five U.S. territories via air permitting offices, which regulate generators under the Clean Air Act, *rather than imposing new direct reporting burdens on operators.*”⁴³ In addition to shifting the perception of authority, EIA’s information collection using 860S shifts the costs of the EIA’s information gathering from EIA to the States.⁴⁴ This intrusion into state authority is underscored by the fact that EIA could instead exercise its statutory authority pursuant to 15 U.S.C. § 772(b)

³⁸ *Murphy*, 584 U.S. at 473.

³⁹ *Id.* at 473-74.

⁴⁰ *Id.* at 474.

⁴¹ See 44 U.S.C. §§ 3501(1), 3502(10) (defining “person” under the PRA to include, among others, “a State, territorial, tribal, or local government or branch thereof”). Although the PRA includes state governments in its definition of “person,” as further detailed above in Section I.A., the PRA is a procedural rather than substantive tool, and independent substantive authority is required for information collection. See *Steele*, 144 F.4th at 323. The EIA lacks statutory authority to solicit this information from States, even if other statutes may authorize federal agencies to collect information from States in other contexts.

⁴² See *Murphy*, 584 U.S. at 474; *New York*, 505 U.S. at 168-69.

⁴³ EIA Memo, *supra* note 5, at 3 (emphasis added).

⁴⁴ See *Murphy*, 584 U.S. at 474.

to seek information about backup generators from individual generators themselves, in accordance with Congress’s clear intent and with constitutional federalism principles.⁴⁵

In sum, constitutional principles of federalism further support the plain reading of 15 U.S.C. § 772(b). It is unreasonable to suggest that Congress intended section 772(b) to authorize EIA to commandeer States to obtain detailed energy information from regulated sources outside the scope of the States’ permitting regimes. For the reasons above, the EIA should discontinue its EIA-860S information collection from States.

II. EIA Should Discontinue EIA-860S or, in the Alternative, Narrowly Tailor the Data Requested because EIA’s Estimated Burden was Inaccurate and Failed to Account for States that do not Maintain the Requested Data in Readily Accessible Formats.

A. EIA grossly underestimated the burden of the proposed information collection on States.

Notwithstanding the States’ assertion that EIA lacks the statutory authority to solicit information from the States as argued above, the States separately submit that EIA’s estimated burden on state air permitting agencies is grossly lower than the actual burden on States to respond to EIA’s Form EIA-860S, which was issued to several of our States on February 18, 2026, and required those States to respond by May 1, 2026: a very short time period to collect the extensive amount of information for individual permits that EIA-860S requires.

EIA provides little support for its total estimated burden of 280 hours,⁴⁶ 5 hours per respondent, except to note that the “actual burden on respondents may be lower, given that the required administrative data is typically publicly available, including on official websites. . . .”⁴⁷

EIA’s limited explanation of its methodology for estimating the burden on States falls short for multiple reasons. Fundamentally, if the information is already publicly available, then an information collection activity should not have been undertaken because the data solicited is rendered duplicative of information already accessible to the agency.⁴⁸ EIA suggests that

⁴⁵ The States further note that EIA’s information collection using 860S is not a voluntary request but rather a mandatory one purporting to carry the threat of subpoena, inspection, and hefty civil and criminal penalties for noncompliance. *See* 15 U.S.C. §§ 772(d)-(e), (i), 796, 797; 10 C.F.R. § 207.7 (dictating that each day of a violation is deemed a separate violation and setting forth civil penalties of up to \$13,273 per violation as well as criminal prosecution and fines).

⁴⁶ *See* EIA Memo, *supra* note 5, at 4 (suggesting an estimate of 5 hours per each of the 56 respondents).

