ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

State of West Virginia, et al., *Petitioners*, v. U.S. Environmental Protection Agency, et al., *Respondents.*	No. 15-1363 and consolidated cases

PROPOSED BRIEFING FORMAT AND SCHEDULE OF PETITIONERS AND PETITIONER-INTERVENORS

On January 21, 2016, the Court issued an order directing the parties to submit a briefing proposal for "all of the issues in these cases" by noon on January 27, 2016. ECF No. 1594951. The parties have conferred and have been unable to agree on a proposed format and schedule for briefing in these cases. This pleading sets forth the briefing proposal of the undersigned Petitioners and Petitioner-Intervenors for the Court's consideration.

This consolidated case involves 39 separate petitions for review by 157 separate Petitioners, including 27 States, of a final rule promulgated by the U.S. Environmental Protection Agency ("EPA") that establishes carbon dioxide emission performance rates for coal- and gas-fired electric generating units. 80 Fed. Reg. 64,662 (Oct. 23,

2015). Those performance rates are then used to calculate emission performance requirements for 47 of the 50 States. Each of these States must submit a plan to EPA setting forth how it will restructure the power sector within the State to meet its emission reduction requirement. EPA claims that the rule is authorized under section 111(d), 42 U.S.C. § 7411(d), of the Clean Air Act ("CAA" or "Act"). EPA has relied on this section of the CAA only a handful of times in the history of the Act and has never issued a rule of this scope or magnitude under this provision – or, for that matter, any other provision of the Act. The rule requires, through the States, a restructuring of the American electric utility industry that will impact every American in some way if it is implemented. Being mindful of the Court's admonition that it "looks with extreme disfavor on repetitious submissions . . . and . . . encourage[s] [the parties] to limit both the number and size of the briefs they propose to file," *id.*, and taking into consideration the unprecedented nature of this case and the numerous issues that need to be raised, Petitioners and Petitioner-Intervenors propose the following briefing format and schedule:

Document	Due Date	Word Limits
State Petitioners' Opening Brief on Fundamental Legal Issues	February 22, 2016	14,000 words
State Petitioners' Opening Brief on Record-Based Issues	February 22, 2016	14,000 words

Document	Due Date	Word Limits
Non-State Petitioners' Opening Brief on Fundamental Legal Issues	February 22, 2016	14,000 words
Non-State Petitioners' Opening Brief on Record-Based Issues	February 22, 2016	14,000 words
Joint Brief of Petitioner-Intervenors	February 25, 2016	10,000 words
Amici Briefs in Support of Petitioners	February 29, 2016	To be determined by Court
EPA's Response Brief	March 25, 2016	56,000 words
Joint Brief of Respondent-Intervenors	March 28, 2016	10,000 words
Amici Briefs in Support of Respondents	April 1, 2016	To be determined by Court
State Petitioners' Reply Brief on Fundamental Legal Issues	April 15, 2016	7,000 words
State Petitioners' Reply Brief on Record-Based Issues	April 15, 2016	7,000 words
Non-State Petitioners' Reply Brief on Fundamental Legal Issues	April 15, 2016	7,000 words
Non-State Petitioners' Reply Brief on Record-Based Issues	April 15, 2016	7,000 words
Petitioner-Intervenors' Reply Brief	April 15, 2016	5,000 words
Deferred Joint Appendix	April 18, 2016	N/A
Final Briefs	April 22, 2016	N/A

Given the scope, complexity, and sheer number of issues involved in this case, Petitioners' and Petitioner-Intervenors' proposal requests the minimum number of words required to ensure that *all* of this diverse group of Petitioners and Petitioner-Intervenors obtain meaningful judicial review. Given EPA's unprecedented interpretation of its authority under section 111(d), State and Non-State Petitioners each need full-length briefs to address whether EPA has authority to adopt the rule. Beyond those fundamental, overarching issues, the rule raises a very large number of record-based issues that must also be resolved. These record-based issues include those listed in Attachment A (record-based issues of State Petitioners) and in Attachment B (record-based issues of Non-State Petitioners). The large number of record-based issues present in this case arises from a number of factors.

Foremost, the rule is lengthy and complex. EPA's rule and its supporting documents span thousands of pages. The rule itself is more than 300 pages of the Federal Register and is supported by a regulatory impact analysis of more than 300 pages and a 152-page legal memorandum.[1] The rule's emission performance rates and state-by-state "mass-based" and "rate-based" requirements are the product of a complicated grid-wide analysis explained in a 50-page CO_2 Emissions Performance Rate and Goal Computation Technical Support Document and a 124-page

[1] The technical support documents and modeling for the rule are available at http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-technical-documents.

Greenhouse Gas Mitigation Measures Technical Support Document. Moreover, these rates and goals were the product of extensive computer modeling and remodeling of the power grid based on a myriad of technical assumptions. The comments on the rule were so extensive that EPA's Response to Comments document consumed 7,565 pages. Given the extensive record, the number of documents, and the complexity of the assumptions and calculations that undergird the rule, it is unsurprising that Petitioners have a large number of issues that relate to whether aspects of the rule are arbitrary and capricious.

Further complexity results from the fact that the rule affects each State and each electric generator within each State differently depending on the stringency of the different emission reduction requirement each State faces, that State's current mix of electric generating resources, the ability of the State to develop new renewable energy generation, each State's transmission interconnections with other States to import and export power, the size and type of the affected electric generators, the generation resources available to each electric generator owner and operator, and a host of other State- and utility-specific factors. This is not a matter of a single legal flaw in the rule causing different impacts in different States. Under section 111(a)(1)(A) of the CAA, standards of performance for stationary sources must be based on the "best system of emission reduction" that is "adequately demonstrated" considering compliance cost and other factors, and those standards of performance that result from this emission-reduction system for a source must be "achievable."

What may be adequately demonstrated, cost-effective, and achievable for sources in one State may not be for sources in another State, depending on State-specific factors. Texas, for instance, must have an opportunity to demonstrate that transmission constraints within its borders caused by its intrastate grid, which is unique as compared to the rest of the contiguous United States, render the rule unachievable in a way that might not be the case in another State.

Yet further complexity stems from the nature of electric generation throughout the country and how the electric grid works. Electric utilities and generation companies are numerous, diverse, and unique. Some are large multistate, vertically-integrated utilities that own many different kinds of electric generating stations. Many more are very small municipalities that own only a single facility. Still others are cooperatives that operate in rural areas. Some are located in windy or sunny areas of the country and have access to renewable resources, but some are not. A large number of power plants are now owned by independent power producers, which only sell power at wholesale. Much of the population of the country is served by utilities that operate in "organized markets" run by regional transmission operators or independent system operators that operate electric transmission systems and dispatch power across those systems. But some of the population is served by utilities that still own and operate their own generation and transmission systems and use those systems to serve their retail customers. There is also a dual system of electric utility regulation, with the Federal Energy Regulatory Commission regulating interstate

transmission and wholesale transactions and State agencies regulating everything else, including retail sales to the public. All of this complexity generates a host of utility- and State-specific issues stemming from EPA's assertion that its best system of emission reduction, the foundation of which is the nationwide electric grid as a whole, is adequately demonstrated, cost-justified, or even feasible for specific States, regions of the country, and electricity providers.

Finally, it should be noted that the word limits sought by Petitioners are in line with – and actually less than – the limits imposed by this Court in similar CAA cases. The closest example to this case is this Court's review of EPA's initial suite of greenhouse gas rules that established greenhouse gas emission standards for motor vehicles and triggered regulation of greenhouse gas emissions from stationary sources through the Act's Title V and prevention of significant deterioration permitting programs. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *aff'd in part and rev'd in part sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Those cases were argued over two days, as the Court has indicated is possible in this case. ECF No. 1594951. In *Coalition for Responsible Regulation*, petitioners and their supporting intervenors had a total of 108,000 words.[2] *See* ECF No. 1299368 (endangerment finding; 30,000 words for opening briefs; 15,000 words for reply);

[2] The Court actually provided 115,500 total words but one petitioner, which had been provided a separate opening brief and reply totaling 7,500 words, decided not to file a brief.