⁴⁷ *Id.*

⁴⁸ If, as EIA suggests, the data is publicly available, EIA has failed to explain how its emergency collection is “not unnecessarily duplicative of information otherwise reasonably accessible to the agency.” 44 U.S.C. § 3506(c)(3)(B) (requiring each agency to certify that each information collection submitted to OMB is not “unnecessarily duplicative of information” that is “reasonably accessible to the agency.”). Moreover, in its Supporting Statement A, EIA does not seriously attempt to argue that it is avoiding duplication, only that “[t]here is no other known source available to provide a comprehensive and time-sensitive source of data.” Supporting Statement—Part A, *supra* note 4, at 6. Taken together, EIA’s statements suggest that while it believes the data is typically publicly available, simply because there is no “comprehensive database” it can look to, it is justified in requiring the States to collect such duplicative data that it already has access to and could gather on its own. *Id.* at 5-6. A naturally flowing

although publicly available, the information is “not in an easily retrievable, consolidated format.”⁴⁹ The fact that it may be cumbersome for EIA to gather the information does not justify instead burdening the States to retrieve and organize the data on behalf of EIA.

In addition, EIA puts forward a burden-shifting analysis in its memo, stating that it has decided to burden States with this information collection as a means to reduce the burden on the appropriate recipients, the operators of the backup generators.⁵⁰ EIA suggests that it is currently “underestim[ing] . . . the generator population, possibly by several hundred to over a thousand units.”⁵¹ In other words, EIA has artificially deflated the true burden to gather this information by shifting the burden to the States instead of soliciting this information from potentially hundreds to thousands of operators. Because EIA improperly solicited information on backup generators from the States and not the generation operators themselves, any estimated burden is too high.⁵²

However, despite EIA’s contention, the States do not concede that all—or even the majority—of the information requested on Form EIA-860S is publicly available or maintained in a location readily retrievable by the state air permitting agencies. And because the States maintain that the data solicited goes well beyond what many state air permitting agencies require from permitted sources such as backup generators, EIA’s estimated burden is significantly lower than the actual burden placed on the States if EIA requires States to gather information that States do not currently possess.⁵³ Under the PRA and its implementing regulations, the “burden” is estimated to include the “time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency.”⁵⁴ A broad swath of resource expenditures may be included in estimating the burden on respondents.⁵⁵

consequence of requiring States to provide information that is already accessible to EIA through public resources is that States should not be burdened at all to gather the information for EIA. Therefore, any estimated burden is too high.

⁴⁹ EIA Memo, *supra* note 5, at 4.

⁵⁰ *Id.* at 3 (explaining that the information collection targets states “rather than imposing new direct reporting burdens on operators.”).

⁵¹ *Id.*

⁵² See 44 U.S.C. § 3506(c)(3)(C) (requiring agencies to “reduce[] to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency. . .”).

⁵³ Some of our States report having access to the information but not in an easily retrievable format, while most report not maintaining all the data in a centralized location or not maintaining this information generally in the performance of their regulatory functions. The result is the same: these agencies are now significantly burdened with the task of potentially soliciting this information from individual operators and combing through numerous records, reports, and other databases in attempt to complete EIA’s task, which the state permitting agencies should not be required to do for the reasons outlined in Section I.

⁵⁴ 44 U.S.C. § 3502(2); 5 C.F.R. § 1320.3(b) (modifying the language slightly to include efforts to “retain, or disclose” information to a federal agency). Resource expenditure may include time for “reviewing instructions; . . . searching data sources; . . . completing and reviewing the collection of information; and . . . transmitting, or otherwise disclosing the information.” 44 U.S.C. § 3502(2).

⁵⁵ *Id.*

Many States have expended far more than 5 hours in pursuit of collecting the requested data—some substantially so—and estimate a significant number of additional hours needed to solicit data from individual generation sources, including any required follow-up discussions, and to conduct extensive research and perform data entry. A polling of these States found resource expenditures of anywhere from approximately twenty (20) to over eighty (80) hours to collect only the data readily accessible to the States, with estimated additional time of hundreds to thousands of hours per State to solicit information from regulated sources and organize the data for all fields in Form EIA-860S. As discussed below in Section II.B., the various state regulatory schemes for permitting generation sources differ in such a way that not every state air permitting authority has ready access to all the different fields required to be completed in EIA-860S. EIA failed to take this into account in its burden estimate, instead assigning a blanket 5 hours for each respondent, when in fact many States do not collect this data as part of their regulatory function; or, if they know where the data resides, will take significant effort to collect.⁵⁶