ECF No. 1299440 (motor vehicle greenhouse gas emission standards; 14,000 words for opening briefs; 7,000 words for reply); ECF No. 1299257 (timing rule and tailoring rule; 28,000 words for opening briefs; 14,000 words for reply). Petitioners and Petitioner-Intervenors here seek 99,000 words in total, fewer words than were allocated in *Coalition for Responsible Regulation*. Further, Petitioners propose to split their proposed words evenly between State and non-State entities.

Fewer words than those proposed here would effectively deprive Petitioners of their right to judicial review. The judicial review provision of the CAA reflects a congressional decision to allow "preenforcement review of agency rules and regulations." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). That congressional directive can be given effect only by allowing a meaningful opportunity to present all issues. Moreover, this Court has made clear that issues must be raised with specificity. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1251 (D.C. Cir. 2014) ("[C]ursory treatment is inadequate to place [a] challenge . . . before the court, because 'it is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'") (quoting *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013)). Given the number of issues that exist in this case, and the Court's directive that all the issues must be briefed, the word limits proposed here by Petitioners are necessary to ensure meaningful judicial review and due process.

Specifically, the fundamental legal issues that Petitioners seek to raise are:

State Petitioners' Fundamental Legal Issues:

1. Whether the rule, which regulates existing power plants under CAA § 111(d) is unlawful because EPA has regulated the same power plants under CAA § 112;

2. Whether EPA's interpretation of CAA § 111(d) to grant it the authority to force States to transform their energy economies to favor only certain sources of electricity is consistent with the Supreme Court's recent decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014);

3. Whether the rule is contrary to law because it invades the traditional authority of States over electricity generation and intrastate electricity transmission as recognized by the Federal Power Act, 16 U.S.C. § 824 et seq., in violation of that Act and/or in excess of the power delegated to EPA under the CAA;

4. Whether the rule is contrary to law because it prescribes inflexible state-specific emission limits that each State must achieve, rather than the procedures for States to use in establishing standards of performance as authorized by CAA § 111(d)(1); and

5. Whether the rule's reliance on actions by State and their officials, as well as its inherent threats to electric reliability and affordability, exceeds the powers of the federal government and impinges on powers reserved to the States by the Tenth Amendment.

Non-State Petitioners' Fundamental Legal Issues:

1. Whether the rule violates section 111 of the CAA by:

a. Requiring that States adopt standards of performance for carbon dioxide emissions from existing coal- and natural gas-fired electric generating units that are not based on air pollution controls that can be implemented at any such unit, but instead require the curtailment or closure of such sources and replacement of their generation by EPA-preferred facilities, including many outside the regulated source category;

b. Requiring States to adopt standards that do not continuously limit the rate at which the regulated pollutant is emitted by regulated sources through technological or operational processes that can be installed or implemented at the individual source;

c. Requiring States to establish standards for *existing* units that are more stringent than those EPA contemporaneously established under section 111(b) as the best achievable even for state-of-the-art *new* units; and

d. Depriving States of their authority "to take into consideration, among other factors, the remaining useful life" of an existing source when applying a standard of performance to that source; and

2. Whether EPA has contradicted basic rules of statutory construction by asserting authority to transform the power sector, without clear congressional

authorization or the necessary expertise and in a manner that would intrude on the jurisdiction of State governments.

In addition, as discussed above, Petitioners also have numerous record-based issues regarding the rule. These issues are complex, myriad, and sometimes highly specific to a source or State. The list of the record-based issues that the States plan on raising include those listed in Attachment A, and the list of record-based issues that the non-state Petitioners plan on raising include those listed in Attachment B. Given the sheer number of issues listed, the request for a full-length, 14,000 word brief for each set of these record-based issues is modest, and Petitioners will have an extremely limited number of words to address each issue and may even need to forgo raising some of them.

Petitioner-Intervenors should also be granted a separate brief. In their motions to intervene, Petitioner-Intervenors showed that they have distinct interests in this proceeding and have met the standard for showing that the existing parties do not adequately represent their interests. Petitioner-Intervenors, which are represented by Professor Laurence Tribe, plan on expanding on the constitutional and statutory construction issues raised in Petitioners' briefs as follows:

1. Petitioner-Intervenors will expand on the States' argument that EPA has no authority to regulate sources under section 111(d) if those sources are also regulated under section 112. In particular, Petitioner-Intervenors will argue that even if there were two "versions" of section 111(d) (and there are not, as the States will

argue), EPA lacks the authority under separation of powers principles to decide which "version" to make legally operative.

2. Petitioner-Intervenors will present additional arguments regarding the fact that the rule offends principles of federalism and violates the Tenth Amendment. Specifically, Petitioner-Intervenors will focus on why the violations of the structural protections of federalism threaten individual liberty. The Supreme Court has held that private parties as well as States can invoke the protections of federalism. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

3. Petitioner-Intervenors will further develop arguments regarding the impact of the rule on the coal industry, with a focus on the unconstitutionality of the rule as applied to Petitioner-Intervenors. They will show, for example, that the rule raises serious constitutional questions under the Fifth Amendment that could be avoided by a proper statutory construction of the CAA and that the rule is invalid because EPA failed to properly consider costs and benefits and violated the mandate of *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

Petitioner-Intervenors are well aware of this Court's rules against duplication and will not file briefing that is redundant of Petitioners' submissions. Petitioner-Intervenors are asking only for permission to file a 10,000 word brief (18 percent of the total words Petitioners seek). This is the absolute minimum number of words Petitioner-Intervenors deem necessary to address the critically important issues EPA's rule raises. Petitioner-Intervenors understand that Respondent-Intervenors plan on

seeking far more words – fully 62.5 percent of the total words allocated to EPA. Although Petitioner-Intervenors think that is excessive, they believe the Court should abide by a principle of parity, allowing Petitioner-Intervenors an equal number of words to whatever it grants Respondent-Intervenors.

With regard to the briefing schedule, the Court has ordered that reply briefs must be filed by April 15, 2016, or 79 days from today. ECF No. 1594951. The schedule proposed in this case is based on a distribution of those days consistent with the Federal Rules of Appellate Procedure. In an ordinary case under the Rules, each party would have an equal amount of time to file their respective opening briefs (e.g., 30 days each) and the petitioner/appellant would then have half that time to file a reply brief (e.g., 15 days). In total, the petitioner/appellant would have 3/5 of the total days (e.g., 45 days), and the respondent/appellee would have 2/5 (e.g., 30 days). Following that distribution, Petitioners are proposing that they have 47 of the 79 total days (roughly 3/5) and EPA have 32 (roughly 2/5). The proposed schedule allots 26 of Petitioners' 48 days for opening briefs and 21 days for replies.

It is particularly important that Petitioners and Petitioner-Intervenors have at least three weeks from the time EPA files its brief to ensure there is enough time for adequate coordination, particularly among the 27 States that are parties and that have unique review and approval requirements for judicial filings. Even among the Non-State Petitioners, coordination is difficult simply because of the sheer number of parties and counsel. Moreover, time for coordination between State Petitioners, Non-

State Petitioners, and Petitioner-Intervenors is needed to avoid duplication and repetition. Petitioners and Petitioner-Intervenors understand that EPA may advocate for its brief to be due just two weeks before the April 15, 2016 deadline for reply briefs, with multiple Respondent-Intervenor briefs being due after that. Such a schedule would not give Petitioners and Petitioner-Intervenors adequate time to prepare reply briefs.

For all these reasons, Petitioners and Petitioner-Intervenors respectfully request that the Court adopt the briefing format and schedule proposed herein.

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ATTACHMENT A
State Petitioners' Record-Based Issues

1. Whether the Rule's exclusion of certain categories of sources of zero-emission energy and sources of energy efficiency from the special incentives created under the Clean Energy Incentive Program is unlawful.