Furthermore, a possible indirect consequence of EIA's extension of EIA-860S reporting requirements for an additional three years is that some States may have to, in attempt to reduce the future burden on state resources, consider modifying or overhauling their respective permitting processes in order to ensure that the required information will be on hand for the next annual report to EIA. That alone is a massive burden placed on States that was not accounted for in EIA's burden estimate.⁵⁷ In addition, an accurate estimate of burden is essential in order for States to be able to properly budget and seek any necessary legislative appropriations for agency resources including staff time. The States should not be required to undertake such a significant burden to comply with EIA-860S, when EIA can request this information directly from generators.

The real estimated burden should be calculated based on obtaining the data for EIA-860S from the appropriate backup generation operators. However, in the event that EIA continues to seek this information from state air permitting agencies, it should reevaluate the estimated burden utilizing a methodology that accounts for the variations in state regulatory approaches for permitting generators and resource expenditures required by each State to gather the data from potentially hundreds of individual permitted sources. In the alternative, and discussed in more detail below, EIA could overhaul EIA-860S to drastically reduce the number of fields required to be filled out, and instead require only such basic information that most (if not all) state air permitting agencies maintain in the ordinary course of performing their regulatory function; thus, significantly reducing the burden on the States.

⁵⁶ Confusingly, EIA's FAQs on EIA-860S suggest that state air permitting agencies should coordinate with other state agencies that maintain the data EIA is requesting, indicating that EIA knows that air agencies do not necessarily maintain this data and will have to take measures to collect and assemble it. FAQs for Survey Form EIA-860S, FAQ No. 21, https://www.eia.gov/survey/form/eia_860s/faqs.pdf.

⁵⁷ As discussed in Section I.B. above, this implicates Tenth Amendment anti-commandeering concerns.

B. EIA-860S exceeds the scope of information that state air permitting agencies generally maintain and should be discontinued, or, in the alternative, should be substantially narrowed to include only basic information identifying state-licensed sources that is readily accessible to state air permitting agencies.

The States do not dispute the potential utility to EIA of the generator-level data sought. EIA suggests that its real motive for issuing EIA-860S is to “enhance the completeness and accuracy of the frame for the EIA-860” Annual Electric Generator Report.⁵⁸ However, the States observe that EIA could separately identify those individual facilities targeted in EIA-860S and mandate that those generators report to EIA the information it seeks, and, even more so, the States strongly maintain that EIA cannot instead use the States to supply that information for the sake of “completeness and accuracy” on EIA’s behalf.

That being said, if EIA should continue to seek generator information from States using EIA-860S (which it should not) the form should be limited to request only the information that States maintain and that would allow EIA to identify those facilities that are the appropriate and proper respondents for this information collection. No source-specific data should be requested from States.

Our States’ authority to license sources comes from both the Federal Clean Air Act and state law, and as such the information collected through state permit applications for licensed sources can vary from state to state. EIA-860S solicits responses from States to several questions: state permit number, company name, primary contact’s name, primary contact’s phone and email, facility name, facility’s address, the “Nameplate Capacity” in Megawatts of the generator, the “Prime Mover” for the generator, the “Energy Source” for the generator, the date of commercial operation for the generator, whether the generator is an “Auxiliary” or “Backup” generator, whether the generator is “Synchronized to the grid,” whether the generator is “participating in a Demand-Side Program,” and the “Reliability Coordinator.”