2. Whether the Rule allowing cap and trade as a compliance option for meeting a "performance standard" is unlawful.

3. Whether the Rule requiring State Plans to regulate new, existing, or modified sources through means which include leakage provisions, set asides, and new source complements is unlawful.

4. Whether the Rule allowing States that choose a mass-based compliance plan to adopt a "state measures approach" and denying this option to States that choose a rate-based compliance plan is unlawful.

5. Whether the Rule's limitations on trading between rate-based and mass-based States are unlawful.

6. Whether the Rule is unlawful and violates due process because fundamental elements critical to the Rule are uncertain or unknown, including technical issues relating to emission rate credits (ERCs), or are currently non-final agency action, including the model trading rules and the federal plan.

7. Whether the Rule's treatment of existing nuclear energy sources in Arkansas, particularly EPA's refusal to provide clean energy credit for Entergy's Arkansas Nuclear One power plant, is unlawful.

8. Whether EPA's failure to consider Florida's unique peninsular geography and the fact that only two States border Florida, thus limiting Florida's power transfer opportunities, is unlawful.

9. Whether EPA's failure to allow Florida to receive credit for decreases in emissions already achieved is unlawful.

10. Whether EPA's assumptions regarding the extent of renewable generation that could be developed in Florida and used to offset emissions from fossil fuel sources without accounting for intricacies and constraints on purchasing renewable energy under Florida law is unlawful.

11. Whether the Rule's failure to provide a method to account meaningfully for over three billion dollars in stranded investments made by Kansas and Mississippi utilities to install criteria pollutant control equipment on power plants in those States, is unlawful.

12. Whether the Rule's failure to provide compliance credit or emission rate credits for New Jersey's pre-2013, multi-billion dollar ratepayer investments in renewable energy, energy efficiency, and nuclear construction and uprates is unlawful.

13. Whether EPA has the authority to require New Jersey, an energy deregulated State that has chosen to eliminate the traditional retail monopoly structure which electric public utilities had previously held in this State for electric power generation and supply services, to enact a new legislative scheme so that New Jersey can exercise the authority over electric generation facilities that is required to comply with the Clean Power Plan.

14. Whether the Rule's failure to significantly account for the cost of achieving emissions reductions in New Jersey and Mississippi is unlawful.

15. Whether the Rule's effect of severely limiting fuel diversity in New Jersey and Mississippi, thereby presenting significant reliability and cost concerns, especially during bouts of extreme weather, is unlawful.

16. Whether the Rule unlawfully threatens the reliability of electric supply in South Dakota because the only coal-fired power plant and the only natural gas-fired power plant in the State lack common ownership, have different regional transmission operators, and do not share a common customer base.

17. Whether the Rule unlawfully forces Texas to redesign the Electric Reliability Council of Texas ("ERCOT"), which is the only Independent System Operator in the continental United States that operates an electricity market that is wholly contained within one State and is not synchronously interconnected with the rest of the country, and which has otherwise been a vibrant and

extremely successful competitive wholesale and retail electricity market for Texas.

18. Whether Texas is being unlawfully punished by the Rule as a first mover in the area of wind energy because, under the Rule, none of the renewable energy installed prior to January 6, 2013 (or capacity upgrades to existing renewable energy completed prior to that date) can be used by generators or the State to demonstrate compliance with the Rule.

19. Whether the Rule unlawfully applied a 4.3% heat rate improvement to Wisconsin steam power plants.

20. Whether the Rule unlawfully failed to consider biomass energy in developing the Wisconsin emission standard.

21. Whether EPA unlawfully failed to consider the impact of the Rule throughout Wyoming on the greater sage grouse and other sensitive species.

22. Whether the Rule improperly deprives North Dakota of authority to consider the remaining useful lives of regulated sources.

23. Whether EPA abused its discretion by attempting to force North Dakota to amend its laws to enforce EPA's requirements in the Rule, and in doing so, is effectively dictating the sovereign legislative power of North Dakota.

24. Whether EPA acted arbitrarily and capriciously, or in an otherwise irrational manner, in basing the Rule in part on an unsupported assumption as to the

heat-rate improvements that the existing coal-fired power plants in Oklahoma subject to the Rule can achieve on average.

25. Whether EPA acted arbitrarily and capriciously, or in an otherwise irrational manner, in basing the Rule in part on an unsupported assumption as to the shift in generation from coal-fired to natural-gas-fired generation achievable in Oklahoma.

26. Whether EPA acted arbitrarily and capriciously, or in an otherwise irrational manner, in basing the Rule in part on an unsupported assumption as to the amount of expanded renewable-generation capacity attainable in Oklahoma.

ATTACHMENT B
Non-State Petitioners' Record-Based Issues

1. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because of EPA's failure to evaluate the achievability of its "Building Blocks" collectively, rather than the achievability of each "Building Block" standing alone.

2. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because of EPA's failure to demonstrate that the assumed heat rate improvements are achievable, taking into account factors that alter heat rate and the unsustainable nature of heat rate improvements.

3. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because of EPA's determination of a source's gas-shifting capabilities with insufficient state, region, or national-level data to support its conclusion.

4. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because of EPA's failure to adequately consider costs, as required under Section 111 of the Clean Air Act, when developing guidelines for "standards of performance."

5. Whether the Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because of EPA's failure to adequately address reliability concerns.

6. Was EPA's failure to establish subcategories for different coal types by CO_2 emission performance characteristics when establishing the standards of performance arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law?

7. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because it prohibits renewable energy resources built prior to 2013 from generating emission reduction credits that can be used to comply with the Final Rule and state or federal plans adopted thereunder.

8. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because it is not a logical outgrowth of EPA's Proposed Rule.

9. Whether EPA's regulation of "leakage" in the Final Rule exceeded its statutory authority or is otherwise arbitrary and capricious, an abuse of discretion, or not in accordance with law.

10. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because it places unnecessary and arbitrary restrictions on implementation.

11. Whether EPA properly placed into the public docket and agency record during the Notice of Proposed Rulemaking (NPRM) all relevant and necessary material as required by 5 U.S.C. § 553.

12. Whether EPA engaged in improper ex parte communications prior to the NPRM which formed the basis of the agency action and were undisclosed during the notice-and-comment process.

13. Whether EPA allowed personnel with conflicts of interest to draft the rule and failed to recuse decisionmakers with "unalterably closed minds" from reaching the determination to implement the Final Rule.

14. Whether EPA failed to respond to substantial issues raised in comments to the NPRM.

15. Whether in the Final Rule EPA improperly set rate-based performance standards based on an assumed level of renewable energy that has the effect of increasing system-wide carbon emissions.

16. Whether in the Final Rule EPA improperly imposed on Arkansas, Louisiana, Mississippi, Texas, and other states performance standards that are not achievable by those states utilizing the "system" identified as EPA's definition of best system of emission reduction.

17. Whether the Final Rule's "leakage" requirement for mass-based plans is unlawful because it attempts to regulate the operation of non-affected electric generating units (EGUs) and makes mass-based programs more stringent than rate-based plans.

18. Whether EPA's decision in the Final Rule to exclude all existing hydro and nuclear generation and to not credit wind and solar renewable energy

generation sources or nuclear uprates constructed before 2013 for compliance under rate-based plans is arbitrary and capricious.

19. Whether EPA contravened the Clean Air Act and the Administrative Procedure Act by failing to provide adequate notice of and opportunity for comment on the requirement that mass-based state plans must address "leakage" to non-affected EGUs.

20. Whether EPA contravened the Clean Air Act and the Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the methodology for determining "equivalence" between the mass- and rate-based performance standards.

21. Whether EPA exceeded its authority under Section 111(d) of the Act by regulating EGUs that undergo a modification that results in an hourly increase in carbon dioxide emissions of 10 percent or less.

22. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the mass-based goals for Arkansas, Louisiana, Mississippi, Texas, and other states.

23. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the "new unit complement" to the mass-based goals for Arkansas, Louisiana, Mississippi, Texas, and other states.

24. Whether EPA's Final Rule disproportionately penalizes Texas, among other states, for proactively investing in a diverse generation portfolio, including natural gas combined cycle ("NGCC") units and renewables.