Many of our States lack centralized, readily accessible data for several of these categories of information. In particular, our States generally lack any data regarding certain technical specifications or grid-related questions EIA-860S poses, such as a generator’s nameplate capacity in Megawatts, whether the generator is an auxiliary or backup generator, whether the generator is synchronized to the grid, whether the generator is participating in a demand-side program, and the reliability coordinator. For several other questions on EIA-860S, data may be available but is not readily accessible by our States. In order for our States to generate the information that is unavailable, state agencies would be required to conduct extensive communication with the licensed sources, as well as time-consuming research and manual data entry. That is why the States estimate that soliciting information from licensed sources to

⁵⁸ EIA Memo, *supra* note 5, at 3. EIA makes it clear in its memo that it considers the existing annual electric generator Form EIA-860, which is currently limited to generators with a capacity of 1 MW or greater, to be a critical survey in the performance of its functions, and the States take no position on EIA’s characterization of its EIA-860 survey in this comment letter.

respond to the full scope of the current EIA-860S would require each of our States to expend time in the range of several hundred to thousands of hours.⁵⁹

If form EIA-860S continues to be issued to States at all, it should be modified to request such basic information from States that may be used by EIA to identify permitted sources, providing flexibility in the form for States to submit only the facility data that it maintains in a centralized, accessible format.⁶⁰ This would drastically reduce the burden on States, likely bringing it closer to EIA's current 5-hour estimate. The change would better align this information collection with the primary purpose of the PRA to minimize the burden on respondents.⁶¹ With identifying information in hand, EIA could then seek information for the outstanding questions on current EIA-860S directly from power generators, as it does with forms such as EIA-860.

In addition, limiting the scope of EIA-860S to identify information such as licensee name and contact information could reduce the severity of the constitutional anti-commandeering problem that the current EIA-860S creates. As further described above, EIA-860S violates key tenets of the Tenth Amendment anti-commandeering doctrine. When, as here, States are commanded to solicit information on behalf of the federal government from the very sources the States regulate under state permitting programs, the line between federal and state regulation is blurred in the eyes of the public, lowering federal accountability, and improperly shifting costs from the federal government to the States.⁶²

In sum, because EIA lacks authority to solicit backup generator information from States, our States request that EIA discontinue Form EIA-860S for the reasons described above. In the alternative, should any form of EIA-860S information collection continue, the States request that EIA substantially narrow the scope of the inquiry to States to a list of contact information for state-licensed generators to the extent available to the State in a centralized, accessible format in order to reduce the excessive burden the information collection imposes on States, to better

⁵⁹ See Section II.A.

⁶⁰ See 44 U.S.C. § 3506(c)(3)(C)(i) (requiring a federal agency to certify to the Director of OMB that it has reduced the burden on respondents, including by “establishing differing compliance or reporting requirements or timetables that take into account the resources available to those who are to respond”).

⁶¹ 44 U.S.C. § 3501(1) (stating the primary purpose to “minimize the paperwork burden for individuals, small businesses, education and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.”); see *Steele*, 144 F.4th at 320 (noting that “Congress enacted the [PRA] to ‘minimize the paperwork burden’ and promote coordinated efficient information policies.”); see also 44 U.S.C. §§ 3504(a)(1) (in conducting its oversight of the use of information resources, the Director of OMB “shall . . . provide direction and oversee . . . the review and approval of the collection of information and the reduction of the information collection burden”), 3505(a)(1) (stating that the Director of OMB shall “set annual agency goals to . . . reduce information collection burdens imposed on the public that . . . represent the maximum practicable opportunity in each agency”), 3506(b) (“With respect to general information resources management, each agency shall . . . manage information resources to . . . reduce information collection burdens on the public”), 3506(c)(3) (requiring the federal agency to certify to the Director of OMB that the information collection “reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency”), 3514(a)(2) (requiring OMB to report annually to Congress regarding its PRA oversight efforts and to include in the report, among other things, “a description of the extent to which agencies have . . . reduced information collection burdens on the public”).

⁶² See Section I.B.; *Murphy*, 584 U.S. at 473-74.

comport with the primary purpose of the PRA, and to mitigate the federalism concerns that the current EIA-860S poses.

Conclusion

For the reasons discussed above, the States generally oppose EIA's information collection using EIA-860S and strongly recommend that EIA discontinue its use of EIA-860S in collecting information from States, including declining to extend for an additional three years, EIA's emergency information collection using EIA-860S.

Respectfully submitted,

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