25. Whether EPA adequately considered costs in developing its standard of performance, as required by Section 111 of the Clean Air Act, in regard to the unique attributes of the Electric Reliability Council of Texas ("ERCOT") market.

26. Whether EPA adequately demonstrated that its emission performance rates are achievable at Texas units, including units owned by Luminant Generation Company LLC, Oak Grove Management Company, LLC, Big Brown Power Company, LLC, Sandow Power Company LLC, Big Brown Lignite Company LLC, Luminant Mining Company LLC, and Luminant Big Brown Mining Company LLC.

27. Whether EPA's determination of the "best system of emission reduction" is adequately demonstrated for ERCOT or is arbitrary and capricious as applied to ERCOT.

28. Whether EPA has demonstrated that the required heat rate improvements at affected sources are achievable at Texas units.

29. Whether EPA has adequately demonstrated that the shift in generation to NGCCs necessary under the Final Rule is achievable in Texas.

30. Whether EPA has adequately demonstrated that the additional amount of renewable energy required in Texas under the Final Rule can be developed and implemented in the timelines provided by EPA.

31. Whether EPA sufficiently considered reliability concerns for ERCOT, which is not interconnected with any other reliability regions.

32. Whether EPA's state goal for Texas is arbitrary and capricious and contrary to law.

33. Whether the Final Rule's "Evaluation Measurement and Verification" requirements for demand-side energy efficiency projects are arbitrary and capricious.

34. Whether EPA's failure to provide for a categorical exclusion in the Final Rule for lignite-fired power plants was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.

35. Whether EPA's failure to recognize regional variability of power plant fuels was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.

36. Whether in the Final Rule EPA improperly imposed on Montana performance standards that are not achievable by Montana utilizing the "system" identified as EPA's definition of best system of emission reduction.

37. Whether in the Final Rule EPA improperly imposed on Montana performance standards that are not achievable by Montana without resorting to interstate

trading of emissions, which EPA cannot require under Section 111(d) of the Act.

38. Whether EPA's Final Rule is arbitrary and capricious as applied to Petitioner NorthWestern Corporation d/b/a NorthWestern Energy (NorthWestern) because the Final Rule requires NorthWestern to achieve additional emissions reductions in its generation asset portfolio despite the fact that NorthWestern's portfolio is already in compliance with the final 2030 emissions rate targets set in the Final Rule.

39. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the mass-based goal for the state of Montana.

40. Whether the Final Rule is arbitrary and capricious because there is no record support for the achievability, by any individual unit in the category, of the emission rates that EPA established in the Rule for coal-fired units and natural gas combined cycle units.

41. Whether the Final Rule is arbitrary and capricious because, in establishing the emission rate for coal-fired units, EPA double-counted incremental generation from natural gas combined cycle units.

42. Whether the Final Rule is arbitrary and capricious due to miscalculations in the States' individual target emission rates as specified by EPA.

43. Whether the Final Rule is arbitrary and capricious, or otherwise contrary to law because it does not contain adequate provisions to ensure a reliable electric supply under all reasonably foreseeable circumstances, such as during heat waves and periods of extreme cold or due to unanticipated failures or retirements of units.

44. Whether the Final Rule is arbitrary, capricious, or otherwise contrary to law because it does not exempt from its requirements coal- or gas-fired units that are owned by entities that do not own other units to which generation can be transferred or that cannot feasibly find replacement generation from lower-emitting or zero-emission generation sources.

45. Whether EPA's inclusion of hypothetical generation from NGCC EGUs in the Rule's goal calculations is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

46. Whether EPA's failure to apply the sales exclusion in the Rule's goal calculations, which resulted in non-affected EGUs being included in the goal calculations, is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

47. Whether EPA's inclusion of generation capacity from duct burners of NGCC EGUs in the Rule's calculations of Building Block 2 is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

48. Whether EPA's inclusion of EGUs that were under construction, out of service, retired, and/or announced for retirement in 2012 in the Rule's goal calculations is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

49. Whether EPA's use of unrealistic emission rates for coal-fired and NGCC EGUs in the Rule's goal calculations is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

50. Whether the Rule violates section 111 of the CAA, 42 U.S.C. § 7411, and is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because EPA based its emission guidelines on: (a) heat rate improvements at coal-fired EGUs under Building Block 1 that are not achievable, and (b) levels of increased utilization of NGCC units under Building Block 2 that are not achievable.

51. Whether EPA's failure to account for conflicts between Building Block 1 of the best system of emission reduction and the CAA's New Source Review program is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

52. Whether in the Final Rule EPA improperly imposed on Kansas performance standards that are not achievable by Kansas utilizing the "system" identified as EPA's definition of best system of emission reduction.

53. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the mass-based goal for the state of Kansas.

54. Whether EPA's decision in the Final Rule not to credit carbon sequestration for compliance under rate- or mass-based plans is arbitrary and capricious.

55. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the mass-based goal for the state of Oklahoma.

56. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the "new unit complement" to the mass-based goals for Oklahoma.

57. Whether the rule is arbitrary and capricious because EPA based its cost-benefit analysis on alleged global benefits that do not accrue to the United States or its citizens, even though all of the costs of the rule will be borne by domestic entities.

58. Whether the rule is arbitrary and capricious because EPA's reliance on foreign benefits violates the Clean Air Act's purpose, which is "to protect and enhance the quality of *the Nation's* air resources so as to promote the public health and welfare and the productive capacity of *its* population." 42 U.S.C. § 7401(b) (emphasis added).

59. Whether the rule is arbitrary and capricious because EPA's reliance on foreign benefits violates guidance of the Office of Management and Budget, which requires a regulatory impact analysis to "focus on benefits and costs that accrue to citizens and residents of the United States." Office of Management and Budget, Circular A-4, at 15.

60. Whether the rule is arbitrary and capricious because EPA based its cost-benefit analysis on the alleged health benefits of incidental reductions of fine particulate matter ($PM_{2.5}$) and ozone, even though section 111(d) of the Clean Air Act expressly excludes those criteria pollutants from the statute's delegation of rulemaking authority.

61. Whether the rule is arbitrary and capricious because EPA's calculation of these "co-benefits" is based on double-counting of $PM_{2.5}$ and ozone reductions mandated by other EPA rules, and over-counting of $PM_{2.5}$ and ozone in areas that are already in attainment with EPA's National Ambient Air Quality Standards for those pollutants.

62. Whether the rule effects an unconstitutional delegation of legislative power to the executive branch in violation of the constitutional separation of powers, under *Whitman v. American Trucking Associations*, 531 U.S. 457, 475-76 (2001), and *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 644-45 (1980), in that the alleged health benefits on which the rule is based result from pollution reduction below the level "necessary to protect public

health" from a "significant risk of harm," as set forth in EPA's own National Ambient Air Quality Standards.

63. Whether the rule is arbitrary and capricious because EPA's cost-benefit analysis fails to account for "carbon leakage," which is the tendency of energy intensive industries to move to countries where carbon emissions are regulated less stringently and the price of energy is lower.

64. Whether the rule is arbitrary, capricious, or otherwise contrary to law because it has a disparate impact on electric cooperatives, making it impossible to provide reliable, low cost electricity to rural America (including the poorest parts of the country), contrary to federal and state law.

65. Whether EPA's Final Rule is arbitrary and capricious or otherwise unlawful under Section 307(d) of the Clean Air Act and the Administrative Procedure Act because EPA revised the applicability language for affected electric generating units in the Final Rule without providing the required notice and opportunity to comment and because the applicability language is not a logical outgrowth of EPA's Proposed Rule.

66. Whether the Final Rule results in an unconstitutional taking of property in violation of the Fifth Amendment.

67. Whether EPA's rule is arbitrary, capricious, or otherwise contrary to law because the rule limits the emission rate credit eligibility of waste to energy

facilities to electricity produced from the biogenic portion of the facility's waste throughput while excluding the anthropogenic portion.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January 2016, the foregoing document was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Allison D. Wood
Allison D. Wood